UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KEITH L. PULLAM
United States Air Force

ACM S31170

10 October 2008

Sentence adjudged 12 June 2006 by SPCM convened at Brooks City-Base, Texas. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 3 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Anthony D. Ortiz, and Captain Tiaundra D. Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Brian M. Thompson.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of wrongful use of methamphetamine and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced him to a bad-conduct discharge and confinement for three months. The convening authority approved the sentence as

adjudged.[1] The case was originally submitted to this Court on its merits. This Court alerted counsel to a possible post-trial processing issue, noting that there was no addendum to the Staff Judge Advocate Recommendation (SJAR). In response, the appellant did not file an assignment of error with respect to the post-trial processing. The appellant filed an assignment of error asserting that his due process right to timely review and appeal was violated. We address both the post-trial processing issue and the appellant's assignment of error. Finding no error, we affirm.

Background

On 19 June 2006, one week after the appellant was sentenced, the Staff Judge Advocate (SJA) prepared the SJAR and attached the Air Force Form 1359, Report of Result of Trial, and the appellant's personal data sheet to it. In the SJAR, the SJA told the convening authority she should consider all matters within the record of trial, as well as those matters submitted by the accused and counsel. The SJA recommended the sentence be approved as adjudged. On 29 June 2006, the appellant submitted his clemency request to the convening authority. The record of trial does not contain an addendum to the SJAR. On 29 June 2006, the convening authority took action and approved the sentence as adjudged.

The appellant's record of trial was docketed by this Court on 10 October 2006. On 9 May 2007, the appellant submitted his case on the merits. On 25 August 2008, this Court specified an issue with respect to the post-trial processing, regarding whether the convening authority properly considered defense clemency submissions prior to taking action. On 28 August 2008, the appellant filed an assignment of error asserting that his right to due process was violated when this Court failed to render a decision within eighteen months of docketing the case. The appellant elected not to address the post-trial processing issue specified by this Court.

Missing Addendum to the SJAR

We review post-trial processing issues de novo. *United States v. Sheffield,* 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho,* 54 M.J. 63 (C.A.A.F. 2000)). Failure by the appellant to submit clemency matters within the time prescribed shall be deemed a waiver of such right. Rule for Courts-Martial (R.C.M.) 1105(d)(1); *United States v. Pierce,* 40 M.J. 149, 150 (C.M.A. 1994). Upon submission of clemency matters, the appellant shall be deemed to have waived the right to submit additional matters unless the right to submit additional matters within the prescribed time limits was expressly reserved in writing. R.C.M. 1105(d)(2).

[1] The pretrial agreement capped confinement at four months if the appellant received a bad-conduct discharge and seven months if no bad-conduct discharge was adjudged.

Prior to taking final action in any special court-martial that results in a bad-conduct discharge, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig,* 28 M.J. 321, 324-25 (C.M.A. 1989); R.C.M. 1107(b)(3)(A)(iii). The preferred method of documenting a convening authority's review of clemency submissions is completion of an appropriate addendum to the SJAR. *United States v. Godreau,* 31 M.J. 809, 811 (A.F.C.M.R. 1990). In this case, the SJA did not prepare an addendum to the SJAR. In *Godreau,* we held that two conditions must be met to comply with *Craig* when an appellant has properly submitted clemency matters, but no addendum is prepared. *Id.* at 811-12. First, the convening authority must be advised in the post-trial recommendation that he is required to consider all matters submitted by the accused. *Id.* Second, there must be some means to determine that all matters submitted by the appellant were in fact considered by the convening authority. *Id.* at 812. The method approved in *Godreau* requires the convening authority to initial and date each item submitted by the appellant and his counsel. *Id.* Failing this, the convening authority is required to submit an affidavit verifying that he actually considered the appellant's submissions. *Id.*

In the case at hand, the convening authority was told in the SJAR that she "should" consider all matters within the record of trial as well as those matters submitted by the accused and counsel. Use of the word "should" suggests the convening authority has discretion to review or not review, and thus falls short of the mandatory review requirement of *Craig*. Nonetheless, we find no prejudice, as the record of trial indicates that each item submitted by the appellant was in fact considered by the convening authority prior to action.

