UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEPHEN T. JONES
United States Air Force

ACM S31078

30 May 2007

Sentence adjudged 21 February 2006 by SPCM convened at RAF Lakenheath, United Kingdom. Military Judge: Gordon R. Hammock (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

BRAND, Judge:

Pursuant to his pleas,[1] the appellant was convicted of carnal knowledge with a person over 12 years of age, but under 16 years of age; sodomy, on divers occasions, with a person over 12 years of age, but under 16 years of age; indecent acts, on divers occasions, with a person under 16 years of age; communicating indecent language, on divers occasions, to a person under 16 years of age; and indecent acts, on divers occasions, in violation of Articles 120, 125 and 134, UCMJ, 10 U.S.C §§ 920, 925, 934. A military judge sitting as a special court-martial sentenced the appellant to a bad-

[1] Except for Specification 3 of Charge III, in which the appellant pled guilty but was found guilty by exceptions and substitutions.

conduct discharge, confinement for 30 days, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant alleges that information provided to the convening authority in the addendum to the staff judge advocate's recommendation (SJAR) was "new matter" and thus, should have been served on him prior to action. We disagree.

Background

After the appellant's trial, the convening authority's staff judge advocate (SJA), pursuant to Rule for Courts-Martial (R.C.M.) 1106, properly prepared a SJAR and served it on the appellant. In response, the appellant submitted a clemency package which, in addition to numerous other attachments, included letters from the appellant and his trial defense counsel. In these letters, the appellant and his counsel asked the convening authority to disapprove the bad-conduct discharge or in the alternative, set aside the guilty finding for Charge III, Specification 3.[2] The reason for the request was based upon the following: the victim was the aggressor; the appellant had been rehabilitated in confinement; and the statements made by the military judge on the record. The clemency petition from the trial defense counsel referenced a statement made by the military judge, in which the military judge indicated the sentence in this case had been a very difficult decision for him to make.[3] The trial defense counsel informed the convening authority the military judge in this case had been the Chief Military Judge.[4] The trial defense counsel's letter also reminded the convening authority that he had the sole discretion to grant clemency and cited "R.C.M. 1107(b)(1)" in support of this proposition. The trial defense counsel also cited R.C.M. 1107(d) to remind the convening authority that he "may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased."

The addendum to the SJAR addressed the defense request for clemency. In the addendum, the SJA informed the convening authority that he **must** (emphasis added by SJA) consider all matters submitted by the appellant,[5] and could consider the record of trial, the personnel records of the appellant, and other matters he deemed appropriate. In the fourth paragraph of the addendum, the SJA made the following statement:

> I recommend against granting [the appellant's] clemency request. A punitive discharge is appropriate for the offense [sic] for which the accused was convicted. The offenses involved sexual acts with a minor. Despite [the

[2] The reasoning was the victim had reached legal age and was not held accountable, so the appellant should not be either.
[3] In addition, the military judge recommended consideration of the appellant for entry into the Return to Duty Program. This recommendation was addressed in the SJAR.
[4] In fact, he was the Chief Circuit Military Judge, European Circuit.
[5] These matters were listed separately as attachments to the SJAR addendum.

> appellant's] characterization of the victim as the aggressor, he was the adult in this relationship. The judge considered the *defense evidence and decided a bad conduct discharge is appropriate in this case, and I concur*. The attached proposed action approves the adjudged sentence. Should you wish to grant any form of clemency, we will prepare the appropriate action for your signature.

(Emphasis added to highlight the language the appellant now asserts constitutes error.).

Law and Analysis

The issue before this Court is whether the addendum to the SJAR contained "new matter" such that the appellant should have been allowed to comment on it prior to submission to the convening authority. R.C.M. 1106(f)(7). If we find that the addendum did, in fact, contain "new matter," we must decide if the appellant was prejudiced by the SJA's failure to serve the addendum upon the appellant and provide an opportunity for him to comment. *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997).

The standard of review for determining whether post-trial processing was properly completed is 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)). Whether a matter contained in an addendum to the SJAR constitutes "new matter" that must be served upon an accused is a question of law that is also reviewed de novo. *Chatman*, 46 M.J. at 323; *United Sates v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

As our superior court has stated, the starting point for reviewing the issue of whether "new matter" has been introduced in an SJAR addendum is R.C.M. 1106(f)(7). *United States v. Gilbreath*, 57 M.J. 57, 60 (C.A.A.F. 2002). R.C.M. 1106(f)(7) states:

> The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments. Substitute service of the accused's copy of the addendum upon counsel for the accused is permitted in accordance with the procedures outlined in subparagraph (f)(1) of this rule.

