UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman PATRICK L. LINENBERGER II
United States Air Force

ACM 35904

22 February 2006

Sentence adjudged 3 March 2004 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major John N. Page III.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant, pursuant to his pleas, was convicted of wrongful use of marijuana and methamphetamine on divers occasions, and wrongful manufacture of methamphetamine, all in violation of Article 112a, UCMJ, 10 U.S.C § 912a. A general court-martial composed of a military judge sitting alone sentenced him to a bad-conduct discharge, confinement for 20 months, forfeiture of all pay and allowances, and reduction to 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 upon the appellant. In response, the appellant submitted a clemency package. This package included letters from the appellant, his trial defense counsel, the appellant's wife, and another Airman. It also included copies of the appellant's oral and written unsworn statements from trial and the defense sentencing exhibits admitted into evidence at the court-martial. In clemency, the appellant and his counsel asked the convening authority to reduce the adjudged confinement. The portions of trial defense counsel's letter that addressed confinement pointed out that the appellant had been sentenced to twenty months of confinement and stated "[t]wenty months from the day [the appellant] went into confinement will be November of 2005." Later, trial defense counsel asserted that "twenty-months confinement is not appropriate for the person that [the appellant] is." 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(a)(1)" in support of this proposition.[1] The trial defense counsel also cited to R.C.M.1107(d)(1) 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."

On 12 April 2004 the SJA submitted an addendum to the SJAR that addressed the defense request for clemency. In the addendum, the SJA restated the appellant's clemency request. He also informed the convening authority that he was required to consider all matters submitted by the appellant, and could consider the record of trial, personnel records of the appellant, and such other matters he deemed appropriate. In the fourth paragraph of the addendum, the SJA made the following statement:

> The facts of this case fully support the adjudged sentence. [The appellant] was found guilty of using methamphetamine and marijuana on numerous occasions and manufacturing methamphetamine. *The sentence was adjudged by a military judge who considered many of the arguments presented to you in this clemency submission. Assuming [the appellant] performs well in confinement, he will earn four months of good time. This will reduce his*

[1] The actual language cited by trial defense counsel lies in R.C.M 1107(b)(1), which states:

> The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a court-martial is a matter of command prerogative. The convening authority is not required to review the case for legal errors or factual sufficiency.

> *actual confinement from 20 months to 16 months.* Based upon the severity of his crimes and the above comments, I recommend that you approve the findings and sentence as adjudged.

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

Law and Analysis

The issue before this court is whether the addendum to the SJAR contained "new matter" that the appellant should have been allowed to comment on 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). 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.

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) and its Discussion states:

> *New matter in addendum to recommendation.* 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.

Discussion

> "New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. *"New matter" does not ordinarily include any discussion by the staff judge advocate 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 also 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)).

We agree with the government's contention that "fair play" extends to both the appellant and the United States. In this case, the trial defense counsel repeatedly emphasized in his clemency letter that the appellant would be incarcerated for 20 months. For example, he asserted, "Twenty months from the day [the appellant] went into confinement will be November of 2005." While this statement is literally true, it is also potentially misleading in that the appellant, as the SJA pointed out, could potentially be released months prior to that date if he performed well in confinement. The SJA was entitled to comment upon the "correctness of the initial defense comments on the [SJA's] recommendation" and such comments are not "new matter." R.C.M 1106(f)(7), Discussion. On appeal, the appellant does not allege that the SJA's comment regarding good time was erroneous. We find that once trial defense counsel created the impression that the appellant would be confined until November 2005, the convening authority was entitled to have that assertion clarified by the SJA prior to taking action on the appellant's clemency request.

The appellant also asserts that the following sentence in the SJAR addendum is "new matter": "The sentence was adjudged by a military judge who considered many of the arguments presented to you in this clemency submission." In assigning error, the appellant relies on *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997) and *United States v. Gilbreath*, 57 M.J. 57 (C.A.A.F. 2002).

The case before us today is readily distinguishable from both cases relied upon by the appellant. First, unlike *Catalani* and *Gilbreath*, the SJA's statement at issue in this

case is factually correct. The clemency package does contain many of the same arguments that were considered by the military judge at trial. Second, the SJA here did not attempt to bolster his original recommendation by commenting on the fairness or appropriateness of the judge's decision, as was the case in *Catalani*. 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. *See Catalani*, 46 M.J. at 327-28; *Gilbreath*, 57 M.J. at 61. In fact, it could be argued that the statement pointed out to the convening authority that the military judge had not considered all the material the convening authority was about to consider, thereby highlighting the convening authority's responsibility to view the package carefully and in its entirety.

Assuming, arguendo, that the two statements in question were "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. Second, through affidavits, 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 (citing *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 him 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 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. *See Id.*

Likewise, as to the SJA's comment regarding "good time" credit -- keeping in mind that the appellant himself does not allege that the statement is erroneous -- we again find no prejudice. *See Id.* The appellant, in his affidavit, asserts that if he had been served the addendum he would have asked his defense counsel to "explain to the convening authority that it would not be appropriate to rely on possible administrative

consequences of serving my confinement time and he should instead focus on the reasons why I am requesting a reduction in my confinement time." Additionally, he asserts that it would have been important for his counsel to "ensure the convening authority remembers his obligations in the clemency process and to distinguish his role from that of the military judge and any administrative process that occurs after the court-martial." We fail to see how such inputs from the trial defense counsel would serve to "deny, counter, or explain" the SJA's statement in any way that could have produced a different result. *See Chatman*, 46 M.J. at 323. As mentioned previously, both the trial defense counsel and SJA reminded the convening authority of his role and responsibilities in clemency. The appellant's clemency package focuses intently on why he, and those writing on his behalf, requested that the adjudged confinement of 20 months be reduced. His argument before this Court is simply an assertion that he should be allowed to give the convening authority the impression he would serve the entire 20-months' of adjudged confinement without giving the convening authority's SJA the opportunity to clarify this potentially misleading statement. Therefore, even if the SJA's comment was "new matter," we again find that the appellant has failed to provide even a colorable showing of possible prejudice because his proffered possible response to the comment would not have produced a different result. *See Gilbreath*, 57 M.J. at 61.

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

LAQUITTA J. SMITH
Documents Examiner