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

---

**UNITED STATES**

**v.**

**Staff Sergeant MICHAEL J. MOSCICKI**
**United States Air Force**

**ACM 37849**

**23 August 2012**

Sentence adjudged 29 December 2010 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 54 months, a fine of $25,000.00, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges



PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of two specifications of selling military property, valued at approximately $145,682, in violation of Article 108, UCMJ, 10 U.S.C. § 908; and one specification of larceny of military property, valued at approximately $217,502, in violation of Article 121, UCMJ, 10 U.S.C. § 921.[1] The adjudged and approved sentence

[1] The appellant pled guilty to Charge I and II and their specifications by exceptions and substitutions, and the military judge found him guilty as pled. Following arraignment, the military judge dismissed Charge III and its Specification, which alleged a violation of Article 123, UCMJ, 10 U.S.C. § 923, for defrauding the Government of the same property listed in Charges I and II.

consisted of a dishonorable discharge, confinement for 54 months, a $25,000 fine, forfeiture of all pay and allowances, and reduction to E-1.[2]

The appellant raises one assignment of error before this Court. He asserts that the staff judge advocate (SJA) erred when he failed to advise the convening authority about the appellant's combat service in the Staff Judge Advocate's Recommendation (SJAR). The appellant asks this Court to return the case to the convening authority for a new SJAR and Action. The Government argues that the appellant was not prejudiced. We find error with no resulting prejudice and, therefore, affirm.

*Background*

During presentencing, trial counsel submitted a Personal Data Sheet (PDS), dated 29 December 2010, to the military judge, which was admitted as a prosecution exhibit. The PDS included a correct summary of the appellant's combat service history: "June 2002 – 60 day deployment to Uzbekistan, June 2003 – 60 day deployment to Jordan, June – September 2006 – Iraq." On 20 January 2010, the acting SJA submitted the SJAR to the convening authority. Attached to the SJAR was an older draft of the PDS, dated 20 April 2010.[3] This PDS omitted the deployments to Uzbekistan, Jordan, and Iraq, and incorrectly stated that the appellant deployed to Afghanistan in 2001 – 2002. On 2 February 2011, trial defense counsel submitted the appellant's clemency package to the convening authority, which referenced the appellant's combat service history. On 10 February 2011, the SJA provided the SJAR addendum to the convening authority. The SJA attached a copy of the appellant's clemency request to the addendum and advised the convening authority that he must consider matters submitted by the appellant prior to taking action. The convening authority endorsed the addendum indicating that he had considered the appellant's clemency request before taking action in the case.

In a post-trial declaration, the appellant states that he never deployed to Afghanistan, that the PDS submitted at presentencing accurately describes his combat service history, and that he is "disappointed" that the convening authority did not grant him any form of clemency:

> I am disappointed that he did not review my true record combat service when he made his decision. In my career field, we deploy on a regular basis. The convening authority might have thought that I was a problem Airman prior to my charged misconduct because there was only one deployment listed on the PDS, when that was not the case, and that may

[2] The pretrial agreement in this case stated that the convening authority would not approve any confinement in excess of 5 years and would not approve any fine in excess of $25,000. There were no further limitations on sentence.

[3] The SJAR lists the 20 December 2010 PDS as an attachment, although the 20 April 2010 version was the one included with the SJAR.

have affected his decision about clemency. I would respectfully ask for another opportunity for clemency.

The appellant's trial defense counsel did not make a timely objection to or comment on the perceived error to the convening authority, but the appellant raises it for the first time on appeal. As such, we review the asserted deficiency for plain error.

*Discussion*

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, or on matters attached to 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). The convening authority's vast power to grant clemency makes the threshold for establishing prejudice low in these instances; however, an appellant must make some "colorable showing of possible prejudice in terms of how the [perceived error] potentially affected [his] opportunity for clemency." *Id*. at 437.

In this case, the SJA included an erroneous PDS that omitted the appellant's deployments to Uzbekistan, Jordan, and Iraq, and instead incorrectly lists a deployment to Afghanistan. This was error. To be entitled to relief, however, the appellant must show prejudice. Here, the appellant's clemency request and submissions sufficiently apprised the convening authority of the appellant's combat service history.[4] The SJAR correctly informed the convening authority that he was required to consider the appellant's clemency submission pursuant to R.C.M. 1107(b)(3)(A)(iii). We are convinced that the convening authority was aware of the appellant's combat service history because an endorsement to the SJAR indicates he did, in fact, consider all of the matters submitted by the appellant. Notwithstanding the SJA's error, we find the appellant failed to make a colorable showing that he suffered prejudice from the error.

[4] The appellant's clemency submission specifically references his deployment history in the following documents: Personal Clemency Request, dated 27 January 2011; Attachment 7, EPR, dated 1 October 2002; Attachment 7, EPR, dated 30 June 2004; Attachment 8, Defense Exhibit H, Air Force Commendation Medal, dated 28 December 2006; and Attachment 8, Defense Exhibit L, Unsworn Statement. The appellant's clemency package also contains letters that refer generally to his three deployment tours. *See* Attachment 3, Letter from Gary Moscicki (refers to the appellant returning home from "his third tour in the Middle East"); Attachment 4, Letter from Pao Yun Moscicki (states that the appellant "has been overseas three times"); Attachment 5, Letter from Tracy Moscicki (states that the appellant "served his nation, not once, by [sic] three times abroad.")

*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

ANGELA E. DIXON, MSgt, USAF
Deputy Clerk of the Court