UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic PETER M. LAVOIE
United States Air Force

ACM S31453 (recon)

21 January 2009

Sentence adjudged 04 February 2008 by SPCM convened at Travis Air Force Base, California. Military Judge: Nancy Paul (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Kimani R. Eason.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

UPON RECONSIDERATION

FRANCIS, Senior Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of wrongful possession of oxycodone, a Schedule II controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1]

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[1] The Court notes the Court-Martial Order (CMO), dated 20 March 2008, incorrectly lists the end date in Specification 1 as "on or about 27 November 2007" vice "on or about 4 November 2007." Additionally, the CMO states that the sentence was adjudged on 5 February 2008, when it was actually adjudged on 4 February 2008. The Court orders the promulgation of a corrected CMO.

The approved sentence includes a bad-conduct discharge and confinement for five months.[2]

This case is before the Court for the second time. The appellant was convicted by special court-martial on 4 February 2008. On the same date, he signed documentation declining appellate defense counsel representation. On 15 July 2008, the Court issued a decision affirming the findings and sentence, having reviewed the case with the understanding that the appellant was not represented by counsel. *United States v. Lavoie*, ACM S31453 (A.F. Ct. Crim. App. 15 Jul 2008) (unpub. op.).

On 17 July 2008, the appellate defense counsel purporting to represent the appellant in this case filed a motion for reconsideration, asserting that the appellant, after his initial decision to decline appellate representation and before this Court's decision of 15 July 2008, had changed his mind and opted for appellate counsel. The Court granted the motion and, by order of 25 July 2008, vacated the original decision.

The appellant has subsequently raised a single 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.

Background

This is the appellant's second court-martial. On 4 October 2007, he was convicted by special court-martial 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 for that court-martial included a bad-conduct discharge and confinement for seven months. The Court affirmed that conviction in the unpublished decision of *United States v. Lavoie*, ACM S31409 (A.F. Ct. Crim. App. 24 Sep 2008).

The possession charge that is the subject of the appellant's second court-martial arose while he was serving the post-trial confinement from his first conviction. On 28 October 2007, confinement officials caught the appellant with a quantity of oxycodone that had been smuggled into the facility for him by his wife.

The appellant's courts-martial were not his only experiences with military discipline. Before his first trial, the appellant had also received two nonjudicial

[2] The adjudged sentence consisted of a bad-conduct discharge and six months confinement. Pursuant to the terms of a pretrial agreement, the convening authority agreed to withdraw an additional specification alleging wrongful use of oxycodone, not commute any adjudged bad-conduct discharge to confinement, and not approve more than five months confinement.

punishment actions under Article 15, UCMJ, 10 U.S.C. § 815, and three administrative sanctions for various offenses.[3] One Article 15, UCMJ, action 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 both Article 15, UCMJ, actions are significant, the latter is doubly so, in that it was given for misconduct while the appellant was deployed to Iraq, one of three deployments that he asserts should have been brought to the attention of the convening authority, but were not.

Post-Trial Processing Errors

The appellant's military service included one deployment to Kuwait and two deployments to Iraq. Despite those deployments, the PDS provided to the convening authority with the SJAR erroneously indicated the appellant had no "foreign service" or "combat service." In addition, the PDS failed to list several of the awards and decorations to which the appellant was entitled, including the Iraq Campaign Medal, Air Force Good Conduct Medal, Air Force Expeditionary Service Ribbon, Air Force Outstanding Unit Award, and Small Arms Marksmanship Ribbon.

Beyond this missing information, the SJAR also misstated the maximum imposable punishment for appellant's offense, advising the convening authority that the court could have imposed a bad-conduct discharge, confinement for 12 months, forfeiture of 2/3 pay *and allowances* per month for 12 months, reduction to E-1, and a fine. A special court-martial may not order forfeiture of allowances. Article 19, UCMJ, 10 U.S.C. § 819. The appellant asserts that the stated maximum punishment was also wrong in two additional respects. First, he was already an E-1 and therefore not subject to a further reduction to that grade. Second, he was already subject to automatic forfeitures in connection with the confinement imposed by his first court-martial, and therefore had no pay subject to additional forfeiture.

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.

[3] The administrative sanctions consisted of a letter of reprimand, letter of admonishment, and letter of counseling.

In this case, the appellant affirmatively waived in writing his right to object to or comment on the post-trial information provided to the convening authority. As a result, we review the asserted deficiencies for plain error.

At the outset, we note that the processing errors in this case are almost identical to those made by the same legal office in the post-trial processing of the appellant's prior court-martial, and which were raised as assertions of error in that case. Here, as there, we find that the SJAR's false report, both that the appellant had no "foreign service" or "combat service" and the failure to list all of his awards and decorations, constituted error and that the errors were obvious. As we noted in our review of the appellant's prior court-martial, "[t]he Manual for Courts-Martial (MCM) mandates that the SJAR include a summary of an accused's military record, including his awards and decorations." *Lavoie*, ACM S31409, unpub. op. at 3-4 (citing 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, any meaningful summary of a military member's record logically should do so, particularly when the deployments are to hostile fire zones. Moreover, even if such information is not specifically required in the SJAR, once the staff judge advocate (SJA) elects to advise the convening authority about an accused's "foreign service" or "combat service," the information provided must be accurate. Here, it was not. Moreover, the SJA in this case knew or should have known that the information was incorrect. The error concerning the appellant's deployments was specifically noted by the military judge on the record in his current trial and had been noted on the record by the military judge in the prior trial some four months earlier. Further, the legal office clearly had the correct information readily available, as the PDS admitted as an exhibit at the first court-martial contained the correct information. Under these circumstances, it is difficult to envision a more obvious error, one which even a cursory review of the record should have disclosed.

