UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JABARI L. HINES
United States Air Force

ACM S31515

20 May 2009

Sentence adjudged 08 July 2008 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Imelda L. Paredes, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Captain Coretta E. Gray, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of absence without leave terminated by apprehension and one specification of wrongful use of cocaine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a.* The adjudged and approved sentence

* The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise not to approve confinement in excess of 105 days if a bad-conduct discharge was adjudged and not in excess of five months if a bad-conduct discharge was not adjudged.

consists of a bad-conduct discharge, four months confinement, and a reduction to E-1. On appeal the appellant asks this Court to set aside his bad-conduct discharge or, in the alternative, set aside the convening authority's Action and remand the case for new post-trial processing.

The basis for his request is that he opines: (1) the staff judge advocate (SJA), in his addendum to his recommendation, erroneously advised the convening authority to approve the sentence as adjudged; (2) the addendum contained a new matter that was not served on him and his trial defense counsel; and (3) the convening authority's Action failed to give the appellant the benefit of his pretrial agreement. Finding prejudicial error, we affirm the findings and modify the sentence.

Background

On 5 April 2008, the appellant went to a local bar for drinks. While there, he befriended a woman and the two consumed several drinks. Eventually the appellant and the woman ended up in a local hotel room where the appellant, over the course of several days, drifted in and out of consciousness. On one occasion, the appellant woke to find the woman injecting a solution into his arm. On 9 April 2008, the appellant checked out of the hotel and into a local homeless shelter, which became his residence for the next 25 days. On 2 May 2008, while partying with residents at a local hotel, the appellant smoked "crack" cocaine.

The next day, an Air Force Office of Special Investigations (AFOSI) agent and local law enforcement officials spotted the appellant, arrested him, and transported him to base. After a proper rights advisement, the appellant waived his rights, confessed, and consented to a search of his urine. He submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for a cocaine metabolite.

On 11 July 2008, the SJA provided his recommendation (SJAR) to Brigadier General RD, then the convening authority. In his SJAR, the SJA reminded the convening authority of his promise not to approve confinement in excess of 105 days, advised the convening authority that there were no other restrictions on the sentence that could be approved, and recommended the convening authority, pursuant to the pretrial agreement, approve only so much of the sentence that called for "the reduction to E-1, confinement for 105 days, and . . . [the] bad-conduct discharge."

On 17 July 2008, Brigadier General OM replaced Brigadier General RD as the convening authority. On 4 August 2008, the SJA provided his SJAR addendum to the convening authority. In his addendum, the SJA informed the convening authority of his predecessor's promise not to approve confinement in excess of 105 days, advised the convening authority that there were no other restrictions on the sentence that could be

approved, and erroneously recommended the convening authority approve the sentence as adjudged.

The SJA failed to serve his addendum on the appellant's trial defense counsel, and the appellant avers on appeal that the SJA's recommendation to approve the sentence as adjudged is a new matter of which he was deprived the opportunity to respond. The appellant's trial defense counsel avers that had he been served with a copy of the SJAR addendum, he would have corrected the SJA's erroneous advice by advising the convening authority that the appellant's pretrial agreement prohibited the convening authority from approving confinement in excess of 105 days. On 4 August 2008, the convening authority approved the sentence as adjudged.

SJAR Addendum

Proper completion of post-trial processing is a question of law, which this Court reviews 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, 65 (C.A.A.F 2000)). We need not spend a great deal of time on the first and third assignments of error. The pretrial agreement obliged the convening authority to not approve confinement in excess of 105 days. The SJA thus erred when he advised the convening authority to approve the sentence adjudged – a sentence that included four months confinement. Moreover, the convening authority, in approving the adjudged sentence, failed, at least on paper, to give the appellant the bargain to which he was entitled – an approved sentence that does not include confinement in excess of 105 days. Thus, we find for the appellant on the first and third assignments of error.

Concerning the second assignment of error, whenever a SJA introduces a new matter into the addendum, he must serve the addendum on the appellant and the trial defense counsel and give them an opportunity to comment on the new matter. Rule for Courts-Martial (R.C.M.) 1106(f)(7). Whether a comment in an addendum is a new matter is a question of law reviewed de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002). "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed." R.C.M. 1106(f)(7), Discussion.

An appellant who was not served an addendum which includes a new matter will be entitled to relief if he makes a "colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 324 (C.A.A.F. 1997)). To make such a showing, the appellant must show what he would do to resolve the error if given such an opportunity and show that his response could have produced a different result. *United States v. Gilbreath,* 57 M.J. 57, 61 (C.A.A.F. 2002); *Wheelus,* 49 M.J. at 288; *Chatman*, 46 M.J. at 323.

In the case *sub judice*, the SJA's recommendation to approve the sentence adjudged was a matter not previously discussed and as such was a new matter. Additionally, the SJA failed to serve the addendum with the new matter on the appellant and his trial defense counsel and, in so doing, violated the very essence of post-trial practice – depriving the appellant and his counsel of the right to comment on the new matter. *See United States v. Haney*, 45 M.J. 447, 452 (C.A.A.F. 1996) (quoting *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996)) ("the 'essence of post-trial practice is basic fair play -- notice and an opportunity to respond.'"). Furthermore, the appellant has made a colorable showing of possible prejudice – the advice his trial defense counsel would have given in response to the new matter could have produced a different result, namely the advice could have caused the convening authority to approve a sentence in conformity with the pretrial agreement.

Because the appellant has prevailed on all three assignments of error, we must remedy the errors and provide meaningful relief. In this regard, we can set aside the Action and remand the case for a new Action or we can attempt to remedy the error ourselves. Both the legislative and executive intent in this area are for the Court to take corrective action rather than returning the case to the convening authority for further action. *See* R.C.M. 1106(d)(6) (noting that in "case of error in the recommendation not otherwise waived . . . appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority"); S. REP. NO. 98-53, at 21 (1983) ("If there is an objection to an error that is deemed to be prejudicial under Article 59[, UCMJ, 10 U.S.C. § 859,] 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.").

The appellant does not complain of serving more than 105 days in confinement. Nor is there any evidence of such. The appellant asks this Court to set aside his bad-conduct discharge or, in the alternative, to set aside the Action and remand the case for new post-trial processing. We decline to do either. Setting aside the bad-conduct discharge would give the appellant a windfall to which he is not entitled, and setting aside the Action and remanding the case to the convening authority would run counter to our obligations under Article 59, UCMJ, and R.C.M. 1106(d)(6). Instead we will modify the sentence. We approve the findings and only so much of the sentence that calls for a bad-conduct discharge, 105 days confinement, and a reduction to E-1. Such a sentence rectifies the errors made and gives the appellant the benefit of his pretrial agreement.

Conclusion

The findings, as approved, and the sentence, as modified, are correct in law and fact, and no other 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 findings, as approved, and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court