UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVON L. HARRIS
United States Air Force

ACM S30392 (f rev)

7 November 2005

Sentence adjudged 6 May 2003 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos McDade, Major Sandra K. Whittington, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, Captain C. Taylor Smith, and Jesse Coleman (legal intern).

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

This case is before us for the second time. When it was first considered, the appellant raised three issues. We were asked to decide: (1) Whether the staff judge advocate (SJA) was disqualified from preparing the staff judge advocate recommendation (SJAR) and its addendum; (2) Whether the convening authority's action failed to approve

the sentence; and (3) Whether the appellant's immunized testimony tainted the decision to prosecute him.

Finding error as to the first and second issue, on 9 February 2005, we returned this case to the convening authority for new post-trial processing and a new action. *United States v. Harris*, ACM S30392, (A.F. Ct. Crim. App. 9 Feb 2005) (unpub. op.). We explicitly stated we would consider the error alleging improper use of immunized testimony after completion of these tasks.

A new SJAR was rendered by a different SJA and served on the appellant. He responded with a letter from his defense counsel. In this letter, he raised the immunity issue and asked the convening authority to set aside all of the findings of guilty. The SJA duly noted this issue in the addendum to the SJAR, but advised the convening authority that "this matter was fully litigated at the appellate level, and the courts [sic] found that A1C Harris' testimony was not 'tainted.'" The addendum was not served on the appellant, and thus he had no opportunity to respond to this clearly inaccurate statement.[1]

The appellant now challenges the addendum and asks that we address the "personal and institutional problems" evident in the post-trial processing of his case by reducing his confinement or disapproving the bad-conduct discharge. The government concedes prejudicial error exists in the post-trial processing of the appellant's case, but argues that the proper remedy is to return the record for a new SJAR and post-trial action.

Our authority to reassess the sentence to remedy errors in post-trial proceedings before the convening authority is well established. *See United States v. Cook*, 46 M.J. 37, 39 (C.A.A.F. 1997). Indeed, the legislative intent behind Article 59, UCMJ, 10 U.S.C. § 859, favors corrective action by this Court. *See* S.Rep. No. 98-53, 98th Cong., 1st sess. 21 (1983) ("If there is an objection to an error that is deemed to be prejudicial under Article 59 during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority."). Executive intent is the same. *See* Rule for Courts-Martial 1106(d)(6) ("In case of error in the [SJA] recommendation not otherwise waived . . . appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority.")

[1] We note that even if this Court had actually decided the immunity issue before remanding for new post-trial processing, the SJA's advice would run afoul of our superior court's holdings that such comments are improper. *See, e.g., United States v. Gilbreath*, 57 M.J. 57, 61 (C.A.A.F. 2002) (holding it was improper for addendum to suggest that court members had already considered the defense clemency materials and found them unpersuasive); *United States v. Catalani*, 46 M.J. 325, 328 (C.A.A.F. 1997) (finding error when an SJA bolstered his recommendation by noting that the "seniormost military judge in the Pacific" had considered the defense evidence and imposed a "fair and proportionate" sentence).

We decline to take corrective action at this level. The nature of the error in this case potentially affects the findings, rather than the sentence, and thus the proper remedy is not to modify the sentence at this level. The appellant's post-trial submissions focused exclusively on the immunity issue and asked that all of the charges and specifications be dismissed. Although a convening authority is not required to take action on the findings of a court-martial, he or she may, in his or her "sole discretion," dismiss a finding or reduce it to a lesser-included offense. Article 60(c)(3), UCMJ, 10 U.S.C. § 860(c)(3). Given this unfettered authority to dismiss or modify the findings, we find the appellant has established a colorable showing of prejudice. *See United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). The only meaningful relief in this case is to remand to the convening authority for a new post trial recommendation and action. *See Id.* Upon completion, Article 66(c), 10 U.S.C. § 866(c), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court