

CORRECTED COPY

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class RICKY GUERRA
United States Air Force**

ACM 34715

7 May 2003

Sentence adjudged 30 June 2001 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Major Jennifer R. Rider, and Captain Matthew J. Mulbarger.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

PER CURIAM:

This was a straightforward case, made unnecessarily complex by errors in the post-trial processing. We find error and take corrective action.

The appellant was convicted, in accordance with his pleas, of the wrongful use of 3,4 methylenedioxymethamphetamine (commonly called ecstasy), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The sentence adjudged and approved was a bad-conduct discharge, confinement for 60 days, forfeiture of all pay and allowances, and reduction to E-1.

This is yet another case where the staff judge advocate's recommendation (SJAR) to the convening authority lists as an attachment the Report of Result of Trial, AF Form 1359, but that document is not found in the record of trial. The appellant argues that this error calls into question whether the staff judge advocate (SJA) properly advised the

convening authority of the findings and the sentence, as required by Rule for Courts-Martial (R.C.M.) 1106(d)(3)(A).

The available evidence indicates the SJAR and the required attachments were properly prepared and presented to the convening authority, but inadvertently omitted from the record of trial. The SJAR was served upon the trial defense counsel, who did not mention the absence of the report of result of trial in his response. This suggests the document was attached to the SJAR when originally drafted. The government also submitted an affidavit from the SJA, indicating that it was his standard practice to bring the SJAR, all attachments, and the record of trial to the convening authority for final action, and to brief the convening authority on the case personally. The SJA produced a copy of his notes for that meeting reflecting the findings and sentence in this case, and indicated that he believes he briefed the convening authority. Exercising our fact-finding power, we conclude that the AF Form 1359 was properly attached to the SJAR, and that the required information was provided to the convening authority. See *United States v. McKinley*, 48 M.J. 280, 283 (1998).

The convening authority's action approved the adjudged sentence, which included the forfeiture of all pay and allowances. However, at the time the convening authority approved the sentence, the appellant was no longer in confinement. The appellant contends that approving forfeiture of all pay and allowances when a service member is not in confinement violates the R.C.M. 1107(d)(2) and *United States v. Warner*, 25 M.J. 64, 67 (C.M.A. 1987). The appellant also submitted pay records indicating he forfeited all pay and allowances during the period in question. The government concedes error and the need for corrective action. We will take corrective action consistent with R.C.M. 1106(d)(6). Only so much of the sentence as provides for a bad-conduct discharge, confinement for 60 days, forfeiture of \$695.00 pay per month for 3 months, and reduction to E-1 is affirmed.

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

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator