UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PHILLIP M. JAMESON
United States Air Force

ACM S31438

06 January 2009

Sentence adjudged 19 December 2007 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Ronald Gregory (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIUM:

Pursuant to his pleas, a military judge sitting as a special court-martial found the appellant guilty of one specification of divers wrongful use of marijuana, two specifications of larceny of other than military property, and one specification of dereliction of duty, in violation of Articles 112a, 121, and 92, UCMJ, 10 U.S.C. §§ 912a,

921, 892. The adjudged and approved sentence consists of a bad-conduct discharge, three months confinement, and a reduction to the grade of E-1.*

On appeal the appellant asks this Court to grant appropriate relief. As the basis for his request, he asserts that upon announcing the sentence, the military judge made a clemency recommendation, the staff judge advocate failed to advise the convening authority of the military judge's clemency recommendation, and, as a result, the appellant had a substantial right prejudiced. Finding no prejudicial error, we affirm.

Background

The relevant facts of this case are fairly straightforward. Following the announcement of the sentence but before adjournment, the military judge made a clemency recommendation wherein he stated, "I would urge the convening authority to seriously consider a deferral of confinement, not only because of the time of year, but because of the condition of his grandmother, to allow Airman Jameson sufficient time to visit her." After making this statement and dealing with final matters before the court, the military judge restated his clemency recommendation when he said, "I would urge the convening authority to seriously consider granting a deferral of confinement . . . to allow Airman Jameson to visit his grandmother."

On 19 December 2007 and 2 January 2008, trial defense counsel submitted deferral of confinement requests to the convening authority. The basis for the requests was for the appellant to visit his ailing grandmother and, upon her death, to attend her funeral. The requests did not inform the convening authority that the military judge had made an "on record" recommendation for deferral of the appellant's confinement. Without explanation, the convening authority denied both requests.

On 5 February 2008, the staff judge advocate served her recommendation on the convening authority. Conspicuously absent from her recommendation was any mention of the military judge's "on record" recommendation for the deferral of the appellant's confinement. On 12 February 2008, trial defense counsel submitted a clemency request wherein he advised the convening authority that: (1) the military judge had made an "on record" recommendation for the deferral of the appellant's confinement; (2) the appellant had submitted two deferral of confinement requests; (3) the convening authority, without explanation, had denied both requests; and (4) in light of such, the convening authority should remit nine days of the appellant's confinement.

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* 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 three months and not to court-martial, seek non-judicial punishment, or take other administrative action against the appellant for allegedly misusing the credit card of Ms. BB.

On 13 February 2008, the staff judge advocate served her addendum to her recommendation on the convening authority. Nowhere in her addendum did she advise the convening authority of the military judge's "on record" recommendation for the deferral of the appellant's confinement. On 13 February 2008, the convening authority approved the findings and the sentence as adjudged.

Discussion

The President specifically directs staff judge advocates to advise convening authorities of clemency recommendations made by sentencing authorities in conjunction with the announcement of the sentence. Rule for Courts-Martial 1106(d)(3)(B). Moreover, our superior court has also held that "[a] recommendation by a military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence." *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999) (citing *United States v. Clear*, 34 M.J. 129 (C.M.A. 1992)). It thus stands that the staff judge advocate's failure to advise the convening authority of the military judge's clemency recommendation is error.

However, this does not end the inquiry. We must now test for prejudice. Because the trial defense counsel mentioned the military judge's clemency recommendation in the clemency petition and the clemency petition is listed as an attachment to the addendum, we presume the convening authority reviewed and considered the clemency petition, to include the reference to the military judge's clemency recommendation, prior to taking action. *See e.g. United States v. Foy*, 30 M.J. 664, 665-66 (A.F.C.M.R. 1990) (instructing that when all clemency submissions are listed on the addendum to the staff judge advocate's recommendation, there is a presumption the convening authority performed his responsibilities in a proper manner). In short, the convening authority received and considered the military judge's clemency recommendation prior to taking action, albeit not in time to allow the appellant to visit his ailing grandmother and attend her funeral. The convening authority opted not to grant the appellant clemency. Such a decision was within the convening authority's sound discretion, and we will not disturb it.

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; *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, YA-02, DAF
Clerk of the Court