UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MICHAEL J. ROY
United States Air Force

ACM 38089

25 March 2013

Sentence adjudged 19 December 2011 by GCM convened at Joint Base Pearl Harbor-Hickam, Hawaii. Military Judge: Martin T. Mitchell (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 83 days, and forfeiture of $978.00 pay per month for 3 months.

Appellate Counsel for the Appellant: Captain Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

On 19 December 2011, consistent with his pleas, the appellant was found guilty by a military judge sitting as a general court martial of wrongful use of ecstasy on divers occasions, wrongful distribution of oxycodone on divers occasions, and wrongful introduction of ecstasy onto a military installation, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The military judge sentenced him to confinement for 83 days, a bad-

[1] By way of background, we note that the appellant was tried and convicted by a military judge sitting as a general court-martial on 21 July 2011. During post-trial processing, the Government discovered that an endorsement signed by the convening authority excusing three members and replacing them with three members was not included in an amended convening order. No action was taken to serve the appellant with notice of the changes in the potential court panel composition. On 27 September 2011, the convening authority ordered a post-trial hearing pursuant to

conduct discharge, and forfeiture of $978.00 pay per month for three months. The convening authority approved the sentence as adjudged.[2] Before this Court, the appellant argues that he is entitled to a new action because the convening authority failed to consider all matters before taking action. We disagree and affirm.

Background

On 25 January 2012, the Staff Judge Advocate (SJA) prepared the Staff Judge Advocate's Recommendation (SJAR) for the convening authority. On 7 February 2012, the appellant's defense counsel submitted a two-page memorandum entitled "Petition for Clemency," which asked the convening authority to disapprove the bad conduct discharge and to "consider all the attachments." No attachments or other matters were submitted with this two-page document.

Upon receipt, the Hickam Air Force Base legal office contacted the appellant's defense counsel and inquired if there were any submissions "they may have missed." Defense counsel informed the legal office that "there were no submissions from the accused, none would be forthcoming, and that his client intended to waive clemency." The legal office staff advised defense counsel that they would need "something in writing" if the appellant was going to waive clemency. That same day – 7 February 2012 – appellant's defense counsel submitted a one-page memorandum entitled "Waiver of Clemency," which stated that the appellant, after consulting with counsel, waived his right to submit matters other than the "Petition for Clemency" already submitted.

On 10 February 2012, the SJA prepared an Addendum to the SJAR. On 12 February 2012, the convening authority signed an endorsement to the Addendum stating that he considered the attachments before taking action. The Addendum referenced three attachments: "Proposed Action of the Convening Authority;" "*Waiver of Clemency Matters, dated 7 Feb 12 (2 pages);"* and "SJAR (w/2 Atchs), dated 25 Jan 12." (Emphasis added.). In her affidavit, the SJA states that she hand-carried the post-trial package to the convening authority, complete with both memoranda from defense counsel. She states the convening authority reviewed all attachments prior to taking action. She further states that the Addendum, which listed the "Clemency Waiver" as being two pages, did contain both memoranda from defense counsel: the two-page Petition for Clemency and the one-page Waiver of Clemency.

Article 39(a), 10 U.S.C. § 839(a), UCMJ. On 29 September 2011, the defense moved for a new trial, which the military judge granted on 5 October 2011. As part of his ruling, the military judge explained that the appellant could not be retried on those specifications of which he was found not guilty during the court-martial held in July 2011.

[2] The appellant and the convening authority entered into a pretrial agreement in which the appellant agreed to plead guilty in exchange for the convening authority approving a sentence of confinement not to exceed 83 days and not approving a dishonorable discharge, if adjudged by the military judge. The 83 days of confinement equates to the time the appellant served in confinement after his first court-martial in July 2011.

Discussion

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)). "When a record leaves a question as to whether post-trial matters were considered before the convening authority's action, we will examine the record in an effort to resolve that doubt." *United States v. Crawford*, 34 M.J. 758, 761 (A.F.C.M.R. 1992) (citations omitted). Appellate courts will not speculate as to whether a convening authority considered matters before taking action. *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989).

We have considered the record and appellate filings. These filings include an affidavit from the convening authority's SJA stating that the post-trial package she submitted to the convening authority contained both memoranda from the appellant's defense counsel. This affidavit is corroborated by our examination of the Addendum, which included those memoranda. The convening authority signed an indorsement to the addendum, in which he stated he had considered "the attached matters" prior to taking action. Therefore, we find that the convening authority considered everything actually submitted by the appellant. *See Craig*, 28 M.J. at 325 (citing Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2)); Rule for Courts-Martial 1107(b)(3)(A)(iii)). We can rely on the "presumption of regularity" with regard to a convening authority's exercise of his responsibilities on clemency. *United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1999). The appellant is not entitled to new post-trial processing.

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 the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court