Before we determine if the convening authority actually reviewed all clemency matters, we must determine what, in fact, was actually submitted. Although not raised by the appellant, in review of the appellant's clemency submission, we note that the trial defense counsel memorandum attached to the submission indicated there were fifteen attachments plus the three-page trial defense counsel memorandum, which we calculated to be a total of twenty-four pages. In contrast, the record of trial actually contains forty-two pages of clemency matters submitted. Comparing the documents listed as attachments on the trial defense counsel memorandum with the documents actually in the clemency submission, we note there is one document listed which is not within the submission, and there are nine documents and ten photographs unlisted but included in the clemency submission. The missing document is a one-page character statement by the dorm manager who supervised the appellant during the time period immediately preceding his court-martial. Included in the submission, but not listed as attachments on the trial defense counsel memorandum, were the appellant's five-page unsworn statement, a quarterly award nomination, a high school diploma, two certificates from middle school, three musical performance and recital notices highlighting the appellant, a letter of acceptance into college, and ten photographs. We note that all of the documents discussed above, including the character statement, were admitted into evidence during

the appellant's sentencing case and are part of the record of trial. The clemency matters were submitted by facsimile. The top of each page has a reference to the Lackland Air Force Base area defense counsel's office with date, time, and page numbers sequentially from one to forty-two (i.e. 29 June 2006, 1140, Lackland ADC, page 01/42, continuing sequentially to page 42/42). The record of trial contains forty-two pages in sequential order with the same identifying markings on top of the page. The appellant and his trial defense counsel prepared the clemency matters submission and failed to ensure it contained each referenced item and listed all documents actually within the submission.

Although not raised by the appellant as error, we find the omission in the clemency submission of the character statement by the dorm manager to be waived pursuant to R.C.M. 1105(d). We also find the appellant, in any event, was not prejudiced because of the missing document. Given the appellant's history of misconduct noted in the record[2] and the fact that his commander characterized his service as unacceptable and substandard, that character statement would have been unlikely to impact the convening authority's sentencing decision, had it been included in the clemency submission. Finally, the appellant put eighteen pages of additional matters before the convening authority which were not listed as attachments. After review of the entire record, we find as a matter of fact, the forty-two pages contained in the record of trial are the only clemency matters that were submitted by the appellant.

Now, turning to the second prong of the two-part test, we must determine if the convening authority reviewed the clemency submission. Reviewing the forty-two page clemency submission of the appellant, we note each page has the initials "G.H." or "G" at the top right corner. There is no date along with the initials. The convening authority's initials are G.H. Review of the action signed by the convening authority on 29 June 2006, reveals a handwriting style that matches the style found on the top right corner of each page in the clemency submission. Having received no assignment of error after specifying the issue, we find the initials contained on the top corner of each page of the clemency submission to be that of the convening authority. Although undated, we note each page of the forty-two page clemency submission reflects a facsimile date of 29 June 2006, the date of the Action. Despite our holding in *Godreau* that one of the means of determining that all post-trial matters submitted by the accused were, in fact, considered, is to have the convening authority initial and date each page of clemency at a clearly indicated location, the requirement of a date is not an absolute. In this case, it is clear the convening authority received and reviewed the clemency matters submitted by the appellant on 29 June 2006. Further, we have a reliable means of determining she reviewed each page because of her initials on the top right corner of each page of the clemency submission. Therefore, we find, as a matter of fact, that the convening

[2] The appellant has been court-martialed on two other occasions. He was convicted by special court-martial for use of methamphetamine and by summary court-martial for absence without leave and dereliction of duty. The appellant received non-judicial punishment pursuant to Article 15 twice and was issued four letters of counseling.

authority considered the appellant's clemency submission prior to taking action on the appellant's case.

Moreno Consideration

In this case, the overall delay of 731 days between the time the case was docketed by this Court and completion of our review is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno,* 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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

CHRISTINA E. PARSONS, TSgt, USAF
Deputy Clerk of the Court