**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Staff Sergeant BRENTON MCDANIEL**
**United States Air Force**

**ACM 36649**

**31 August 2007**

Sentence adjudged 10 January 2006 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Dawn Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, reduction to E-1, and forfeiture of $640.00 pay per month for 8 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

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

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges



PER CURIAM:

The appellant was convicted, in accordance with his pleas, of two specifications of selling military property without authority, one specification of disposing of military property without authority, one specification of attempting to sell military property without authority,[1] two specifications of stealing military property and one specification of wrongfully appropriating military property, in violation of Articles 108 and 121, UCMJ, 10 U.S.C. §§ 908, 921. A general court-martial consisting of a military judge

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[1] We note the Court-Martial Order incorrectly indicates the appellant was charged with "attempt to sell" rather than "sell" under Specification 3 to Charge I (Article 108). The charge sheet accurately reflects the charge; the accused pled guilty to the lesser included offense of attempt. Although we find this mistake did not result in a prejudicial error to the substantial rights of the appellant, this error should be corrected during the new post-trial processing as ordered.

sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of $640.00 pay per month for eight months, and reduction to E-1. The convening authority approved the sentence as adjudged, deferred the reduction in grade until action, and waived automatic forfeitures for the benefit of the appellant's spouse and his dependent child from a previous marriage.

On appeal, the appellant alleges that the Staff Judge Advocate's (SJA) advice to the convening authority was defective with regard to deferment of forfeitures and the impact of adjudged forfeitures on the waiver of mandatory forfeitures and thus did not provide the convening authority with the advice contemplated by *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). The government concedes error. We agree, affirming the findings and setting aside the convening authority's action.

We review post-trial processing de novo. In clemency the appellant asked that his forfeitures be waived to the maximum extent allowed by law and provided evidence of his continuing child support obligations. The SJA prepared an addendum for the convening authority which did not address deferment of forfeitures but recommended deferring the reduction and waiving the mandatory forfeitures for a period of six months. The convening authority followed the advice of the SJA. However, the convening authority did not first suspend or modify the adjudged forfeitures, as required by *Emminizer*. In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that this is error, requiring a new action.

*Conclusion*

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL


STEVEN LUCAS, GS-11, DAF
Clerk of Court