UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN R. POPE
United States Air Force

ACM S31124

19 September 2007

Sentence adjudged 21 February 2006 by SPCM convened at Minot Air Force Base, North Dakota. Military Judge: James B. Roan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Major John P. Taitt.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of wrongfully appropriating a motor vehicle in violation of Article 121, UCMJ, 10 U.S.C. § 921. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant asserts two assignments of error. In his first assignment, he argues that his sentence is inappropriately severe due to improper arguments by trial counsel during sentencing, and in the second, that the addendum to the Staff Judge Advocate's (SJA's) recommendation contained new matter which should have been served upon

defense counsel. Finding no merit in either assignment, we affirm the findings and sentence.

Sentence Appropriateness and Trial Counsel's Argument

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 396 (C.M.A. 1986). The appellant argues that the trial counsel, in his sentencing argument, inappropriately focused on the appellant's disciplinary history rather than the wrongful appropriation offense which was the subject of the court-martial. We disagree.

Prior to his trial, the appellant had been subjected to nonjudicial punishment twice and had two letters of reprimand in his personnel file. Additionally, his enlisted performance reports contained some unfavorable information, including a comment that the appellant had been sent home from his Iraq deployment early for discharging a firearm while intoxicated. The trial counsel properly commented on this information to support his argument that the government had repeatedly tried to put the appellant on notice of his behavioral problems and rehabilitate him, apparently to no avail, and that therefore a strong message needed to be sent "so he gets it and will be able to turn his life around." In trial counsel's opinion, a bad-conduct discharge and 4-6 months of confinement would send this message.

In our opinion, the trial counsel's comments are in accord with the guidelines for sentencing arguments found in Rule for Courts-Martial (R.C.M.) 1001(g) and were therefore not improper. Significantly, trial defense counsel did not object to the trial counsel's comments. Absent objection by trial defense counsel, we review this assertion of error under a plain error standard, and find none. *See* R.C.M. 1101(g); *United States v. Ramos*, 42 M.J. 392, 397 (C.A.A.F. 1995). Further, we note that this was a judge-alone trial. As our superior court has often noted, "military judges are presumed to know the law and to act according to it." *United States v. Previt*, 40 M.J. 396, 398 (C.M.A. 1994). Accordingly, if the trial counsel's comments had been improper, we would find no prejudice. As for the sentence itself, taking into account all the facts and circumstances, we do not find the appellant's sentence inappropriately severe. *Snelling*, 14 M.J. at 268. To the contrary, after reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.AF. 2005); *Healy*, 26 M.J. at 395.

Addendum to the Staff Judge Advocate's Recommendation

We also disagree with the appellant's assertion that the SJA's addendum contained new matter. Whether a matter contained in an addendum to the SJA's recommendation constitutes "new matter" that must be served upon an accused is a question of law we review de novo. *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). If an addendum does contain new matter and was not served on the appellant, we test for prejudice. *United States v. Jones*, 44 M.J. 242 (C.A.A.F. 1996). To show prejudice, the appellant must first show, "what, if anything would have been submitted to 'deny, counter, or explain' the new matter." *Chatman*, 46 M.J. at 323-24. Second, the appellant must make, "some colorable showing of possible prejudice" by proffering a possible response to the unserved addendum that could have produced a different result. *See e.g. United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000) (citing *Chatman*, 46 M.J. at 324).

After a careful review of the post-trial matters, we find that the SJA's comment was a direct response to comments made by the appellant in his clemency submission, and therefore not "new matter." Further, we find that even if the comment was "new matter," the appellant has failed to proffer a possible response that may have produced a different result. Trial defense counsel's affidavit stating that he would have "disagreed" with the SJA's comment, had the addendum been served upon him, is insufficient.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court