UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CLIFTON J. SHELBY
United States Air Force

ACM S31403

18 November 2008

Sentence adjudged 21 September 2007 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Maura McGowan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, 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 G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, the appellant was found guilty of one specification of failing to obey a lawful order and one specification of divers carnal knowledge with a person who had attained the age of 12 but was under the age of 16, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920. A military judge sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, confinement for two months, two months restriction, and a reduction to the grade of E-1. The convening authority approved the findings, the bad-conduct discharge, the two months confinement, and the

reduction to E-1.[1] On appeal the appellant asks the court to "return the case to the convening authority for new post-trial processing" because there is no addendum to the Staff Judge Advocate's Recommendation (SJAR) and there is no way to know if the convening authority received or considered the appellant's clemency submissions. Finding no error, we affirm.

Background

The appellant has known Ms. MM, the victim, since 2002. The appellant dated Ms. MM's sister, and when that relationship ended he began a relationship with Ms. MM. On 20 March 2006, the appellant's commander became aware of the appellant's relationship with Ms. MM and issued the appellant a "no contact order" prohibiting the appellant from communicating with or otherwise contacting Ms. MM. On several occasions during the spring and summer of 2006, the appellant violated the "no contact" order by telephoning Ms. MM, visiting her, and engaging in sexual intercourse with her.[2] At the time of the sexual intercourse, the appellant was 19 years old and Ms. MM was 15 years old.

Discussion

Missing SJAR Addendum

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 SJAR. *United States v. Godreau,* 31 M.J. 809, 811 (A.F.C.M.R. 1990).

The addendum should: (1) inform the convening authority that the accused has submitted matters and they are attached to the addendum; (2) inform the convening authority that he must consider the matters submitted by the accused before taking action on the case; and (3) list as attachments matters submitted by the accused. *Id.* (citing *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990)). While such an addendum is not required, in its absence the court "must have some reliable means of verifying that the convening authority actually considered the appellant's submissions." *Id.* at 812 (citing *Craig*, 28 M.J. at 325).

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to refer the appellant's case to a special court-martial.

[2] The appellant received a letter of reprimand for violating the "no contact order" on 31 October 2006 and non-judicial punishment for violating the "no contact" order on several occasions between 30 December 2006 and 5 February 2007.

In response to appellate defense counsel's brief on this issue, appellate government counsel submitted an affidavit from the convening authority's then-acting staff judge advocate. The staff judge advocate's affidavit contains, as an attachment, the addendum to the SJAR. This affidavit and its accompanying attachment is an approved method to demonstrate compliance with R.C.M. 1107. The affidavit and the addendum to the SJAR clearly highlight that prior to taking action in the appellant's case the convening authority considered the appellant's clemency submissions. Accordingly, we find that the convening authority received and considered the appellant's clemency submissions prior to taking action on the appellant's case.

Erroneous Promulgating Order

Finally we note that the promulgating order fails to state the pleas to the specifications and that the sentence was adjudged by the military judge. Further, the specification of Charge II should not be numbered. Preparation of a corrected court-martial order is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

The approved 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

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