UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RYAN G. PALMQUIST
United States Air Force

ACM 35512

22 February 2006

Sentence adjudged 5 December 2002 by GCM convened at Hill Air Force Base, Utah. Military Judge: Jack L. Anderson.

Approved sentence: Bad-conduct discharge, confinement for 26 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, Captain Diane M. Paskey, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of absence without leave, four specifications of wrongful use of methamphetamine, and two specifications of distributing methamphetamine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. A general court-martial consisting of officer members sentenced the appellant to a bad-conduct discharge, confinement for 26 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant has submitted two assignments of error: (1) Whether the convening authority's action should be set aside under the cumulative error doctrine; and (2) Whether the action is valid in light of *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). We have considered the basis for applying the cumulative error doctrine, however we decline to do so in light of a significant prejudicial error that necessitates new post-trial processing. *See United States v. Dollente*, 45 M.J. 234, 242-43 (C.A.A.F. 1996).

Post-Trial Processing

During the post-trial processing of the appellant's case, an allegation surfaced that the appellant had solicited an undercover Air Force Office of Special Investigations (AFOSI) informant, Airman First Class (A1C) S, to sell cocaine to him while he was serving post-trial confinement. A1C S alleged the appellant asked to purchase $15 worth of cocaine from him. Throughout the course of the investigation, A1C S provided three written statements to AFOSI agents. However, despite the defense counsel's request for discovery regarding A1C S' allegations, only one of his three statements was provided. This omission was critical because the two statements that were not provided to the defense counsel or the convening authority were inconsistent with one another, and both statements were relevant for assessing A1C S's credibility. The defense counsel vigorously challenged A1C S' reliability throughout the three clemency submissions that were made on the appellant's behalf.

The convening authority received the staff judge advocate's recommendation (SJAR), three addenda, multiple sworn statements, and the appellant's clemency matters. The SJAR and addenda attested to the credibility and trustworthiness of A1C S, which were bolstered with statements from the AFOSI agents that interviewed A1C S, saying A1C S "has proven himself as reliable, truthful, and trustworthy in every situation." Additionally, the staff judge advocate (SJA) informed the convening authority that the appellant had confessed to asking A1C S to buy cocaine for him.

We review records of trial de novo to determine whether post-trial processing was properly completed. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). The post-trial review stage in the court-martial process culminates in the convening authority's highly discretionary decision to approve, reduce, or set aside the findings and sentence of the court-martial. *United States v. Taylor*, 60 M.J. 190, 193 (C.A.A.F. 2004). It is also at this level that the appellant has the best opportunity for relief because of the convening authority's broad discretion. *United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005); *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971). "Because the convening authority can act for any or no reason, the staff judge advocate's review should include all *pertinent* matters." *Boatner*, 43 C.M.R. at 218 (citing *United States v. Fields*, 25 C.M.R. 332 (C.M.A. 1958)). "The better the convening authority is informed the more fairly and justly will he exercise his

discretion." *Boatner*, 43 C.M.R. at 218 (citing *United States v. Foti*, 30 C.M.R. 303 (C.M.A. 1961)).

Rule for Courts-Martial (R.C.M.) 1107(b)(3)(B)(iii) permits the convening authority, before taking action, to "consider matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable." However, the accused must be notified and given an opportunity to rebut. *Id*.

In the case sub judice, the convening authority was not given all of the evidence to properly assess the credibility of A1C S, the AFOSI informant, who alleged the appellant had solicited cocaine from him. *See United States v. Parker*, 46 C.M.R. 737, 739 (A.C.M.R. 1972). The convening authority was not told that A1C S had lied, under oath, in an official written statement taken by an AFOSI agent who later attested to A1C S' credibility. Instead, the convening authority was provided with a statement from the same AFOSI agent indicating that A1C S was "reliable, truthful, and trustworthy in every situation." Moreover, after reviewing all of the AFOSI agents' statements, the question of whether the appellant confessed is open to interpretation. As a result, we find the convening authority was not given the chance to fairly and justly exercise his discretion. *See Boatner*, 43 C.M.R. at 218.

Evidence that bore on the informant's credibility was critical in this case because only two people were present when the cocaine solicitation conversation took place--the appellant and the informant, A1C S. Failure to provide this information to the defense counsel, especially when specifically requested, effectively denied the appellant a meaningful opportunity to rebut the cocaine solicitation allegation. *See* R.C.M. 1107(b)(3)(B)(iii). Failure to provide this evidence to the convening authority before he took action was error. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

To resolve a claim of error connected with the convening authority's post-trial review, the appellant must first allege the error at the Court of Criminal Appeals; second, he must make some colorable showing of possible prejudice as a result of the error; and third, he must show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Defense counsel asserts prejudice in light of a comment the SJA made to her: "[I]f [the] appellant had not been involved in additional misconduct in confinement, he would have seriously considered recommending clemency in [the] appellant's case." Had the SJA recommended clemency, it may have been more likely for the convening authority to grant clemency. We note the appellant had only asked for a reduction in confinement from 26 months to 21 months. Armed with the inconsistent sworn statements of A1C S, the appellant could have substantiated his attack on A1C S' veracity and may have convinced the convening authority to grant some relief. We find the appellant has made some colorable showing of possible prejudice. *See Id.* To resolve the error, we find the appellant is entitled to have an informed convening authority take action on his case and a defense counsel

armed with essential evidence to rebut adverse matters brought to the convening authority's attention. Because we cannot speculate what relief, if any, the convening authority may have provided, we return the record of trial for proper post-trial processing. *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989).

Emminizer

The appellant also alleges that the convening authority's action is not consistent with our superior court's holding in *Emminizer*, 56 M.J. at 441. We agree. After the trial, the convening authority deferred the adjudged and mandatory forfeitures until the date of the action, 24 March 2003. On that date he directed that the mandatory forfeitures be waived for a period of six months and be paid to the appellant's dependents. However, the convening authority did not first suspend or modify the adjudged forfeitures, as required by *Emminizer*.

Conclusion

The record of trial is returned to The Judge Advocate General for remand to the convening authority for a new post-trial processing consistent with this opinion. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator