UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANNE M. SCHEURER
United States Air Force

ACM 34865

10 April 2003

Sentence adjudged 7 August 2001 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Major Jennifer R. Rider, and Major Adam Oler.

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

At a general court-martial convened at Yokota Air Base (AB), Japan, the appellant pled guilty to ten specifications of illicit drug activity, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The military judge found the appellant guilty of multiple uses and distributions of 3,4-methylenedioxymethamphetamine (ecstasy) and methamphetamine, a single use and distribution of lysergic acid diethylamide (LSD), introduction of ecstasy and methamphetamine onto Yokota AB, and solicitation of an underage male to use methamphetamine. The military judge sentenced her to a bad-conduct discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to airman basic. The convening authority approved the findings and sentence without modification.

On appeal, the appellant contends there was error in the post-trial processing of her case. We agree and correct the error by reassessing the sentence.

Background

The appellant and her husband became deeply immersed in drug activity shortly after arriving at Yokota AB in November 1999. She admitted to using a variety of drugs, but her clear preference was for methamphetamine. In particular, she admitted to an addiction to crystal "meth." At trial, the parties stipulated to certain facts, to include the circumstances surrounding the "almost daily" conversations the appellant had with a co-worker, Airman First Class (A1C) Sullivan. It is the nature of these workplace discussions that forms the basis of this appeal.

According to the stipulation of facts entered into at trial, A1C Sullivan initially did not believe the appellant's statements about drug use. A1C Sullivan tried to ignore them, but as the conversations became more frequent and more earnest in July 2000, she notified investigators. The stipulation further elaborated as follows:

> In [a 20 July 2000] conversation, the Accused told A1C Sullivan that she and her husband were doing crystal meth and how they had been arguing about drugs and doing them again. The Accused stated that crystal meth stays in a person's system for varying lengths of time. It depends on how much and how long a person uses it. When A1C Sullivan asked how long it would stay in the Accused's system, the Accused said she didn't know, because she had used crystal meth before, then stopped, then began using again recently. A1C Sullivan recalls discussing [LSD and ecstasy] with the Accused.
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> Eventually, A1C Sullivan agreed with [Air Force investigators] to wear a "wire" and record conversations she had with the Accused. On 17 Aug 00, A1C Sullivan had a conversation with the Accused [during which] the Accused stated that she and her husband were experiencing an increasing need for methamphetamine. The Accused said they were "going through a gram in a week," when a gram used to last a month. She said that during the last weekend she and her husband had smoked and snorted 2 grams. The Accused said her last line was on Tuesday, Aug 15. During these conversations the Accused also stated[,] "They are investigating . . . and not letting anybody know. . . . So we stopped using." The Accused had heard a rumor that [investigators were] asking about [them].
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> During the same conversation, the Accused said that [investigators were] "not going to get us on something petty like using. They're trying to get

> us[,] but they're not going to get us on the petty shit like using, they are going to get us on something big like selling - selling to an underager . . . Contributing to a minor."

After her court-martial, the appellant and her counsel were served a copy of the staff judge advocate recommendation (SJAR) as required by Rule for Courts-Martial (R.C.M.) 1106(f). The SJAR included many details about the appellant's drug activities and summarized the appellant's conversations with A1C Sullivan as follows:

> Beginning in Jan 00, the accused began telling a coworker in the Supply Squadron on an almost daily basis about her and her husband's use of illegal drugs. As time went on and the admissions continued, the coworker decided to contact [investigators] who asked her to wear a "wire" to record the accused's conversations. During one recorded conversation at the accused's work section on 17 Aug 00, the accused said she and her husband were experiencing an increasing need for methamphetamine and were going through a gram in a week when a gram of the drug used to last them a month. The accused also said she and her husband had smoked and snorted two grams of methamphetamine the prior weekend.

After receiving a copy of this recommendation, the appellant submitted clemency matters pursuant to R.C.M. 1105. She asked the convening authority to "grant any mercy your heart allows." She was primarily interested in the Air Force Return to Duty Program (RTDP). *See generally* 10 U.S.C. § 953. This highly selective program allows inmates with "exceptional potential" to return to active duty if they successfully complete the program's rigorous requirements. Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 11.4 (9 Apr 2001). Although the appellant's clear preference was to enter this program, she asked, in the alternative, for a reduction in her confinement.

The appellant's defense counsel also submitted matters. He forthrightly advised the convening authority that the appellant "could not be discouraged from asking" for the RTDP even though the eligibility requirements were rigorous and narrow. Alternatively, he asked the convening authority to reduce her confinement. In support of these requests, the defense counsel emphasized the appellant's acceptance of her drug dependency. In addition, he addressed the appellant's mental status. In this regard, he provided a letter from a clinical psychologist. According to the psychologist, the appellant suffered from a dependent personality disorder, a mental condition which typically involves great difficulty in "making every day decisions without an excessive amount of advice and reassurance from others." As a result, the defense counsel suggested, the appellant had "virtually no resistance" to her husband's pressure to use drugs. He took no issue with the SJAR's rather neutral discussion of the appellant's workplace conversations about drugs.

The appellant's clemency package also included: 1) letters from her mother-in-law and father-in-law, 2) a prisoner assessment report rating her as "above average," 3) her unsworn statement, 4) eight character letters attesting to her excellent duty performance, and 5) a letter of appreciation.

In response, the staff judge advocate prepared an addendum to the SJAR wherein he advised the convening authority as follows:

> The accused is not a deserving candidate for entry into the Return to Duty Program. Indeed, it boggles the mind to think retaining her in the Air Force would be in the best interests of the service. Her drug abuse wasn't borderline or slight; it was extensive and continuous. Less than two months after the accused arrived at Yokota AFB, her first duty station, she was deeply involved in the use of illegal drugs and bragging about her exploits on an almost daily basis to a coworker at her duty section. For over seven months she continued to share details of her illegal conduct, showing no regard whatsoever for the requirements of the law or Air Force values. The accused had more than ample opportunity to serve honorably in the Air Force had she been so inclined, but she wasn't the least bit interested in doing so. When a person chooses to break the law, there must be consequences. While it's appropriate to show mercy and grant clemency in deserving cases, this is not such a case. The sentence adjudged for this accused is entirely appropriate. The accused has earned the punitive discharge and 30 months confinement she received.

This addendum was never served on the appellant or her counsel. She claims on appeal that the addendum contained "new matter" which warranted an opportunity to respond prior to the convening authority's action on the case.

Discussion

Whether a comment in an addendum to a SJAR is "new matter" that must be served on an accused is a question of law reviewed de novo. *United States v. Key*, 57 M.J. 246 (2002). R.C.M. 1106(f)(7) requires service on the accused and counsel whenever new matter is introduced in an addendum. The Discussion of R.C.M. 1106(f)(7) defines new matter as follows:

> "New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

If new matter is introduced into the addendum and not served on the appellant, an appellant must show prejudice. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). Our superior court has not required a showing of actual prejudice when post-trial reviews are in error. *See United States v. Wheelus,* 49 M.J. 283, 289 (1998). Instead, an appellant must make a "colorable" showing of possible prejudice "by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (1997). Specifically, an appellant must "show what he [or she] would do to resolve the error if given such an opportunity." *Wheelus*, 49 M.J. at 288. No relief is required "where the defense on appeal fails to proffer a possible response to the unserved addendum '*that could have produced a different result.'*" *United States v. Gilbreath,* 57 M.J. 57, 61 (2002)(citing *United States v. Brown*, 54 M.J. 289, 293 (2000)).

We hold that the reference to the appellant "bragging about her exploits on an almost daily basis" was new matter because this comment was "from outside the record of trial" and injected "issues not previously discussed." We recognize that the stipulation of fact and the SJAR included comments about the workplace conversations, but these documents were written in neutral terms and included rather scanty details. Moreover, very little in the stipulation or SJAR supports the notion that these conversations involved a nearly constant level of arrogance or boastfulness on the part of the appellant. *Cf. Key* (SJA's statement that the appellant's financial situation was "one of self-infliction" was a "statement of the obvious" and not new matter). While the abundance of antipathy found in the addendum may have been a reasonable response to the clemency petition, fair play required notice and an opportunity to respond.

Having determined that the comments were new matter, we test for prejudice. In a post-trial declaration, the appellant's defense counsel said that if he was afforded an opportunity to respond to the addendum, he would have advised the convening authority that: (1) some of the conversations with the co-worker indicated the appellant and her husband had been "arguing about drugs and doing them again" and (2) the majority of the conversations "were open expressions of concern over Amn Scheurer's health (i.e. weight loss and irregular menstrual cycle) and legal problems." This satisfies the appellant's obligation to state what she would have submitted to "deny, counter, or explain" the new matter. We next look at whether this response "could have produced a different result." *Brown*, 54 M.J. at 293.

The staff judge advocate's addendum was particularly directed to rebutting the appellant's post-trial request for the RTDP. In broad and forceful language, the addendum suggested that the appellant was a braggart with a boisterous and cavalier attitude, not only within the appellant's work environment, but also in all aspects of her military duties. The appellant counsel's post-trial declaration indicates these discussions were not motivated by egotism, but rather by concerns about her growing drug dependency and the potential medical and legal repercussions she faced. When

considered in the context of the appellant's mental disorder and the other supporting documentation in her clemency submissions, we hold it was possible the convening authority might have granted some clemency if the additional information had been provided to him.

In this regard, however, we note that the appellant had no realistic chance of being selected for the RTDP. First, given the appellant's extensive drug history, it is our collective experience that the appellant would be a highly unlikely candidate for the program. AFI 31-205, ¶ 11.4.3.7, provides that applicants for the program must have "no record of drug abuse. . . . Approval authorities can, in exceptional cases, waive this requirement, but offenders must have completed evaluation and/or treatment." Second, ¶ 11.4.3.6 of this instruction also requires applicants to have a "favorable psycho-social mental health evaluation." The appellant's dependent personality disorder would thus be an additional, independent factor that would weigh heavily against her selection for the RTDP.

The question remains, however, as to whether the appellant could have obtained other clemency relief. The appellant did not put all her eggs in one basket; instead, she asked the convening authority to reduce her confinement so she could pursue her educational and professional goals and return to her family. Under the facts of this case, we hold that the appellant has made a colorable showing of possible prejudice.

Remedy

Because the appellant has met the threshold requirements of establishing an error which could have produced a favorable result on her request for a reduction in confinement, it is incumbent on this Court to remedy the error and provide meaningful relief. We can set aside the action and remand the case for a new action or we can attempt to remedy the error ourselves.

The appellant requests this Court to reassess her sentence rather than return the case to the convening authority for a new action. The legislative intent behind Article 59, UCMJ, favors corrective action by this Court. *See* S.Rep. No. 98-53, 98th Cong., 1st sess. 21 (1983) ("If there is an objection to an error that is deemed to be prejudicial under Article 59 during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority.") The executive intent is the same. *See* R.C.M. 1106(d)(6) ("In case of error in the [SJA] recommendation not otherwise waived . . . appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority).

Considering the appellant's specific request that we take corrective action and the unique circumstances of this case, we conclude this error is best remedied at this level. We are satisfied that reducing the period of confinement by three months is a remedy which more than adequately moots any claim of prejudice and negates any need to return this case to the convening authority for a new review and action.

The approved findings and sentence, as modified, are correct in law and fact, and no additional 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 (2000). Accordingly, we affirm the findings and only so much of the adjudged sentence as provides for a bad-conduct discharge, confinement for 27 months, forfeiture of all pay and allowances, and reduction to the grade of E-1.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator