UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DOMINGO A. RIVERA
United States Air Force

ACM 36123

30 October 2006

Sentence adjudged 26 June 2004 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Bruce T. Smith.

Approved sentence: Bad-conduct discharge, forfeiture of two-thirds pay per month, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

ORR, FRANCIS, and SOYBEL
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of violation of a lawful general regulation, three specifications of dereliction of duty, and two specifications of larceny, in violation of Articles 92 and 121, UCMJ, 10 U.S.C. §§ 892, 921. The appellant was sentenced to a bad conduct discharge, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved only so much of the sentence as provides for a bad conduct discharge, "forfeiture of two-thirds pay per month", and reduction to E-1.

The appellant raises two issues on appeal: (1) The government failed to comply with the appellant's pretrial discovery rights, triggering the need for post-trial fact finding;[1] and (2) The approved sentence does not reflect forfeitures in a whole dollar amount or specify how long they are to run. Finding no material prejudice to the substantial rights of the appellant, we affirm the findings. The sentence, as modified below, is approved.

Pretrial Discovery

In his first assignment of error the appellant asserts a belief that a government witness may have been promised leniency and that despite specific requests to disclose that information made by appellant during the discovery process, the government failed to disclose that information. The appellant asks that we direct a post-trial fact finding hearing. The record does not support the assertion made by appellant. For the reasons set forth below, his request is denied.

Prior to trial, defense counsel submitted three discovery requests seeking a variety of information, including "any known evidence tending to diminish credibility of…potential witnesses." One of the requests also specifically asked for disclosure, pursuant to Mil. R. Evid. 301(c)(2), of "any immunity or leniency granted to witnesses or potential witnesses."

One of the key prosecution witnesses at trial was Senior Airman (SrA) M, who was himself in trouble for stealing government property and for providing contraband to federal inmates assigned to assist in his duty section. SrA M testified under a grant of testimonial immunity. The appellant does not contend the government failed to provide proper notice concerning the grant of immunity.

After the appellant's trial, SrA M was given non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for larceny of government property, misappropriation of government property, and dereliction of duty for providing contraband to federal prisoners. Thereafter, action was initiated to administratively separate him from the Air Force. For both actions, SrA M waived his right to counsel. He also waived his right to a hearing before an administrative discharge board. The appellant asserts SrA M's offenses are similar to his own and speculates that because SrA M was not court-martialed, waived counsel, and waived his right to an administrative discharge board, SrA M may have been promised leniency in return for his testimony.

When confronted with a post-trial dispute over discovery relevant to an appeal, an appellate court must first "determine whether the appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted." *United States v.*

[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Campbell, 57 M.J. 134, 138 (C.A.A.F. 2002). *Campbell* set out a four-part test for making such a determination: (1) Whether the defense has made a colorable showing that the evidence or information exists; (2) Whether or not the evidence or information sought was previously discoverable with due diligence; (3) Whether the putative information is relevant to appellant's asserted claim or defense; and (4) Whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed. *Id.* The *Campbell* decision did not define the standard of evidence required to present a "colorable showing." However, it is clear from other cases using the same test in different contexts that the threshold burden of making a "colorable showing" is a low one. *See e.g.*, *United States v. Capers*, 62. M.J. 268, 269-70 (C.A.A.F. 2005) (addressing the low burden of making a "colorable showing" of possible prejudice resulting from an erroneous Staff Judge Advocate recommendation); *United States v. Calamita*, 48 M.J. 917, 921 (A.F. Ct. Crim. App. 1998) (addressing the low defense burden of making a "colorable showing" of unlawful command influence required to shift the burden of proof to the government on such issues).

The appellant has failed to make a "colorable showing" that the information he seeks exists and so fails prong one of the *Campbell* test. There is no evidence in the record, or presented by the appellant in connection with this appeal, from which we can reasonably infer SrA M may have been promised leniency. To the contrary, the evidence in the record indicates no such promise was made. As part of the appellant's clemency submission, the trial defense counsel asked the convening authority to order an inquiry to determine if SrA M testified under a promise of leniency. In support of that request, which the convening authority later denied, the trial defense counsel included a copy of a post-trial discovery request to the servicing legal office, dated 23 August 2004. In pertinent part, that discovery request sought any information, not previously disclosed, "pertaining to agreements made between SrA [M] and [the legal office], either written or verbal, that in exchange for his testimony he would face a lesser form of punishment." In response to that request, the trial counsel, by letter of 2 September 2004, reported: "As disclosed prior to and during trial, no such agreements exist." The appellant nonetheless continues to speculate that solely because SrA M was not prosecuted and waived his rights to counsel and an administrative hearing, he may have been promised leniency.

We decline to join in such speculation. A copy of SrA M's non-judicial punishment action was also included with the appellant's clemency matters submitted to the convening authority. While somewhat similar, there are significant differences in the quantity and severity of the offenses. SrA M was punished for one specification each of larceny of government property exceeding $500 in value, wrongful appropriation of government property of some value, and dereliction of duty by providing contraband to federal prisoners. In contrast, the appellant stands convicted of two specifications of larceny of property exceeding $500 in value (one each of government property and private property), one specification of violation of a lawful general order, and three specifications of dereliction of duty. The record also indicates the appellant was SrA M's

supervisor and exercised supervisory responsibility over the work area where the offenses occurred. These differences alone provide a reasonable basis on which a convening authority could elect different punishment fora for the two offenders.

We also decline to attach any significance to SrA M's decision to waive his rights to counsel and to an administrative discharge hearing. Such rights are personal to the service member concerned and may be exercised or waived for any or no reason, as he or she sees fit. Accordingly, the appellant's request for a post-trial hearing is denied.

Defective Action

The appellant's second assignment of error asserts we should affirm only so much of the sentence as provides for two-thirds forfeiture of pay, expressed in a whole dollar amount, and that we limit the duration of such forfeitures to one month.[2] We agree in part.

The appellant correctly notes that Rule for Courts-Martial (R.C.M.) 1003(b)(2) requires that any adjudged sentence to partial forfeitures be stated in whole dollar amounts. However, a convening authority's action on such a sentence is taken under R.C.M. 1107(d)(1), which contains no such limitation. Accordingly, a convening authority may legally approve a sentence that includes partial forfeitures expressed in other than whole dollar amounts. *United States v. Jones*, 60 M.J. 964, 972 (A.F. Ct. Crim. App. 2005) (approving "forfeiture of $705.50 pay per month for 1 month"). In reaching this holding, we are aware that this Court's earlier decision in *United States v. Frierson*, 28 M.J. 501 (A.F.C.M.R. 1989), could be interpreted to the contrary. However, we read the true concern in *Frierson* to be the need for certainty in the specific sentence approved. Thus, while a convening authority is not required to express forfeitures in a whole dollar amount, he must state the amount of any partial forfeiture as a sum certain, and must avoid use of generalized fractions. Failure to do so could, if approved forfeitures run for more than one month, raise "a temptation to increase the forfeiture amount as pay scales increase over the period of the forfeiture." This would be counter to the fixed nature of forfeitures and would be prejudicial to an accused." *Id.* at 503. The wording of the action in this case does not meet that requirement and must therefore be converted to a sum certain. The authorized base pay for the appellant at the reduced grade of E-1, both at the time of trial and at the time of the convening authority's action, was $1,193.40. Two-thirds of that amount is $795.52.

With regard to the duration of approved forfeitures, the convening authority's failure to specify the number of months forfeitures are to run creates an unacceptable

[2] Specifically, the appellant asks we "affirm only $788.00 in forfeitures, for a duration of no more than one month". However, $788.00 does not represent two-thirds pay for this appellant. That amount appears to have been calculated by multiplying appellant's base pay at the reduced grade of E-1 by 66% instead of by two-thirds. The correct amount, even if rounded to a whole dollar, as reflected on the applicable maximum forfeiture table in effect at the time, is $795.00. If not rounded to a whole dollar, the amount is $795.52.

ambiguity. "Ambiguous or uncertain sentences to forfeiture are detrimental because they leave military families unsure of how long wages will be forfeited, and less able to engage in financial planning for the future." *United States v. Stewart*, 62 M.J. 291, 294 (C.A.A.F. 2006). Ambiguous actions may be returned to the convening authority to eliminate the ambiguity. R.C.M. 1107(g); *United States v. Foster*, 39 M.J. 846, 848 (A.C.M.R. 1994). Alternatively, in the absence of language indicating forfeitures for a longer period, this Court may limit such forfeitures to no more than one month. *Jones*, 60 M.J. at 972. In the interest of the efficient administration of justice, the latter course is more appropriate in this case. We therefore affirm only so much of the sentence as includes a bad conduct discharge, forfeiture of $795.52 pay per month for one month, and reduction to E-1.

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, 10 U.S.C. §866; *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

JEFFREY L. NESTER
Clerk of Court