UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEVEN J. HOLSEY
United States Air Force

ACM 38306

22 January 2014

Sentence adjudged 10 January 2013 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Rodger A. Drew, Jr. (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Isaac C. Kennen.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Major Terence S. Dougherty.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one charge and specification of murder with the intent to kill and one charge and specification of obstruction of justice, in violation of Articles 118 and 134, UCMJ, 10 U.S.C. §§ 918, 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved only 40 years of confinement, and otherwise approved the sentence as adjudged.

On appeal, the appellant raises four issues: 1) The staff judge advocate's recommendation (SJAR) and its addendum erroneously advised the convening authority that the appellant had no combat service and that the defense counsel raised no allegations of legal error; 2) The military judge applied incorrect sentencing principles in determining the appellant's sentence; 3) The military judge abused his discretion in excluding a defense exhibit in sentencing proceedings; and 4) The appellant's sentence is inappropriately severe. We find no error materially prejudicial to a substantial right of the appellant, and we affirm the findings and sentence.

Background

In the early morning hours of 29 July 2011, the appellant shot and killed Mr. Anthony Harris, Jr., a civilian man, in a parking lot outside a night club in Macon, Georgia. Earlier that evening, the appellant and Mr. Harris had a physical altercation in the night club over a woman with whom the appellant was dancing. Night club security personnel broke up the altercation and isolated the appellant and his friend, Marine Corps Sergeant (Sgt) MM, from Mr. Harris. The appellant then threatened the club's bouncer, saying, "I promise that you don't want me to go into my trunk" because the appellant would "shut this whole f***ing club down," or words to that effect. However, security personnel eventually let the appellant and Sgt MM back into the club.

About an hour after reentering the club, the appellant decided to leave. He and Sgt MM walked toward the appellant's car. On the way, they noticed Mr. Harris and his companions standing by their cars in the club's parking lot. The appellant and Sgt MM did not say anything to Mr. Harris's group, but they did notice one man in the group holding a handgun. The weapon was not pointed at them and neither of them felt threatened by the sight of the handgun.

The appellant reached his car and retrieved his shotgun from the back seat, placing it next to him in the front seat. The appellant then drove the car out of the parking spot, with Sgt MM sitting in the front passenger's seat. The appellant had a clear route to exit the parking lot without passing Mr. Harris's group; however, the appellant elected to drive slowly toward the group. As he passed the group, the appellant rolled down the back passenger window, picked up his shotgun, and fired the weapon out the back passenger's window with the intent to hit and kill Mr. Harris. The appellant succeeded in this, hitting Mr. Harris in the right mid-abdomen with a 12-gauge shotgun slug. The appellant drove away rapidly, with Sgt MM still in the front seat. Sgt MM did not know the appellant was going to shoot Mr. Harris. The gunshot caused numerous internal injuries to Mr. Harris, who died on the pavement of the parking lot.

Later that night, the appellant disposed of his shotgun. The following day, he and his girlfriend left the area and spent one night at his parents' house. On 1 August 2011, the appellant asked two Airmen to help him get his silver Toyota Camry painted in order

to impede an investigation into the shooting. Civilian law enforcement officials interviewed the appellant on 5 August 2011. He repeatedly insisted that Sgt MM shot the victim for no reason. Air Force officials requested and received jurisdiction over this case. The appellant was then promptly placed into pretrial confinement, where he remained until trial.

A lengthy Article 32, UCMJ, 10 U.S.C. § 832, process followed. Based on the investigating officer's recommendation, the convening authority referred one charge and specification of premeditated murder and one charge and specification of obstruction of justice, and referred this matter as a non-capital case.[1] The appellant and the convening authority then formed a pretrial agreement in which the appellant agreed to plead guilty to unpremeditated murder and obstruction of justice in return for a cap on confinement of 40 years.

Staff Judge Advocate's Recommendation

The appellant alleges that the SJAR and its Addendum were in error in two respects: 1) The SJAR stated the appellant had no combat service; and 2) The Addendum stated defense counsel raised no allegations of legal error in its clemency submission when, in fact, defense counsel alleged the military judge erred in his application of Rule for Courts-Martial (R.C.M.) 1006. The Government does not contest either error, but rather contends the appellant was not materially prejudiced by the errors.

Proper completion of post-trial processing is a question of law which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to comment in a timely manner on matters in the SJAR, or on matters attached to the SJAR, waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). An appellant must make some "colorable showing of possible prejudice in terms of how the [perceived error] potentially affected [his] opportunity for clemency." *Id*. at 437 (quoting *Kho*, 54 M.J. at 65).

