UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CEDRIC B. HARDY
United States Air Force

ACM S31780

17 August 2011

Sentence adjudged 21 January 2010 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and forfeiture of $400.00 pay per month for 3 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and SARAGOSA
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was convicted in accordance with his pleas, of one specification of wrongful use of marijuana and one specification of wrongful distribution of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, 3 months of confinement, and forfeiture of $400.00 per month for 3 months. On appeal, the appellant asks the Court to grant appropriate relief in the form of setting aside the convening authority's Action and remanding the case for a new staff judge advocate recommendation (SJAR) and Action. He opines that the post-trial processing constituted plain error because the staff judge advocate failed to

prepare an addendum to the SJAR and failed to present the appellant's submission to the convening authority for consideration.

Background

The appellant was assigned to Minot Air Force Base, North Dakota. The court-martial took place on 21 January 2010 and sentence was adjudged on the same date. The appellant was notified orally and in writing as to his post-trial and appellate rights by his trial defense counsel. On 10 February 2010, the staff judge advocate prepared a recommendation for the convening authority pursuant to Rule for Courts-Martial (R.C.M.) 1106. This SJAR was served on the appellant's trial defense counsel on 23 February 2010. In response, trial defense counsel submitted a Request for Clemency on behalf of the appellant. The request asked the convening authority to disapprove the adjudged forfeitures, waive the automatic forfeitures, and direct payment to the appellant's wife. It further requested the convening authority to disapprove the adjudged bad-conduct discharge. The appellant's written unsworn statement, admitted at trial as Defense Exhibit A, was attached.

Although not included in the record of trial, an addendum to the SJAR was prepared on 2 March 2010. The addendum informed the convening authority that the defense alleged no errors, presented the appellant's matters submitted through the trial defense counsel for consideration, instructed the convening authority that he must consider the matters before taking final action in the case, and provided a proposed Action for the convening authority's signature. This addendum was submitted to this Court by separate motion to supplement the record of trial. Also submitted under separate motion was: 1) a 29 January 2010 "Application for Deferment and Waiver of Adjudged and Automatic Forfeitures, *United States v. AB Cedric Hardy*," with attachment; 2) a legal review and recommendation from the staff judge advocate regarding the appellant's application for deferment and waiver of forfeitures, dated 1 February 2010; 3) the convening authority's disapproval letter regarding the appellant's application for deferment and waiver of forfeitures, dated 1 February 2010; and 4) an affidavit from the staff judge advocate. The convening authority took action approving the sentence as adjudged on 3 March 2010. Although trial defense counsel had been previously served with the SJAR, the appellant was not served with the SJAR until 8 March 2010.

Convening Authority's Consideration of Clemency Submission

We review post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989); R.C.M. 1107(b)(3)(A)(iii). The preferred method of documenting a convening

authority's review of clemency submission is completion of an addendum to the SJAR. *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990). The United States is entitled to enhance the "paper trail" and show that the information in question was indeed transmitted to and considered by the convening authority. *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989).

After review of the entire record, the affidavit of the staff judge advocate, and the documentation submitted by the government under separate motion to enhance the post-trial "paper trail," we believe the Action in this case satisfies the requirements of *Craig* and find no prejudice to the appellant. The appellant's request for relief is premised on his assertion of three "serious problems." This Court will address each of these, in turn.

First, the appellant asserts that the failure to include the 29 January 2010 application for deferment and waiver of forfeitures in the record of trial calls into question whether it was considered by the convening authority. A review of the supplemental documentation answers that concern. A legal review was prepared and presented to the convening authority with respect to the appellant's application for deferment and waiver of forfeitures. The convening authority considered the application and signed a written disapproval letter indicating that he would reconsider the request again at the time of Action. While R.C.M. 1103(c) and R.C.M. 1103(b)(3)(D) provide that "[a]ny deferment request and the action on it," should be attached to the record of trial, this Court finds its exclusion to be harmless error as the appellant has failed to demonstrate any prejudice was incurred based upon this error.

Second, the appellant asserts that he was denied the opportunity for a personal response to the SJAR because he was not served with the SJAR until 8 March 2010, five days after action on the case. R.C.M 1106(f)(1) states:

> "Before forwarding the recommendation and the record of trial to the convening authority for action under R.C.M. 1107, the staff judge advocate or legal officer shall cause a copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused. If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally."

Here, the appellant was not served with a copy of the SJAR before the SJAR and the record of trial were forwarded to the convening authority for Action under R.C.M. 1007. Additionally, there is no indication from the record of trial that service on the

appellant was impracticable. We find this failure to serve the appellant with the SJAR to be error. However, it is not enough for the appellant to simply allege the error, the appellant "must allege prejudice as a result of the error," and "must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). There is material prejudice to the substantial rights of an appellant if there is an error and the appellant "makes some colorable showing of possible prejudice." *Id.* at 289 (citing *United States v. Chatman*, 46 M.J. 321, 323-34 (C.A.A.F. 1997)). "To prevail under a plain error analysis, appellant ha[s] the burden of persuading the Court that (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

In the instant case, the issue presented was, "Whether the Staff Judge Advocate's Failure to Present Appellant's Clemency to the Convening Authority Constituted Plain Error in Post-Trial Processing." It is only in a single sentence on the last page of the appellate brief that the appellant asserts, "Second, the SJAR was not served until 8 March, *five days after action on 3 March*, denying Appellant the opportunity for a personal response." No further alleged prejudice as a result of the error is shown, nor did the appellant show what he would do if the error was resolved and he was provided another opportunity.

Under the circumstances of this case, we conclude that the appellant has not made the requisite showing of prejudice because: the service of the SJAR on the appellant does not appear central to his appeal which questions whether the convening authority actually considered his clemency matters; there is merely a naked allegation that he was denied the opportunity for a personal response; the appellant failed to demonstrate what, if any, information different than what was submitted, would have been presented if given the opportunity for a personal response; and there is significant evidence that the convening authority did receive and consider the appellant's 26 February 2010 clemency matters prior to taking action on the case.

Third, the appellant asserts that the staff judge advocate did not submit an addendum to the SJAR, raising a concern that the convening authority never properly considered the second request for deferment and waiver of forfeitures. Again, the supplemental documentation submitted to this Court demonstrates that an addendum to the SJAR was prepared and submitted to the convening authority. The addendum properly instructed the convening authority that the matters must be considered before taking final action in the case. The appellant's submitted matters were attached to the addendum, along with the record of trial, for the convening authority's consideration. No legal errors were raised in the submission. As such, "the Government is entitled to rely on a presumption of regularity with respect to whether the convening authority has performed his responsibilities in a proper manner." *United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1990). Accordingly, no relief is warranted.

Conclusion

The approved findings and sentence 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 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court