UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAIME PEDROZA
United States Air Force

ACM 36568

17 January 2006

Sentence adjudged 10 March 2004 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Bryan A. Bonner, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major Lane A. Thurgood.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

The appellant, contrary to his pleas, was convicted of using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C § 912a. A general court-martial composed of officer members sentenced him to a bad-conduct discharge, confinement for 5 months, forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged findings and sentence. On appeal, the appellant alleges that the staff judge advocate (SJA) improperly advised the convening authority that the appellant did not have dependents for whose benefit his automatic forfeitures could be waived. We agree, affirm the findings, and set aside the convening authority's action.

The appellant, whose wife is an Airman in the United States Air Force, was convicted and sentenced on 10 March 2004. The convening authority's SJA served the staff judge advocate's recommendation (SJAR) upon the appellant on 6 May 2004. In it,

he erroneously informed the convening authority that military spouses are not considered a "dependent" for purposes of Article 58(b), UCMJ, 10 U.S.C. § 858(b), and cited incorrect statutory authority as his justification. The appellant filed clemency matters on 13 May 2004. Included in his clemency package was a letter from the trial defense counsel that cited the proper statutory authority and correctly pointed out that military spouses do qualify as dependents for purposes of waiving forfeitures. *See* 37 U.S.C. § 401. On 21 May 2004, the SJA submitted his addendum to the SJAR and reiterated his position that the appellant's military spouse did not qualify as a "dependent" for purposes of waiving forfeitures. In his subsequent action the convening authority did not waive the automatic forfeitures.

The appellant avers, and the government concedes, that the SJA's advice to the convening authority was incorrect and that the appellant's counsel made a timely objection to the error. On appeal, the appellant resurrects his objection and makes a colorable showing of possible prejudice. *See United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998). Thus, we find prejudicial error. We decline to speculate, however, upon what action the convening authority may or may not have taken if he had been provided with the proper advice. *See United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003) (citing *United States v. Jones*, 36 M.J. 438, 439 (C.M.A. 1993)). As our superior court noted in *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989), "[s]peculation concerning the consideration of such matters simply cannot be tolerated in this important area of command prerogative." We believe the best course of action is to return the case to the convening authority.

The convening authority's action is set aside. The record of trial will be returned to The Judge Advocate General for submission to the appropriate convening authority for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court