We agree with counsel for both sides that the SJAR and its Addendum are in error in these two respects. With regard to the personal data sheet attached to the SJAR, the military judge at trial specifically notified the parties that the appellant's combat service needed to be reflected on the personal data sheet. The Government made this correction to the personal data sheet used at trial, but it then committed the same error in post-trial processing. We therefore find that the error was plain or obvious. Concerning the

[1] Based on the investigating officer's recommendation, the convening authority elected not to refer one specification of service discrediting conduct under Article 134, UCMJ, 10 U.S.C. § 934. That specification alleged that the appellant concealed razor blades in his pre-trial confinement cell.

second error, trial defense counsel's clemency submission explicitly alleged, "I believe that the sentencing argument made by trial counsel to the judge during the sentencing phase of the trial that the starting point that the judge should employ when deliberating should be life in prison is not only improper but not in accordance with the Rules for Court-Martial." R.C.M. 1106(d)(4) requires the staff judge advocate to state whether corrective action on the findings or sentence should be taken when an allegation of legal error is raised in a clemency submission. The staff judge advocate (SJA) erred by failing to address this allegation of legal error.

However, the fact that the SJA twice erred in her recommendation and its Addendum does not automatically warrant relief. An error in a post-trial SJAR to the convening authority "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). "Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *Id.*

While the SJA should have ensured that her recommendation contained an accurate summary of the appellant's service record, and while she erred by failing to address the legal error raised by the appellant, we find no prejudice to the appellant arising from either error. The appellant's combat service was not so notable that it would have raised any possibility that the convening authority might have taken a more favorable action. As to the second error, below we find no merit in the appellant's allegation that the military judge erred in applying sentencing principles to this case. Therefore, there is no possibility that the convening authority would have granted a more favorable action had the SJA addressed this meritless legal issue. The appellant was not prejudiced by either of the SJA's errors, and therefore he is not entitled to relief.

Military Judge's Sentencing Principles

Trial counsel argued the following in sentencing:

> Now, sir, as you know in every sentencing case it is important to tailor the sentence to the individual accused. But when you're talking about the crime of murder, it seems that that sentence should be the same; should start out at the same point. When you chose to take another man's life, when you choose to kill someone, the starting point should be spending the rest of your life behind bars. And for Airman Holsey, he's 24 years old, that's between 60 and 70 years.

Trial counsel then argued that due to the aggravating factors in this case and the lack of mitigating factors and rehabilitative potential, the requested sentence was warranted. As

he addressed some preliminary matters before beginning his sentencing argument, trial defense counsel asserted as follows:

> And then, Your Honor, as to the government's argument that the court should start with the most severe punishment, I would cite to the court Rule 1006, Deliberations and Voting on Sentence, "All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by a concurrence of the number of members required under subsection D(4) of this rule." The government's argument is contrary to the Rules of Courts-Martial.

The military judge responded to trial defense counsel's assertion:

> Those rules actually pertain to the voting procedures for the military jury or court members and that's how they technically do the voting. Obviously in the case of a judge alone there is no voting. The judge simply considers all the evidence and then decides what the sentence is. But obviously I will consider the entire range of sentencing options from no punishment up to the maximum punishment authorized in this case.

Trial defense counsel did not further pursue this issue. Trial defense counsel then argued that a punitive discharge was appropriate, and that the appellant understood "he is going to have to serve a term of years." Trial defense counsel focused the issue in sentencing as follows: "The only question is whether Your Honor will allow him or grant him the ability to have a life after his punishment for this offense."

The appellant asserts that the military judge failed to apply "modern standards of sentencing" in that his statement to trial defense counsel indicated he would not adjudge the least severe sentence necessary to comply with the recognized purposes of sentencing. He asserts that military courts may refer to federal sentencing guidelines in determining whether a particular sentence achieves sentencing goals, and these guidelines require courts to impose a sentence no greater than necessary to comply with the purposes of sentencing. He further asserts that trial counsel's argument that confinement for life should be the starting point of the analysis – combined with the military judge's refutation of trial defense counsel's reference to R.C.M. 1006 – demonstrates that the military judge did not properly apply sentencing principles in this case.

"As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008). Subject to certain limitations in the *Manual for Courts-Martial*, the sentence to be adjudged is a matter within the discretion of the court-martial. R.C.M. 1002. Generally accepted sentencing philosophies include rehabilitation

of the accused, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his or her sentence from committing the same or similar offenses. R.C.M. 1001(g); Department of Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 2-5-21 (1 January 2010).

We find no error in the military judge's statement that R.C.M. 1006 was not applicable to this case. The rule trial defense counsel cited deals with deliberations and voting procedures by members and does not purport to lay out "modern principles of sentencing." The military judge was not required to consider anything beyond generally accepted sentencing philosophies in reaching his sentence. In fact, even assuming that the principles embodied in the federal sentencing guidelines should have guided the military judge's deliberations,[2] the guidelines actually require mandatory minimum sentences for many offenses, a concept at odds with the appellant's notion of "modern standards of sentencing." Nothing in the military judge's response to trial defense counsel indicates any improper view of his role in sentencing or that he failed to consider the entire range of sentencing options available. In fact, he explicitly stated that he would consider all sentencing options in this case, including no punishment. This assignment of error is without merit.

