UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic PETER M. LAVOIE
United States Air Force

ACM S31409

24 September 2008

Sentence adjudged 04 October 2007 by SPCM convened at Travis Air Force Base, California. Military Judge: Carl L. Reed (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 7 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, and Major Matthew S. Ward.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification each of being absent from his unit without leave, possession and use of methamphetamines, and distribution of oxycodone, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The adjudged and approved sentence includes a bad-conduct discharge and confinement for seven months. The appellant was awarded 67 days of pretrial confinement credit against the approved period of confinement.

The appellant raises one assignment of error. He asserts that the action must be set aside and the case returned for additional post-trial processing because of errors and omissions in the Staff Judge Advocate's Recommendation (SJAR) and the Personal Data Sheet (PDS) attached to the SJAR. Finding no prejudicial error, we affirm.

Post-Trial Processing 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 timely comment on matters in the SJAR, or on matters attached to the SJAR, waives any later claim of error in the absence of plain error. Rule for Courts-Martial (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). Although the threshold for establishing prejudice in this context is low, the appellant must nonetheless make as least some "colorable showing of possible prejudice in terms of how the [perceived error] potentially affected [his] opportunity for clemency." *Id.* at 437.

The appellant points to several perceived errors in the information provided to the convening authority in the SJAR, either directly or through the PDS attached to it. They include: failure to list all of his awards and decorations, falsely reporting that he had no "foreign service" or "combat service," misstating the character of the appellant's service prior to his court-martial, misstating the length of the appellant's military service, and misstating the maximum imposable punishment for the appellant's offenses. The appellant's trial counsel did not make a timely objection to or comment on these perceived errors to the convening authority, but raises them for the first time on appeal. We accordingly review the asserted deficiencies for plain error.

By far the most serious deficiencies noted by the appellant are that the PDS failed to list a number of his awards and decorations, including his receipt of the Iraqi Campaign Medal, and falsely reported that he had no "foreign service" or "combat service." In fact, the appellant had deployed twice to Iraq and once to Kuwait. Turning to the first prong of the required analysis, we find both deficiencies to be error. The Manual for Courts-Martial (MCM) mandates that the SJAR include a summary of an accused's military record, including his awards and decorations. R.C.M. 1106 (d)(3)(C); *United States v. Demerse,* 37 M.J. 488, 489 (C.M.A. 1993). Although the MCM does not explicitly require that the SJAR list an accused's significant deployments, we conclude that a meaningful "summary" of the accused's record, as that term is used in R.C.M. 1106(d)(3)(C), should do so, particularly when, as here, the deployments included tours in a hostile fire zone. In any case, even if such information is not specifically required, once the staff judge advocate elects to include it, he must ensure it is accurate. He did not do so here.

The deficiencies were also obvious. The correct information, both as to the appellant's awards and decorations and his deployment history, was contained on a PDS introduced as a prosecution exhibit at trial and was therefore contained in the record before the staff judge advocate when he completed the SJAR. Moreover, the appellant's deployments to Iraq and Kuwait were actually highlighted by the military judge at trial. The version of the PDS introduced by the prosecution listed the appellant's deployments as "foreign service," and indicated he had no "combat service." The military judge advised the parties that he considered the appellant's deployments as "combat service" when determining an appropriate sentence.

Although these two deficiencies were obvious error, the appellant has not met his burden of showing prejudice. The appellant's disciplinary record was extremely poor. It included two Article 15, UCMJ, nonjudicial punishment actions, a letter of reprimand, and two letters of counseling. One of the Article 15s included punishment for marijuana use. The other was for willfully damaging a government vehicle by putting milk, soda, and Gatorade in the fuel tank while the appellant was on one of the very deployments he asserts should have been brought to the convening authority's attention. Given the appellant's abysmal disciplinary record, in terms of both the quantity and seriousness of his prior offenses, it is inconceivable that the convening authority would have been moved to grant clemency even if he had been made aware of the missing information.[1] He has made no showing to the contrary.

Having considered the other SJAR errors raised by the appellant, we conclude they also do not merit relief. One of the asserted errors is not an error at all, but a fair assessment of the appellant's record. The SJAR indicated that the appellant's service prior to his court-martial was "substandard," an assessment warranted by his prior disciplinary history and contained in two different forwarding endorsements from his commander.[2] The appellant asserts that because one of those endorsements also indicated that his service had at one time in the past been "above average," the SJAR also had to include that language. We do not agree. The SJAR accurately captured the commander's overall assessment of the appellant's performance at the time of trial. If the appellant believed that assessment was incomplete, he could and should have brought it to the attention of the convening authority, either through a response to the SJAR or through a clemency submission. He did neither.

The remaining asserted errors, though they certainly occurred and were obvious, were so insignificant that they did not prejudice the appellant. The SJAR incorrectly

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[1] The appellant's counsel advised the Court that the appellant has subsequently been convicted by a second special court-martial for possession of oxycodone while in post-trial confinement and that his sentence for that offense included a bad-conduct discharge and five months confinement. The appellant's subsequent court-martial would also be before the convening authority if we set aside the action here and return the case for additional processing.

[2] The appellant's offenses were the subject of both an original charge sheet and an additional charge sheet. His commander forwarded each separately.

indicated that the maximum imposable punishment included forfeiture of 2/3 pay *and allowances* and that the appellant had completed 73 months of service (he had completed 75). As with the more serious omissions discussed above, it is inconceivable that the convening authority would have granted the appellant clemency even if he had been provided the correct information.

Our determination that the appellant warrants no relief as a result of the numerous errors in the SJAR and PDS does not mean we condone the poor work evidenced by these and the other post-trial errors discussed below. We decidedly do not. The inattention to detail evidenced by the total combination of errors in this case is disturbing, and certainly not a model to be emulated by others. However, under the facts of the record, the errors simply did not operate to the appellant's prejudice.

Although not raised by the appellant, we also noted and considered that, contrary to R.C.M. 1103(i)(1)(B), the record of trial was not sent to the defense counsel for examination prior to authentication, and there is nothing in the record to indicate that allowing prior defense review would have resulted in unreasonable delay. However, we find no prejudice to the appellant. There is no indication that the record transcript is not accurate. The defense had the authenticated record in time for review in connection with the SJAR, made no objection, waived clemency, and raised no errors to the convening authority.

Defective Court-Martial Order

The appellant correctly notes that the court-martial order fails to reflect his plea and the finding with regard to the specification of the Additional Charge. It also incorrectly indicates that Charge III alleged a violation of Article 121, UCMJ, 10 U.S.C. § 921, instead of Article 134, UCMJ, 10 U.S.C. § 934. The government is ordered to issue a corrected copy.

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

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