UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHASE L. JONES
United States Air Force

ACM S31910

23 August 2012

Sentence adjudged 6 January 2011 by SPCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph S. Kiefer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 100 days, forfeiture of $800.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and SARAGOSA
Appellate Military Judges

PER CURIAM:

The appellant was tried by a military judge sitting as a special court-martial. In accordance with his pleas, he was found guilty of one specification of fraudulent enlistment; one specification of wrongful use of heroin on divers occasions; and one specification of wrongful use of oxycodone, a Schedule II controlled substance, in violation of Articles 83 and 112a, UCMJ, 10 U.S.C. §§ 883, 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 100 days, forfeiture of $800.00 pay per month for 3 months, and reduction to the grade of E-1. On appeal, the appellant asserts the Government was obligated to provide post-trial discovery

to the appellant regarding the appellant's recruiter. He requests that this Court set aside the Action of the convening authority and remand for new post-trial processing.

Background

While being recruited for enlistment in the Air Force, the appellant completed enlistment paperwork admitting to pre-service use of marijuana, but denying use of any other drugs. The appellant subsequently admitted that, prior to enlisting, he had in fact used heroin, rendering his enlistment fraudulent. During the *Care*[1] inquiry, the appellant told the military judge that he lied on the paperwork because when he told his recruiter that he had used marijuana and "pills" in the past, his recruiter told him, "Don't repeat that. Don't bring that up. Stick to the marijuana use." He also acknowledged that he knew it was wrong to lie on the papers and that he made the choice to do so on his own. He was questioned at length by the military judge as to whether he had discussed this issue with his trial defense counsel to determine whether or not any defenses could be raised. He affirmatively asserted this discussion with his counsel had taken place and that he understood that, by his plea of guilty, he would be waiving any defenses to the charge. He further admitted to using heroin while on active duty on approximately 30 occasions during the charged time period of 10 March 2010 and 28 November 2010. He began using heroin after arriving at Luke Air Force Base, Arizona, and reconnecting with his brothers and old friends in the Snowflake, Arizona, area. He also admitted to crushing up an oxycodone pill and snorting it while "trying to get off heroin."

At sentencing, the prosecution introduced the appellant's Personal Data Sheet, enlistment papers, two Letters of Reprimand, a Letter of Counseling, and a recording of the appellant's interview with the Air Force Office of Special Investigations (AFOSI). They also presented testimony from an AFOSI agent and the appellant's recruiter, Technical Sergeant (TSgt) C, who denied the allegations made by the appellant during the *Care* inquiry that he instructed the appellant to withhold information on his enlistment papers. The defense presented the appellant's written and oral unsworn statement; certificates of achievement, including one showing successful recent completion of an inpatient drug rehabilitation program; and several family photos. Testimony was also presented by the appellant's mother and father. A great deal of emphasis was placed on the appellant's rehabilitation potential, as evidenced by his incredible perseverance during a year-long recovery from a four-wheeler accident that nearly caused him to lose a leg when he was twelve years old. Other testimony focused on the fact that his drug introduction was through two older brothers who are heroin addicts. Trial originally adjourned on 6 January 2011[2].

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[2] Originally, the court sentenced appellant to $1,000.00 in forfeitures per month for 3 months; however this amount exceeded the maximum amount allowable per month given the appellant's pay for the reduced grade of E-1. Upon realizing this error, the court was reopened on 13 January 2011 and a revised sentence was announced modifying only the forfeiture part of the sentence to $800.00 in forfeitures per month for 3 months.

On 12 January 2011, trial defense counsel sent an e-mail to the staff judge advocate requesting post-trial discovery "to assist in the preparation of matters in the abovementioned case under [Rule for Courts-Martial] 1105." He requested the names of roughly 56 other Airmen recruited by TSgt C. He cites the need for this discovery as two-fold. First, that it is a potential matter in mitigation that was not available for consideration at the court-martial. Second, that it may reveal a violation of Article 84, UCMJ, 10 U.S.C. § 884, by TSgt C. The discovery request was considered and denied by Captain S, the trial counsel. The issue of this denial of discovery was raised in the clemency matters presented to the convening authority prior to action. An Addendum to the Staff Judge Advocate Recommendation was prepared and stated that the allegations of error for failing to provide the requested post-trial discovery were considered and determined to be without merit. No clemency relief was granted.

Post-Trial Discovery

When faced with a post-trial dispute over discovery relevant to an appeal, an appellate court must first determine whether the appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted. *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). *Campbell* provides:

> In addressing this question, the court should consider, among other things:
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> (1) whether the defense has made a colorable showing that the evidence or information exists;
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> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
>
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and
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> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id.

In applying the *Campbell* factors to the case at bar, this Court finds an insufficient showing that some measure of appellate inquiry is warranted. First, while it appears assumed by all that a list of TSgt C's other recruits may exist, there is no colorable showing that there exists any evidence or information that he instructed any recruits to withhold information on their enlistment paperwork. Second, this information was clearly known prior to trial and not requested. Defense counsel's request for post-trial discovery states, "Consistent with the expectation I stated in our pretrial negotiations,

A1C Chase Jones testified in his Care inquiry that TSgt C counseled him to lie on forms discussing pre-service drug use during his enlistment." Counsel further acknowledges, "I understand that the defense could have made this discovery request earlier and apologize that we did not." This Court finds that the evidence sought was previously discoverable with due diligence. Third, the putative information is simply not relevant to an issue presented at trial and, if so, was affirmatively waived by the appellant's guilty plea. The military judge thoroughly canvassed the appellant of whether he had discussed these issues surrounding the recruiter with his defense counsel and whether he understood he would be waiving all possible defenses by entering his guilty plea. The appellant unequivocally acknowledged discussions with counsel about possible defenses, did not believe the discussion with the recruiter presented a defense, and was waiving any defenses to proceed with his guilty plea. The putative information appears to have been sought in an effort to bolster the appellant's claim against the recruiter for some marginal relevancy it may have had during clemency or to initiate investigation into TSgt C's recruitment practices, a matter completely collateral to the court-martial proceeding.

Finally, there is no showing of a reasonable probability that the result of the proceeding would have been different. The only "proceeding" involved here is a clemency review by the convening authority. Essentially what the appellant asked for was "clemency discovery." The issues surrounding the appellant's claim that his recruiter instructed him to withhold information on his enlistment paperwork was presented to the convening authority, as well as the dispute over the requested information. Therefore, the convening authority was on notice of the allegation and free to investigate to the extent he felt it was relevant before taking action, so there is no "colorable showing of possible prejudice" to the clemency outcome. *See United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999) (citations omitted).

After considering all of the *Campbell* factors, this Court concludes no error occurred in the denial of post-trial discovery for clemency. Assuming *arguendo* that it was error to deny the discovery, we find any error to be harmless.

Conclusion

The findings and approved 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA E. DIXON, MSgt, USAF
Deputy Clerk of the Court