Exclusion of Defense Evidence

On direct examination in sentencing, trial counsel elicited that Sgt MM decided to move his family out of state about 10 days after the shooting because he was concerned what the appellant or people the appellant knew might do to him. On cross-examination, trial defense counsel attempted to demonstrate that Sgt MM actually moved his family because he feared retribution from the victim's friends rather than the appellant. However, Sgt MM maintained that he moved his family based on his fear of the appellant. Then, in the defense's sentencing case, trial defense counsel attempted to introduce a memorandum from the Air Force Office of Special Investigations (AFOSI) detachment commander recommending closing the Article 32, UCMJ, investigatory hearing based on a possibility of retaliatory attacks against the appellant, witnesses, family members, or others associated with the hearing. In pertinent part, the memorandum read:

> 2. WITNESSES associated to DECEASED have expressed a desire to retaliate against SUBJECT and SUBJECT's family. WITNESSES have stated that DECEASED's friends who were armed the night of DECEASED's death should have retaliated against SUBJECT on that night. One WITNESS was carrying a firearm the night of the incident and

[2] The Government correctly notes that the guidelines themselves state that they are inapplicable to military courts-martial. *See* 18 U.S.C. § 3551(a).

> stated he attempted to fire at SUBJECT after DECEASED was shot, but the WITNESS' firearm malfunctioned. WITNESSES associated to DECEASED have asked Special Agents from my office for information regarding the location of SUBJECT's family. One WITNESS stated all of DECEASED's friends carry weapons and when they find out where SUBJECT is from, they will "black out" SUBJECT's family.
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> 3. During interviews with AFOSI, [Sgt MM] expressed concern for the safety of himself and his family. [Sgt MM's] spouse and children have since relocated from the Warner Robins area because of [Sgt MM's] safety concerns. [Sgt MM's] testimony at the Article 32 hearing will likely identify for all in attendance that he was with SUBJECT before, during, and after DECEASED was shot. That information could make [Sgt MM] an attractive target for retaliation.

Trial defense counsel asserted that the memorandum was relevant solely as impeachment of Sgt MM's testimony because it demonstrated that he moved his family out of fear of the victim's friends, not the appellant. Trial counsel objected that it was not relevant and unduly prejudicial under Mil. R. Evid. 403. The appellant renews his contention on appeal that the document properly impeached Sgt MM's testimony about his reason for moving his family, and therefore it should have been admitted.

This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation omitted). A decision to admit or exclude evidence based upon the balancing test set forth in Mil. R. Evid. 403 is within the sound discretion of the military judge. *United States v. Smith*, 52 M.J. 337, 344 (C.A.A.F. 2000) (citation omitted).

We find no abuse of discretion in the military judge's decision to exclude this memorandum. The AFOSI memorandum merely states that Sgt MM had expressed concern for his safety and that of his family. While it does express concerns that Sgt MM's testimony could expose his involvement to the victim's companions, it does not state whether Sgt MM's concern was aimed at the appellant or the victim's friends. Therefore, it had little relevance concerning the only basis for which trial defense counsel offered it – impeachment. Even assuming that the military judge erred in excluding the memorandum, we are convinced that its exclusion did not prejudice the appellant, as Sgt MM's fear of the appellant did not play a prominent role in the Government's sentencing case. In fact, trial counsel did not even mention this testimony in his sentencing argument. It is apparent that the appellant's sentence was based on his crimes, not Sgt MM's perception that his family faced danger.

Sentence Severity

The appellant argues his sentence is inappropriately severe. He bases his argument in part on the matters raised above, contentions we have already rejected. He also asserts his sentence fails to adequately account for his intoxication at the time of his offense, his lack of any prior offense, his "creditable duty performance history," and the fact that someone in the victim's group brandished a firearm in the parking lot before the shooting.

This Court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review sentence appropriateness de novo, employing "a sweeping congressional mandate" to ensure "a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted). We have discretion to approve only a sentence, or such part of a sentence, that we determine should be approved, even if the sentence is legally correct. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010). In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999)). Although we are accorded great discretion to "do justice," we may not "grant mercy," which is the purview of the convening authority in the exercise of his or her clemency power. *Nerad*, 69 M.J. at 138, 146 (quoting *United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998)).

We have reviewed the record of trial, giving individualized consideration to this appellant on the basis of the nature and seriousness of his offense and his character. We find that neither the approved nor the adjudged sentence is inappropriately severe. The appellant killed a fellow human being over a petty dispute. He then enlisted the help of two fellow Airmen to help him conceal his actions by painting his car, and he told law enforcement officials that his friend, Sgt MM, shot the victim. We also note that the appellant's service record was lackluster, as he received nonjudicial punishment in 2009 for domestic assault and a false official statement, and never once received an overall "5" on an enlisted performance report. The appellant received a just punishment for his crimes, and we find no basis to disturb this sentence.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVE LUCAS
Clerk of the Court