UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CORY J. QUINN
United States Air Force

ACM S31747

01 August 2011

Sentence adjudged 1 October 2009 by SPCM convened at Beale Air Force Base, California. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; Major Naomi N. Porterfield; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

PER CURIAM:

In accordance with his plea, the appellant was found guilty by a military judge of one specification of wrongfully using heroin on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 3 months, forfeitures of $500.00 pay per month for 5 months, and reduction to E-1.

The issues on appeal are (1) whether the appellant is entitled to judicial intervention to redress his confinement in immediate association with foreign nationals in

Yuba City jail, in violation of Article 12, UCMJ, 10 U.S.C. § 812; that the Staff Judge Advocate (SJA) failed to agree with the appellant's argument on violations of Article 12, UCMJ; and the convening authority failed to order appropriate relief due to the Article 12, UCMJ violation;[1] (2) whether the SJA's failure to opine on the necessity of corrective action regarding the Article 12, UCMJ, issue raised by the appellant violated Rule for Courts-Martial (R.C.M.) 1106(d)(4); (3) whether the government's violation of the 30-day post-trial processing standard warrants relief under *United States v. Tardiff*, 57 M.J. 219 (C.A.A.F. 2002); and (4) whether the appellant's sentence is inappropriately severe based upon cumulative error.

Background

The appellant was convicted of divers uses of heroin on 1 October 2009. He was confined in the Yuba County Jail on 1 October 2009. Upon being incarcerated, he was jailed in an open bay with illegal aliens. He notified the authorities and was removed from the situation on 6 October 2009.[2]

In clemency, the appellant and his counsel centered their request on the appellant's enrollment in the Return to Duty Program (RTDP). The appellant's counsel raised the issue of the illegal confinement with foreign nationals as well and requested two for one credit from the convening authority.

The Addendum to the SJA Recommendation (SJAR), while specifically referencing the request for the RTDP, did not specifically highlight the illegal confinement situation. The SJAR addendum stated "I also reviewed the attached clemency matters submitted by the defense. My earlier recommendation remains unchanged." The SJA informed the convening authority that he must consider the submissions of the appellant. The attachments to the clemency request were listed, and the convening authority indicated that he had considered the submission and attachments.

Discussion

There is little controversy on the issue of whether the appellant was illegally confined for six days with foreign nationals (illegal immigrants). The appellate defense requests meaningful relief, specifically setting aside the bad-conduct discharge. The government opposes such relief as being in the nature of a windfall for the appellant.

Article 12, UCMJ, provides, "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not

[1] Although appellant's counsel raises these issues as three separate issues (Issues I, III and IV), they will be addressed as one issue.

[2] The Government's appellate counsel concedes that the appellant was illegally housed with foreign nationals and the appellant is entitled to 6 days for illegal confinement credit.

members of the armed forces." The "immediate association" language means that military members can be confined in the same jail or brig as a foreign national but they have to be segregated into different cells. *United States v. Wise*, 64 M.J. 468, 475 (C.A.A.F. 2007). "The Air Force confines inmates in facilities that prevent immediate association with enemy prisoners of war or foreign nationals who are not members of the US Armed Forces." Air Force Instruction 31-205, *The Air Force Corrections System*, Change 1 ¶ 1.2.4 (6 July 2007). We find the appellant should receive credit for the six days he was confined with foreign nationals and the SJA could have remedied this situation by recommending credit in his SJAR.

We now turn to the second distinct issue raised on appeal: whether the SJA's failure to opine on the necessity of corrective action regarding the Article 12, UCMJ, issue raised by the appellant violated R.C.M. 1106(d)(4). When defense counsel alleges legal error in matters submitted to a convening authority, the SJA must state whether corrective action is required on the findings or sentence. R.C.M. 1106(d)(4). If the SJA does not respond to allegations of legal error, a reviewing court may nevertheless affirm without remand if the alleged error would not "foreseeably" have resulted in a recommendation more favorable to the appellant or corrective action by the convening authority. *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988). Here, the SJA did not specifically say whether corrective action was necessary. He did state that he had considered the submissions and his original recommendation remained unchanged.[3] In a similar case, *United States v. Catrett*, 55 M.J. 400, 408 (C.A.A.F. 2001), our superior court found that the statement "Nothing contained in the defense submissions warrants further modification of the opinions and recommendations expressed in the Staff Judge Advocate's Recommendations" met the minimal response required by R.C.M. 1106(d)(4). We find the statement in the SJAR Addendum meets the minimum requirements and corrective action is not necessary under this theory.[4]

The next issue is whether the failure to meet the 30-day post-trial processing standard warrants relief under *Tardiff*. The Court of Appeals has authority to grant relief for excessive post-trial delay, if it deems relief is appropriate, through its powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Tardiff*, 57 M.J. at 224. The 30-day standard for forwarding the record of trial to the service Court of Criminal Appeals was established by *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Also established is the presumption of unreasonable delay if a decision is not rendered by the Court of Criminal Appeals within eighteen months.[5] *Id.*

[3] The adjudged sentence included confinement for 5 months and the Staff judge advocate's (SJA) recommendation properly recommended approval of the sentence in accordance with the pretrial agreement.
[4] We recommend that SJAs do not play with fire and invite potential error. They should squarely address legal errors head-on.
[5] Such is the case here.

Because both delays are 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. *Moreno*, 63 M.J. at 129, 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need engage in a separate analysis of each factor. *See 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 entire record, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable doubt and that no relief is warranted. Further, we find the delay of four days in forwarding the record to the service court was not excessive, warranting relief under *Tariff*.

As to the last error raised—that the Court should find the bad-conduct discharge is inappropriately severe under a cumulative errors doctrine—we do not agree. The appellant used heroin on numerous occasions. To grant him relief in the form of disapproving the bad-conduct discharge would be rewarding criminal conduct with a windfall. The appellant was entitled to six days of confinement credit and nothing more. We order the appellant be awarded 6 days credit for post-trial confinement in violation of Article 12, UCMJ.

Conclusion

The approved findings and sentence, as modified, 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 approved findings and sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court