UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ELI S. STEPHENS
United States Air Force

ACM S31152

23 September 2008

Sentence adjudged 10 May 2006 by SPCM convened at the United States Air Force Academy, Colorado. Military Judge: Glenn Spitzer (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 and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Major Donna S. Rueppell, and Captain Jamie L. Mendelson.

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 him of one specification of attempted larceny of military property, one specification of making a false official statement, one specification of divers wrongful uses of Oxycodone, a Schedule II drug, and five specifications of larceny of military property, in violation of Articles 80, 107, 112a, and 121, UCMJ, 10 U.S.C. §§ 880, 907,

912a, 921, respectively. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for two months, and reduction to E-1.[1]

The appellant asserts two errors. First, the appellant asserts that this Court should order new post-trial processing because he claims that the convening authority was not provided with the correct information required pursuant to Rule for Courts-Martial (R.C.M.) 1106(d)(3)(C) when the wrong personal data sheet was attached to the staff judge advocate's recommendation (SJAR). Second, the appellant asserts that he was materially prejudiced by the trial counsel's improper sentencing argument. The trial counsel's argument asked the military judge to consider, over defense objection, the mission of the Air Force Academy and to send a message to cadets. We find to the contrary on both issues. This Court affirms the findings and sentence.

Background

The appellant was a medical technician assigned to the United States Air Force Academy, Colorado. As such, he worked side-by-side with medical providers at the base medical treatment facility. On five different occasions between 25 April 2005 and 31 May 2005, the appellant, without authority, accessed the medical treatment facility's on-line prescription program, using the secure log-ins belonging to medical providers. Pretending to be a medical provider, the appellant prescribed for himself the Schedule II drug Oxycodone, in the form of Percocet. Each time, he prescribed himself twenty pills. The appellant consumed all one hundred pills to ease an alleged shoulder injury. On the sixth occasion, on 21 June 2005, the appellant was caught. Several months later, when interviewed by the Air Force Office of Special Investigations, the appellant signed a false official statement using an Air Force Form 1168. The appellant stated that he had logged onto the medical treatment facility's on-line prescription program using his personal log-on, and he claimed that the prescriptions had been approved by the medical providers. This was false and was then known by the appellant to be false.

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, 65 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider matters submitted by the accused under R.C.M. 1105. *See also* R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989).

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[1] We note that the court-martial order (CMO) incorrectly reflects Charge II, as it exists in the appellant's case. Specifically, the CMO incorrectly uses the word "state," where the correct word should be "statement." Additionally, the CMO lists the appellant's middle initial in Charge II, where the actual charge sheet spells out the appellant's full name. Promulgation of a corrected CMO, properly reflecting the content of the specification of Charge II, is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Upon review of the record of trial, we note the personal data sheet attached to the SJAR is that of another airman. The appellant correctly points out that pursuant to R.C.M. 1106, the SJAR must include a summary of the appellant's service record, to include length and character of service, awards and decorations received. Such advice is usually made in part by attaching a personal data sheet.

In response, the government provided this Court with an affidavit from the legal office paralegal responsible for assembling the record of trial in the appellant's case. In his affidavit, the paralegal unequivocally states the appellant's personal data sheet was attached to the SJAR prior to action. He also states the SJAR and entire action package was reviewed by the staff judge advocate, the deputy staff judge advocate, the chief of military justice, and himself prior to forwarding the package to the convening authority for action. The paralegal claims that when he was assembling the appellant's record of trial, he was also making copies of another record of trial to forward to the Air Force Military Justice Division.[2] The paralegal states that the incorrect personal data sheet was inadvertently included in the appellant's record of trial well after action had been taken by the convening authority.

In similar circumstances, we have allowed the government 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); s*ee also United States v. Garza,* 61 M.J. 799, 802 (Army Ct. Crim. App. 2005). After reviewing the entire record and considering the documentation provided this Court, we are satisfied the convening authority properly considered the appellant's personal data prior to taking action in this case.

