UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STERLING S. MCFADYEN
United States Air Force

ACM S31292

30 June 2008

Sentence adjudged 08 March 2007 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

FRANCIS, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, the appellant was convicted by a special court-martial of one specification of being absent without leave (AWOL), and five specifications of larceny of military property of a value of less than $500.00, in violation of Articles 86 and 121, UCMJ, 10 U.S.C. §§ 886, 921. A military judge sentenced the appellant to a bad-conduct discharge, ten months confinement, and reduction to E-1. The convening authority approved only so much of the adjudged sentence as provided for a bad-conduct discharge, confinement for seven months[1], and a reduction to E-1[2].

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[1] According to the pretrial agreement, the convening authority would not approve any adjudged confinement in excess of seven months.

On appeal, the appellant asserts three errors: (1) the Staff Judge Advocate's Recommendation (SJAR) was inaccurate and therefore in error when it misstated the court's finding on the AWOL charge and its specification; (2) the Staff Judge Advocate improperly advised the convening authority when she advised him that he had only two options when acting upon the appellant's deferment and/or waiver request; and (3) the Special Court-Martial Order must be corrected where it erroneously omits the appellant's not guilty finding of the words "he was apprehended."

Discussion

The appellant pled guilty to all the charges and specifications. As the military judge was going through the providency inquiry, it became apparent that the appellant's plea to AWOL terminated by apprehension was improvident. The military judge informed the parties and asked what they intended to do as to the validity of the pretrial agreement (PTA). The trial counsel informed the military judge that the convening authority had been contacted and had instructed counsel to proceed, not prove up the termination by apprehension, and the plea acceptance did not affect the validity of the PTA.

From reviewing the Report of Result of Trial and the Special Court-Martial Order (CMO), it incorrectly appears the appellant pled to, and was found guilty of AWOL only. The words "he was apprehended" are missing. Based upon this, the appellant argues the convening authority was misled and the appellant was prejudiced. The trial defense counsel did not object to the SJAR when he submitted post-trial matters under R.C.M. 1105 and 1106. The government appellate counsel concedes there is error in the SJAR, the Report of Result of Trial and the CMO.

If a defense counsel fails to make timely comment on an omission in the SJAR, the error is waived unless it is prejudicial under the plain error analysis. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). When there is an error in the SJAR but the appellant has not been prejudiced, Courts of Appeal should say so and articulate reasons why there is no prejudice. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Clearly, the convening authority, who was contacted in the middle of trial, was aware that the appellant was found not guilty of AWOL terminated by apprehension. He was not misled into believing the appellant was guilty of a greater crime. There is no prejudice and this issue is without merit.

Next the appellant avers that the Staff Judge Advocate (SJA) improperly advised the convening authority of his options when addressing deferment of rank and forfeitures, and waiver of forfeitures. Reviewing the advice provided to the convening authority in

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[2] The convening authority waived the mandatory forfeitures.

Attachment 4 to the SJAR, the convening authority was correctly informed as to his options. The appellant complains the convening authority was informed of only two options. The paragraph cited in the appellant's brief referencing the advice, actually states three options – deny the request, defer the automatic forfeitures and then waive automatic forfeitures, or waive automatic forfeitures and direct the money be paid to the former spouse for the benefit of the child. What appellant fails to mention is that in a preceding paragraph, paragraph 3, of the SJA's advice, it states "I recommend you deny the request to defer the adjudged reduction in rank . . . it would not be appropriate for the accused to serve in the grade of Senior Airman." There is no incorrect information contained in the SJA's advice on this issue.

Finally, the appellant, along with the appellate government counsel, avers the CMO is incorrect. First, the CMO indicates that appellant was arraigned on Charge I: Article 86a[3]. This is incorrect – it should read Article 86. Second, the CMO fails to include the words "he was apprehended" in the specification (words to which he pled guilty, but was found not guilty by exceptions), of Charge I.

Conclusion

The 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). Based on the foregoing, we order the promulgation of a corrected Court-Martial Order. Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

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

[3] This error was not noted in either brief.