UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHARLES K. MAXWELL II
United States Air Force

ACM 35456

17 March 2005

Sentence adjudged 5 November 2002 by GCM convened at Schriever Air Force Base, Colorado. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia Jr., Major Terry L. McElyea, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The appellant alleges the staff judge advocate's recommendation (SJAR) is defective in that it did not advise the convening authority of his obligations under the pretrial agreement (PTA) or explain why no specific action was required pursuant to the PTA; nor did it inform him that the military judge found the charges multiplicious for purposes of sentencing. When the appellant submitted his clemency matters to the convening authority, he did not object to the defective SJAR. By failing to object to errors in the SJAR before it was sent to the convening authority, the appellant has waived any later claim of error, absent plain error. *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000). To prevail under the plain error doctrine, the appellant has the burden to show (1) there was error, (2) it was plain or obvious, and (3) the error

materially prejudiced a substantial right. *Id*. at 65 (citing *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998)). In light of the discretionary nature of the convening authority's action on sentence, we can grant relief if the appellant makes "some colorable showing of possible prejudice." *Id.* at 65 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

We conclude the staff judge advocate (SJA) erred by not including in the SJAR what specific actions the convening authority was not obligated to take under the agreement. However, we do not find the error materially prejudiced a substantial right of the appellant. The convening authority who took action is the same convening authority who entered into the PTA with the appellant before trial. None of the provisions of the PTA were breached and the PTA sentence cap did not affect the adjudged sentence. Although the SJA should have advised the convening authority why no specific action was required by the agreement, the appellant has failed to carry its burden of making a colorable showing of prejudice. Finally, we hold the SJA was not required to comment in the SJAR on the military judge's multiplicity ruling. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994).

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

ANGELA M. BRICE
Clerk of Court