UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ERIN E. SAJDAK
United States Air Force

ACM S31433

24 February 2009

Sentence adjudged 07 November 2007 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Le Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Michael T. Rakowski.

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 her of one charge and three specifications of making a false official statement, two charges and four specifications of wrongful appropriation, one charge and five specifications of uttering worthless checks, and one charge and one specification of fraudulent use of a debit card, in violation of Articles 107, 121, 123a, and 134, UCMJ, 10

U.S.C. §§ 907, 921, 923a, 934.[1] The adjudged and approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1. The appellant asserts three errors on appeal: (1) the sentence is inappropriately severe;[2] (2) the convening authority's action should be set aside because the staff judge advocate's addendum did not forward the entire clemency submission for review by the convening authority before action; and (3) the convening authority's Action should be set aside because the Report of Result of Trial attached to the staff judge advocate's recommendation provided inaccurate information to the convening authority. Finding no error, we affirm.

Background

The appellant was a mental health apprentice assigned to the medical operations squadron at MacDill Air Force Base (AFB), Florida. In early 2006, she began experiencing financial difficulties. Rather than resolve her financial difficulties through legal means, she committed a host of criminal offenses, which led to the charges in this case. Between January 2006 and June 2006, the appellant used the debit card number of a fellow airman without his permission to purchase $2,001.28 worth of items and services, which included cellular telephone service, cable and internet services, internet dating services, educational services from a local junior college, and candles from Yankee Candles. In May 2006, the appellant, who was the president of the base junior enlisted council, received a check for $652.85 from a local business for a fundraiser conducted by the council. She was one of three individuals authorized to make deposits and withdrawals on the bank account for the council. The appellant deposited the entire amount and, without permission or authority, withdrew $652.00 on the same day, which she used for her personal debts. In June, July, and August 2006, the appellant presented altered leave and earnings statements to obtain three payday loans. The leave and earning statements had the appellant's name on them, but were altered to reflect false information, including an incorrect social security number, incorrect pay and allowances,[3] and an incorrect number of dependents. Finally, beginning in July 2006 and continuing through the end of August 2006, the appellant wrote worthless checks on five different occasions to off-base businesses. The checks were for hairstyling, goods from a department store, legal services from a local attorney, and pizza from a local restaurant.

Sentence Severity

The appellant asserts the bad-conduct discharge is inappropriately severe. As raised by the appellant during sentencing and in her clemency submissions, she again

---

[1] The specification for fraudulent use of a debit card assimilated 18 U.S.C. § 1029, pursuant to Article 134, UCMJ, 10 U.S.C. § 934.

[2] This issue was raised by the appellant pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982).

[3] The information included incorrect and increased base pay, housing allowance, cost of living allowance, family separation housing allowance, and clothing allowance.

points out that she was diagnosed with a number of disorders, including bipolar disorder, which will necessitate long-term treatment and care.[4] We note that during trial and again on appeal, the appellant is not asserting her diagnosed disorders amount to a lack of either mental responsibility or mental capacity.[5] She simply asks this Court to consider these disorders in connection with assessing the appropriateness of her sentence. The appellant also notes that her newborn baby, delivered months before trial, was a life altering experience and that she is a changed person.

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

We are sympathetic to the number of disorders suffered by the appellant. While so noting, we find the existence of the disorders did not undermine the adequacy of her guilty plea.[6] We also acknowledge the life altering impact the birth of the child has had on the appellant. However, the appellant committed a host of serious criminal offenses which impacted a number of innocent victims, including the members of the junior enlisted council, a fellow airman, and local businesses near MacDill AFB. Her criminal conduct was inexcusable and egregious and not explained or justified by her diagnosed disorders. Likewise, a review of the record shows the appellant had a less than stellar four years in the Air Force. She received nonjudicial punishment in 2004 for stealing from a fellow airman. She also received a number of reprimands and counselings for misconduct ranging from an off-base incident of driving under the influence, to integrity

---

[4] She was diagnosed with bipolar disorder, eating disorder, alcohol abuse disorder in remission, borderline personality disorder with antisocial traits, and irritable bowel syndrome.

[5] In fact, at the request of her trial defense counsel, the appellant met a sanity board prior to trial. The board concluded the appellant did not suffer from a severe mental disease or defect, she was able to appreciate the nature and quality or wrongfulness of her conduct, and she has sufficient mental capacity to understand the nature of the proceedings and to conduct or cooperate in her defense. The military judge conducted an inquiry during trial to determine if the defense was raising mental capacity or mental responsibility issues. The appellant and her counsel told the military judge that they did not raise either issue.

[6] A military judge may properly presume, in the absence of any indication to the contrary, that counsel has conducted a reasonable investigation into the existence of the sanity defense. *See United States v. Shaw*, 64 M.J. 460, 463 (C.A.A.F. 2007). A military judge is not required to inquire further when the appellant makes reference to a mental condition but does not raise it as a defense. *Id.* Further, if mental responsibility does become an issue, our superior court has upheld the providency of a plea when the military judge inquires into the appellant's mental responsibility and concludes evidence of a bipolar disorder does not undermine the adequacy of the plea. *United States v. Inabinette*, 66 M.J. 320, 323 (C.A.A.F. 2008).

issues, past-due debts, and unprofessional conduct. Finally, she received two referral enlisted performance reports. She faced the maximum punishment authorized for special courts-martial, but instead only received a bad-conduct discharge, confinement for six months, and reduction to E-1.

After careful review of the entire record of trial, all the facts and circumstances surrounding the offenses of which the appellant was found guilty, and the appellant's post-trial submissions, we conclude her sentence is not inappropriately severe.

Post-trial Processing

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)). Prior to taking final action, 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); Rule for Courts-Martial (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 addendum to the staff judge advocate's recommendation. *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990). The addendum must meet three criteria to create a presumption that the convening authority received and considered matters submitted in clemency:

> First, the addendum should inform the convening authority that the accused has submitted matters and they are attached to the addendum. Second, the addendum should inform the convening authority that he must consider the matters submitted by the accused before taking action on the case. Third, the addendum should list as attachments the matters submitted by the accused.

Id. (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)). Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.6.3 (21 Dec 2007),[7] provides the addendum must list each defense submission as a separate attachment to the addendum. The government is permitted to "enhance the 'paper trail'" to clarify post-trial processing issues. *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989); *see also United States v. Garza,* 61 M.J. 799, 802 (Army Ct. Crim. App. 2005) (courts of appeals may properly consider post-trial affidavits when reviewing collateral claims such as post-trial processing errors).

---

[7] Air Force Instruction (AFI) 51-201, *Administration of Military Justice* (26 Nov 2003), was superseded by an updated version of AFI 51-201 on 21 December 2007. This change occurred after the appellant's court-martial and after the Report of Result of Trial was completed but before the addendum to the staff judge advocate's recommendation was written. The applicable versions are referenced throughout the opinion.

The appellant asserts two post-trial processing errors. First, she alleges the addendum to the staff judge advocate's recommendation contained an error, in that it failed to include four pages of clemency matters submitted for review by the convening authority. Thus, asserts the appellant, the Action should be set aside and re-accomplished to ensure the convening authority considered each clemency matter before taking action. We reviewed the entire record, including matters submitted in clemency. The appellant notes that the clemency memorandum from the trial defense counsel lists as one of the attachments "Defense sentencing exhibits, A-S (25 pages)." The addendum to the staff judge advocate's recommendation lists as one of the attachments "Defense Sentencing Exhibits, undated (21 pages, incl index)." The four-page discrepancy is the focus of this assertion of error.

Upon review of the entire record, it is clear there is no error. The four-page difference is the appellant's four-page unsworn statement. The unsworn statement was admitted during trial and was marked as "Exhibit S." This same unsworn statement was also attached to the trial defense counsel's clemency memorandum as a separate attachment. Although the trial defense counsel's clemency memorandum indicates that the defense "Exhibits A-S" (i.e., all defense exhibits, including the appellant's unsworn statement) are included as one attachment, only defense "Exhibits A-R" (i.e., all defense exhibits except for the appellant's unsworn statement) are included as a single attachment.[8] However, both the trial defense counsel clemency memorandum and the addendum to the staff judge advocate's recommendation actually list and attach the four-page unsworn statement as a separate attachment.[9] Whether the clerical error originated with the trial defense counsel when he made his submissions or with the staff judge advocate in preparing the addendum, it is clear that the four-page discrepancy is attributable to "Exhibit S." Furthermore, there is no doubt the attachment was included with the addendum. Finally, the convening authority signed an indorsement to the addendum stating that he reviewed and considered all matters submitted by the appellant before taking action. In addition, the convening authority submitted an affidavit stating that he considered each item submitted by the appellant before taking action. Thus, we find no error.

Second, the appellant asserts that numerous errors in the Report of Result of Trial should result in the Action being set aside because the convening authority received inaccurate information before taking action.[10] Specifically, the appellant asserts the Report of Result of Trial does not make it clear that the appellant pled guilty to wrongful

---

[8] Exhibits A-R number 21 pages in length. Exhibits A-S number 25 pages in length.

[9] The four-page statement submitted in clemency is marked "Defense Exhibit S," and marked as having been offered and admitted as an exhibit. Clearly, the statement is taken from the Record of Trial.

[10] Before a convening authority may take action on a sentence, he must consider the result of trial. Rule for Courts-Martial (R.C.M.) 1107(b)(3)(i); R.C.M. 1107(b)(3)(i) Discussion. The Report of Result of Trial is a form (Air Force Form 1359) completed promptly after a court-martial in order to notify the convening authority of the result of trial. R.C.M. 1101(a); AFI 51-201, ¶ 9.1 (26 Nov 2003).

appropriation instead of larceny in the charge and specifications dealing with the three payday loans.[11] Additionally, the appellant asserts the Report of Result of Trial does not correctly indicate the plea and findings for the charge of fraudulent use of the debit card.[12] Specifically, the charge was amended prior to pleas to reduce the charged time period. The appellant pled guilty to the charge as amended. Therefore, according to the appellant, when the Report of Result of Trial indicated the appellant pled guilty to a lesser included time period, the convening authority would be misled. Finally, the appellant asserts the Report of Result of Trial fails to completely summarize the pretrial agreement by failing to state the convening authority would withdraw two specifications and refer the case to a special court-martial.[13] In response, the government provided this Court with an affidavit from the convening authority. The convening authority unequivocally states that he was well aware of the pleas and findings of wrongful appropriation instead of larceny, of the corrected charged timeframe in the fraudulent use of the debit card charge, and of the terms of the pretrial agreement which included his agreement to withdraw two specifications. Finally, we note the pretrial agreement entered into between the convening authority and the appellant contains references to each of the issues raised by the appellant in this assignment of error.[14] There is no doubt the convening authority was aware of the actual pleas and findings and terms of the pretrial agreement in the appellant's case. Thus, we find no error.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[15] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

---

[11] Charge II, Specifications 1-3.

[12] Charge IV and its Specification.

[13] Charge III, Specifications 6 and 7 were withdrawn pursuant to the pretrial agreement.

[14] The terms of the pretrial agreement included: the appellant pleading guilty to wrongful appropriation vice larceny, the amendment of the charged timeframe for the fraudulent use of the debit card, the dismissal of the two specifications, and the requirement the case be a special court-martial vice a general court-martial.

[15] The court-martial order (CMO) must be corrected to reflect a number of minor errors. First, the CMO should reflect that the finding in Charge II was not guilty, but guilty to the lesser included offense of wrongful appropriation. Second, the finding in Charge III was guilty without reference to withdrawn Specifications 6 and 7. Third, the CMO must be corrected to properly reflect the plea of the appellant to Charge IV and its Specification. The Specification was modified pursuant to the pretrial agreement to change the charged timeframe from "between on or about 15 September 2005 and 20 June 2006" to "between on or about 1 January 2006 and 20 June 2006." The appellant pled guilty to the charge and specification as amended so the CMO should reflect only that the appellant's plea to the charge and the specification was guilty. Fourth, the Specification of Charge IV does not correctly indicate the "1 January 2006" date, as modified by the parties. Finally, we note a clerical error in the spelling of "council" in the Specification of the Additional Charge.

The approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court