UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GARY P. GOUGE JR.
United States Air Force

ACM S30496

18 October 2005

Sentence adjudged 20 October 2003 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: Harvey A. Kornstein.

Approved sentence: Bad-conduct discharge, confinement for 82 days, forfeiture of $709.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant pled guilty to two specifications of absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886, and one specification each of wrongful use of cocaine and marijuana, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. On appeal, he asserts that the military judge erred by failing to properly instruct the members during sentencing. Finding no error, we affirm the findings and sentence.

The appellant first contends that the military judge failed to instruct the members that they were solely responsible for selecting an appropriate sentence and that they

should not rely on possible mitigating action by the convening or higher authorities. Such an instruction is required under Rule for Courts-Martial (R.C.M.) 1005(e)(4). We review the adequacy of instructions de novo. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999). Although trial defense counsel did not object to the military judge's instructions, or call the missing instruction to his attention, our superior appellate court has held that the waiver rule "is inapplicable to certain mandatory instructions," such as the one required under R.C.M. 1005(e)(5). *United States v. Miller,* 58 M.J. 266, 270 (C.A.A.F. 2003). We conclude that this stricture applies here, as well.

Clearly, the military judge did not use the precise language set forth in the Rule. However, that does not conclude our inquiry, for we are required to examine the instructions in their entirety. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (citing *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)). Where an omitted instruction is "substantially covered" elsewhere in the military judge's charge to the members, there is no error. *United States v. Damatta-Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Winborn*, 34 C.M.R. 57, 62 (C.M.A. 1963) (setting forth standards for determining error regarding omitted instructions)).

Here, the missing verbiage essentially warns the members that they, and they alone, are responsible for adjudging an appropriate sentence. The instructions actually given cover the same substance:

> Some of the things that you previously asked concerning discharges and who does what to whom and so forth--those are--all those kinds of things are command decisions based upon other people making other decisions the best they can under circumstances that are outside of your control and outside of mine. That's why your decision today is based upon the information that you have received in court with everybody testifying, all the documents and everything, and based upon the law that I gave you. That's what we're asking you to restrict the information to.

Considering the instructions in their entirety, we do not find error. Even were we to conclude otherwise, we perceive no prejudice—the sentence awarded by the members was lenient, given the serious and repetitive nature of the appellant's misconduct. *See Miller*, 58 M.J. at 271 (no prejudice where sentence was "favorable" to the appellant).

Having first argued that the members were not *discouraged* from speculating on subsequent collateral actions, the appellant contends in his next assignment of error that they were not *encouraged* to speculate. After the members began their deliberations, one court member asked what would happen to the appellant should he not be discharged. The military judge informed counsel that he did not plan on providing an answer to the question. When asked if either side objected, the appellant's trial defense counsel asked the military judge to instruct the members that if they failed to award a punitive discharge

"it's up to the squadron" whether the appellant would be retained. The military judge did not give the instruction.

The appellant now concedes that the instruction sought by his counsel at trial was "very limited and vague," and we agree. Unfortunately, it was also not the law. The governing regulation in effect at the time of the appellant's court-martial, Air Force Instruction 36-3208, *Administrative Discharge of Airmen*, (28 May 2003), specifically paragraph 5.56, vested retention authority with the special court-martial convening authority, in other words, at the wing level, rather than with the squadron. We hold that the military judge did not err in declining to give the requested instruction. *See Damatta-Olivera*, 37 M.J. at 478-79.

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court