UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant TIMOTHY R. MAIN
United States Air Force

ACM S31518

30 March 2009

Sentence adjudged 08 May 2008 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Paula B. McCarron (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Zachary Eytalis.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of two specifications of making false official statements, one specification of divers wrongful use of marijuana, and one specification of wrongful possession of marijuana, in violation of Articles 107 and 112a, UCMJ, 10 U.S.C. §§ 907, 912. The adjudged and approved sentence consists of a bad-conduct discharge, four months confinement, and reduction to E-1. On appeal the appellant asks the Court to set aside his sentence and remand his case for new post-trial processing. The basis for his request is that he opines the staff judge advocate (SJA), in his recommendation to the convening authority, provided an inaccurate personal data sheet (PDS) and, in doing so,

erroneously advised the convening authority on the overall nature of the appellant's military service. Finding no prejudicial error, we affirm.

Background

On 9 August 2007, the appellant falsely stated on a Personal Reliability Program (PRP) questionnaire that he had never smoked marijuana, when in reality he had smoked marijuana on multiple occasions since January 2005. In December 2007, the appellant's squadron experienced problems processing the appellant's PRP questionnaire, and Major DS, the appellant's squadron commander, spoke to the appellant about his questionnaire. During that conversation, the appellant falsely told Major DS he did not use illegal drugs.

On 16 January 2008, the appellant was randomly selected for a urinalysis. He submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and subsequently tested positive for 37 ng/mL of tetrahydrocannabinol, a marijuana metabolite. On 28 January 2008, military law enforcement officials summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived his rights, confessed to using marijuana, consented to a urinalysis, and consented to a search of his off-base residence.

The appellant submitted a second urine sample. The second sample was sent to the Air Force Drug Testing Laboratory, and subsequently tested positive for 140 ng/mL of tetrahydrocannabinol. The law enforcement officials also escorted the appellant to his residence and, upon arriving at his residence, the appellant provided them with the marijuana he had stored there. On 1 July 2008, the SJA provided his recommendation (SJAR) to the convening authority. Attached to the SJAR was a 1 May 2008 PDS listing the appellant's combat service as "Al Udeid AB, Qatar – 28 Aug 05 – 11 Jan 06."[*] In reality the appellant's combat service, as reflected on an 8 May 2008 PDS admitted at trial, included service at "Kadena AB, Japan – 06 Dec 04 – 04 Feb 05 and Al Udeid AB, Qatar – 28 Aug 05 – 13 Jan 06."

On 16 July 2008, the appellant's trial defense counsel submitted his request for clemency on behalf of the appellant. In his clemency request, the trial defense counsel failed to comment on or otherwise object to the erroneous PDS. On 25 July 2008, the SJA provided his SJAR addendum to the convening authority. In his addendum, the SJA advised the convening authority that he must consider the matters submitted by the appellant before taking action. The appellant's clemency request, unsworn statement, and Global War on Terrorism (GWOT) Medal certificate were attachments to the SJAR addendum. In his clemency request, the appellant makes reference to his deployments to "Kadena AB, Japan . . . from December 04 to Feb 05" and "Al Udeid AB, Qatar from Aug 05 to Jan 05 [sic]." The appellant's unsworn statement and GWOT Medal

[*] AB is the acronym for "Air Base."

certificate also highlighted his correct deployment history. In taking action, the convening authority averred he considered all matters attached to the SJAR addendum – to include the appellant's clemency request, unsworn statement, and GWOT Medal certificate.

Post-Trial Advice

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 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). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id.* at 437 (quoting *Kho*, 54 M.J. at 65).

The *Manual for Courts-Martial, United States* (2008 ed.) mandates that the SJAR include a summary of an accused's military record. R.C.M. 1106(d)(3)(C). A meaningful "summary" of the appellant's military record includes references to deployments and, barring such references, the SJAR must not mislead the convening authority about an appellant's deployment(s). *United States v. Lavoie*, ACM S31453 (recon) (A.F. Ct. Crim. App. 21 Jan 2009) (unpub. op.). In the case at hand, the SJA failed to reference the appellant's deployment to Kadena AB and erroneously listed the amount of time the appellant was deployed to Al Udeid AB. In so doing, the SJA erred. Moreover, given the extensive evidence of the appellant's deployments in the record of trial, the error was plain.

However, this does not end our inquiry. To be entitled to relief, the appellant must show prejudice. In this regard he has failed. Though the SJA erred, the appellant's clemency submission sufficiently and correctly apprised the convening authority of the appellant's deployment history, and the convening authority considered such matters prior to taking action. Lastly, notwithstanding the SJA's error, the appellant has failed to make a colorable showing of possible prejudice.

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