Sentencing Argument

The appellant asserts that the sentencing argument of the trial counsel was improper because there was no connection between the appellant and the Air Force Academy mission, other than the location of the courtroom and the general vicinity of the offenses. The appellant cites as authority a series of cases which found argument improper where it focused on the impact the case would have on the relationship between two communities.[3] We do not agree. The issue is a general deterrence argument by the trial counsel, not an argument relating to impact on community relations.

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[2] The appellant's record of trial was forwarded to the Air Force Military Justice Division on 25 August 2006. The personal data sheet attached to the staff judge advocate's recommendation in the appellant's record of trial belonged to an airman whose record of trial had been forwarded to the Air Force Military Justice Division on 22 August 2006 after an unrelated court-martial.

[3] *See United States v. Boberg,* 38 C.M.R. 199 (C.M.A. 1968) (argument regarding impact of murder of Vietnamese civilian on military-civilian relations and local Vietnamese citizens was held to be improper.); *United States v. Cook,* 28 C.M.R. 323 (C.M.A. 1959) (argument regarding probable effect of offense on the relations between the military and the civilian community held improper); *United States v. Mamaluy,* 27 C. M. R. 176 (C.M.A. 1959) (impact on relations between two communities held improper); *United States v. Spence,* 3 M.J. 831 (A.F.C.M.R. 1977)

During his sentencing argument, the trial counsel said the following:

> TC: In considering, Your Honor, what is an appropriate sentence for Senior Airman Stephens, we ask that you also consider what the mission is here at the United States Air Force Academy. Here we develop officers through a 4-year military academic training program.
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> DC: Objection, Your Honor. I don't see the relevance of the mission here to develop officers in this case.
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> MJ: Counsel?
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> TC: Your Honor, the sentence you send, sir, will send a message to all those who hear it, including the cadets. I'm trying to give you a perspective, sir, of -- what how they would --
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> MJ: Objection's overruled. You may continue.
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> TC: Your Honor, as I was stating, here at the Air Force Academy we develop officers and the cadets believe in the cadet honor code and are implored to follow it, which is I shall not lie, cheat or steal, nor tolerate among us those who do. Here sir, Senior Airman Stephens lied, cheated, and he stole. Significant confinement for Senior Airman Stephens will show the seriousness of his criminal activity, and we ask that you please consider the message received by all those in the USAFA community who will hear about his punishment, especially, sir, the future officers that are studying right here around us.

Issues involving argument referring to unlawful subject matter are reviewed de novo as issues of law. *United States v. Alameda,* 57 M.J. 190, 198 (C.A.A.F. 2002). The test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). *See United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000). It is well established that general deterrence is a proper subject for argument in sentencing by the trial counsel. *United States v. Lania,* 9 M.J. 100, 104 (C.M.A. 1980); *see also United States v. Jenkins,* 50 M.J. 577, 580 (N.M. Ct. Crim. App. 1999). The trial counsel may not, however, invite the military judge to rely on general deterrence to the exclusion of other factors. *Lania,* 9 M.J. at 104.

(argument that intimated political relations between United States and other nations in the area of controlling drug trafficking was improper).

In this case, the trial counsel's argument for general deterrence was only one of a number of factors he argued to the military judge to consider. The trial counsel did not overemphasize general deterrence. He discussed punishment of the appellant, rehabilitation of the appellant, preservation of good order and discipline in the military, deterrence of the appellant, and general deterrence for those at the Air Force Academy, including the cadets. Despite the trial counsel's argument for a more severe sentence, the military judge adjudged a sentence of two months confinement, a bad-conduct discharge, and reduction to E-1.[4] It was appropriate for the trial counsel to argue for a sentence based, in part, on general deterrence. We find no error in the trial counsel's sentencing argument. Additionally, we find no material prejudice to the appellant even assuming, *arguendo,* there was error. *See United States v. Powell,* 49 M.J. 460, 463 (C.A.A.F. 1998); *see also United States v. Fletcher,* 62 M.J. 175, 179 (C.A.A.F. 2005).

Moreno Consideration

In this case, the overall delay of 755 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno,* 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and no relief is warranted.

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).

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[4] The trial counsel argued for a bad-conduct discharge, confinement for 9 months, 2/3 forfeitures of pay for 9 months, and reduction to E-1.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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