The SJAR's erroneous statement that the maximum possible punishment included potential forfeiture of allowances was also obvious. The inability of a special court-martial to impose forfeiture of allowances is such a basic tenet of military justice practice that we are inclined to attribute the error to carelessness in proof reading rather than lack of knowledge. However, regardless of its cause, the error was an obvious one that should have been caught prior to signature. The same holds true for the SJAR's observation that the appellant could have been reduced to the grade of E-1 and ordered to forfeit two-thirds of his pay. Having already been returned to that grade as the result of prior disciplinary actions, he could not be "reduced" to that grade as the result of his court-martial. Further, through a combination of the fact that his term of service had expired and the fact that he was still in confinement as the result of his first court-martial, the

appellant had no pay entitlement at the time of his second trial, and his charge sheet reflected "$0.00" pay. Accordingly, he had no pay to forfeit.[4]

Even considering the combined effect of the above errors, however, the appellant has not met his burden of showing prejudice. First, the asserted errors in the statement of maximum possible punishment were simply not of sufficient magnitude to have impacted the convening authority's clemency decision. In this regard, we note that the reduction in grade error was of no possible consequence, in that the convening authority, knowing that he was acting on the trial of an airman basic, would certainly have recognized that no further reduction in grade was possible. Further, the defective PDS attached to the SJAR at least correctly noted that the appellant was receiving "$0.00" basic pay and had no foreign pay entitlement. Thus, the convening authority would also have known that the appellant had nothing to forfeit. Second, as we noted in our review of the appellant's prior court-martial, his disciplinary record was so abysmal that it is inconceivable that the convening authority would have been moved to grant clemency even if he had been correctly advised about the appellant's deployments and awards and decorations. That is particularly true given the appellant's prior special court-martial conviction and the fact that his current conviction was for an additional drug offense while in post-trial confinement.

In so holding, we have carefully considered the appellant's arguments, including his assertion that we should return the case for further processing because of the deterrent value it would have in forcing SJAs to get the process right. The argument has some appeal, in that a potentially careless SJA may be moved to greater caution if he knows that he will eventually have to explain to his commanding officer why and how his own carelessness caused needless delay in a military court-martial. However, we ultimately decline to do so. The Court's power to grant relief requires more than just a finding of legal error. The error must also materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Although the threshold for showing prejudice in cases such as this is very low, that threshold must still be met. The appellant has failed to meet that burden here.

We caution SJAs to take no comfort from this holding. Because the threshold for showing prejudice is so low, it is the rare case where substantial errors in the SJAR, or post-trial process in general, do not require return of the case for further processing. The appellant correctly points to examples of several cases where this Court, our sister courts, and our superior court have done just that. *See, e.g.*, *United States v. Covelusky*, ACM S31137 (A.F. Ct. Crim. App. 22 Aug 2007) (unpub. op.); *United States v. Sanders*, 61 M.J. 837 (N.M. Ct. Crim. App. 2005); *United States v. Johnston*, 51 M.J. 227 (C.A.A.F. 1999). For that reason alone, it behooves SJAs to pay attention to what they are sending

[4] Based on these circumstances, the military judge determined that neither a reduction in grade nor forfeiture of pay were viable options and did not include them in the list of maximum permissible punishments when advising the appellant of the potential consequences of his pleas.

to a convening authority and take the time to get it right the first time. More importantly, however, the integrity of our military justice system demands careful attention in each and every case. While any given court-martial may seem routine to a legal office with a busy docket, rest assured it is not routine to the accused. With rare exception, it will be the single most important event in that military member's life. Nor is it routine to the members of the accused's unit, or to the friends, family members, or victims watching carefully to see that justice is served. Slip-shod treatment of the court-martial process, whether at the pre-trial, trial, or post-trial stage, cannot help but undermine faith in the system itself, making it less effective overall as a tool for maintaining military discipline. If a military member's offenses are deemed serious enough to warrant court-martial, they are serious enough to demand the time needed to carefully and correctly shepherd each aspect of the case to conclusion. Luckily, our experience is that most legal offices take this charge seriously, and do take the time to get it right. Unfortunately, that did not happen here. The only distinction between this case and those cases which have been returned for similar errors is the absolute lack of prejudice. Given the nature of the appellant's offense and his abysmal prior disciplinary record, it is not just "unlikely" that a convening authority would grant him clemency if he had been provided the missing information; it is inconceivable that he would do so. [5]

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

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

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

[5] Accordingly, we find this case distinguishable from *United States v. Johnston,* 51 M.J. 227, 229 (C.A.A.F. 1999), in which the majority rejected the dissent's rationale that the case need not be returned to rectify an error in post-trial processing because the accused's record made it "unlikely" that the outcome would have differed. It is also significant that the holding in *Johnston* was based on lack of proper representation by counsel during the clemency process, which our superior court found hindered the appellant's ability to respond to the SJAR. That is not the case here.