R.C.M. 1106(f)(7), Discussion states:

> "New matter" includes discussion of the effect of new decisions on issues in the case, matters from outside the record of trial, and issues not previously discussed. *"New matter" does not ordinarily include any discussion by the [SJA] or legal officer of the correctness of the initial defense comments on the recommendation.*

(Emphasis added.).

R.C.M. 1106(f)(7) does not define the term "new matter" and neither this Court nor our superior court has attempted a comprehensive definition, recognizing that whether or not an addendum contains new matter will always be case specific. The non-binding discussion to the rule provides a number of illustrations of "new matter", which our superior court has cited with approval. *See Chatman*, 46 M.J. at 323; *United States v. Leal*, 44 M.J. 235, 236 (C.A.A.F. 1996). Our superior court has stated that its "overarching concern", in its line of cases that evaluate new matter issues, was "fair play." *United States v. Anderson*, 53 M.J. 374, 377 (C.A.A.F. 2000) (citing *United States v. Buller*, 46 M.J. 467, 469 (C.A.A.F. 1997)).

On appeal, the appellant alleges that the SJA's comment regarding the sentence of the military judge was used to bolster the SJA's recommendation. The appellant also asserts the SJA's comment that the military judge had reviewed the defense evidence before adjudicating a bad-conduct discharge was misleading. In assigning error, the appellant relies on *Gilbreath*, 57 M.J. at 61, and *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997).

The case before us today is readily distinguishable from both cases relied upon by the appellant. First, unlike *Gilbreath* and *Catalani*, the SJA's statement at issue in this case is factually correct. Second, the SJA here did not attempt to bolster his original recommendation by commenting on the fairness or appropriateness of the military judge's decision, as was the case in *Catalani*. *See Catalani*, 46 M.J. at 328. Third, the SJA did not suggest that the convening authority defer to the judgment of the military judge and abdicate his command responsibility. There was no recommendation by the SJA that the adjudged sentence was appropriate because a military judge had imposed it, nor did it include an assertion that a sentence meted out by a military judge of a certain stature should be approved. *Id.* at 327-28; *see also Gilbreath*, 57 M.J. at 61. In fact, it could be argued that the defense submission actually argued this very point.

Assuming, *arguendo*, that the statement in question was "new matter" that should have been served upon the appellant, we must address the question of whether the appellant was prejudiced by not having an opportunity to comment. To prevail, the appellant must first state "what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Chatman*, 46 M.J. at 323 (quoting Article 59(a), UCMJ, 10 U.S.C. § 859(a)). Second, through affidavit(s), the appellant must make some

colorable showing of possible prejudice by proffering a "possible response to the unserved addendum '*that could have produced a different result*.'" *Gilbreath*, 57 M.J. at 61 (quoting *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000) (emphasis added.)).

The appellant fails to meet either prong. As to the SJA's statement regarding the military judge, the appellant simply asserts that, if served with the addendum, he "would have been in a position to stress the convening authority's obligation to take an independent and fresh look at the sentence, as required by Article 60, UCMJ [10 U.S.C. § 860]." The appellant fails to note, however, that his trial defense counsel, in the clemency package, *did* remind the convening authority of his responsibilities by directing the convening authority's attention to R.C.M. 1107. Additionally, the SJA cited Article 60, UCMJ, in the addendum, and informed the convening authority of his responsibilities under the law. Thus, the appellant's proffer simply amounts to a claimed right to remind the convening authority for yet a third time of his responsibilities under the law. The appellant, through counsel, asserts that if he had been served the addendum he would have been afforded the opportunity to clarify for the convening authority that the military judge considered sentencing evidence only, while the convening authority had more; however, the SJA previously informed the convening authority he must consider all matters submitted by the appellant.

We fail to see how such inputs from the appellant or his trial defense counsel would serve to "deny, counter, or explain" the SJA's statements in any way that could have produced a different result. *See Chatman*, 46 M.J. at 323. The appellant has not made a colorable showing of possible prejudice. *See Gilbreath*, 57 M.J. at 61. We find that the appellant's "possible response to the unserved addendum" would not have produced a different result. *Id.*

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

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator