

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class SCOTT W. SCHRAFF
United States Air Force**

ACM S30504

29 April 2005

Sentence adjudged 16 October 2003 by SPCM convened at Hill Air Force Base, Utah. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of \$767.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrea M. Gormel, and Captain David P. Bennett.

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

Before

ORR, MOODY, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

CONNELLY, Judge:

The appellant pled guilty to dereliction of duty, drunken operation of a motor vehicle, wrongful use and distribution of marijuana on divers occasions, wrongful possession of marijuana, and fleeing the scene of an accident, in violation of Articles 92, 111, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 911, 912a, 934. A military judge sitting as a special court-martial accepted the appellant's pleas and sentenced him to a bad-conduct discharge, confinement for 2 months, forfeiture of \$767.00 pay per month for 2 months, and reduction to E-1. The sole issue on appeal is whether the addendum to the staff judge

advocate's recommendation (SJAR) contained "new matter" not provided to the appellant or to trial defense counsel, thus necessitating a new convening authority action in the case. Finding no error, we affirm.

Following service of the SJAR on the appellant and his trial defense counsel, the appellant submitted a clemency package to the convening authority containing clemency letters and excerpts from the record of trial. The appellant asked the convening authority to disapprove his punitive discharge. The staff judge advocate (SJA) completed a two-page addendum to the SJAR recommending that no clemency be granted. Contained within the addendum was the following language:

The sentencing authority, whether military judge or court-martial panel, imposes sentences based on the facts and circumstances of the individual case, including matters in aggravation and in extenuation and mitigation. In this case, a military judge adjudged two months confinement, reduction to the grade of E-1, forfeiture of \$767.00 pay per month for two months, and a bad conduct discharge.

The appellant submits the above language contained "new matter" which should have been served on the appellant and his counsel for review and reply prior to the convening authority's action. *See* Rule for Courts-Martial (R.C.M.) 1106(f)(7).

Whether an addendum to an SJAR contains "new matter" is an issue of law that we review de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). If it does contain "new matter," the addendum must be served on the accused and trial defense counsel. R.C.M. 1106(f)(7). "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 SJA or legal officer of the correctness of the initial defense comments on the recommendation.

R.C.M. 1106(f)(7), Discussion. On a claim that a new matter, interjected by the SJA during the post-trial review process, should have been served on the appellant, the burden is on the appellant to make a "colorable showing of possible prejudice" by stating what, if anything, he would have submitted to "deny, counter, or explain" such new matter. *Chatman*, 46 M.J. at 323-24.

Determining whether an addendum contains "new matter" is a case-specific exercise. The appellant submits the SJA introduced new issues, "namely which, if any, arguments had been considered by the military judge, and what role, if any, the military

judge's evaluation of [the] appellant's sentencing evidence should play in the convening authority's assessment of the clemency request."

It appears the language in question was included in the addendum to help correct a mistake the SJA made in the SJAR when he incorrectly informed the convening authority that a panel of officers had sentenced the appellant. The SJAR is clear about the convening authority's obligation to consider all matters, and that in the convening authority's sole discretion he may modify the findings and sentence of the court-martial as a matter of "command prerogative." R.C.M. 1106(d)(1) and 1107(a). The contested language does not raise any issue concerning what part, if any, the military judge's evaluation of the appellant's sentencing should play in the convening authority's assessment of the findings and sentence and requested clemency. The contested language is merely a logical conclusion drawn from a review of the record. The convening authority's responsibilities and prerogatives are fully explained in the SJAR and the addendum. The language in question does not raise "new matter" and need not be referred to the accused or his trial defense counsel for response. A new convening authority action in this case is not required.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court