

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Staff Sergeant SHAMUSH P. MYERS
United States Air Force**

ACM 35781

31 August 2005

Sentence adjudged 29 September 2003 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Amy E. Hutchens.

Before

**ORR, JOHNSON, and JACOBSON
Appellate Military Judges**

PER CURIAM:

Pursuant to his pleas, the appellant was convicted of conspiracy, wrongful use of cocaine, theft of goods, and uttering worthless checks in violation of Articles 81, 112a, 121, and 123a, UCMJ, 10 U.S.C §§ 881, 912a, 921, and 923a. A general court-martial composed of a military judge sitting alone sentenced him to a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence, but suspended the adjudged forfeiture of pay and allowances and deferred and waived the mandatory forfeitures, with the direction that the appellant's pay and allowances be sent to his wife and children. On appeal, the appellant alleges that the convening authority's action is defective in that it does not reflect the convening authority's approval of the appellant's request for deferment of reduction in rank until action was taken on his case. We agree and affirm the findings but set aside the convening authority's action.

On the day of his trial, the appellant submitted to the convening authority a request for deferment of forfeitures and reduction in rank until action was taken on his sentence. The convening authority approved this request in a memorandum dated 2 October 2003. The convening authority's action, however, reflects only waiver of mandatory forfeitures and deferral of adjudged forfeitures, not the previously approved deferment of the reduction in rank. As a result, the appellant's reduction in rank was applied retroactively to 13 October 2003 and he incurred a debt.

The appellant argues that the omission of the deferment of the reduction in rank in the convening authority's action is plain error. We review application of the plain error doctrine de novo. *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998). *See also* 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review*, § 2.14 (2d ed. 1992). To prevail under a plain error analysis, the appellant has the burden of showing that (1) there was error, (2) the error was plain or obvious, (3) the error materially prejudiced the appellant's substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Because of the highly discretionary nature of the convening authority's action on a sentence, we may grant relief if an appellant presents "some colorable showing of possible prejudice." *Id.* (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

We first review for obvious error. In the instant case, the government concedes this point and we too find that there was error and it was plain and obvious. We next test for whether the error resulted in prejudice to the appellant's substantial right to have a request for clemency judged on the basis of an accurate record. The appellant has demonstrated a "colorable showing of possible prejudice" in that the action signed by the convening authority did not incorporate the deferment of reduction in rank, and this resulted in a significant pay deficit when the reduction was applied retroactively. *See Wheelus*, 49 M.J. at 289.

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 a new action consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court