UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHARLES T. E. STIRTMIRE
United States Air Force

ACM 36045 (f rev)

30 November 2006

Sentence adjudged 3 June 2004 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Glenn L. Spitzer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major James M. Winner, Major L. Martin Powell, Major Sandra K. Whittington, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Amy E. Hutchens, and Jesse Coleman (legal intern).

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

PER CURIAM:

This case is before our Court for further review because the original action was set aside. *United States v. Stirtmire*, ACM 36045 (A.F. Ct. Crim. App. 27 Jan 2006) (unpub. op.). This Court returned the case to The Judge Advocate General for remand to the convening authority for new post-trial processing because the original staff judge advocate's recommendation (SJAR) was drafted and signed by the trial counsel, in violation of Rule for Courts-Martial 1106(b), and because the original SJAR incorrectly advised the convening authority in regard to the authorized maximum punishment faced by the appellant at trial. On 15 February 2006, a new SJAR was completed and the appellant subsequently provided new

clemency submissions to the convening authority. On 22 March 2006, the staff judge advocate provided the convening authority with an addendum to the new SJAR and later, on 27 June 2006, a second addendum to the new SJAR. On 28 June 2006, the convening authority completed a new action. This case came before this Court for further review with no additional assignments of error; however, in our original opinion we declined to address the appellant's original second assignment of error[*] pending completion of new post-trial processing and action. We address that issue today.

At trial, the military judge, trial counsel, and trial defense counsel all agreed that the maximum authorized confinement in the appellant's case was 16 years and 6 months, when in reality it was 13 years and 6 months. The military judge subsequently sentenced the appellant to confinement for 14 months. Pursuant to the terms of the appellant's pretrial agreement, the length of confinement was reduced to 12 months in the convening authority's action. The appellant did not object to the miscalculation of the maximum authorized confinement at trial or in either of his clemency submissions.

Since the appellant did not object to the miscalculation of the maximum authorized confinement at trial, we review for plain error. In reviewing for plain error, we examine: (1) whether there was an error; (2) if so, whether the error was plain or obvious; and, (3) if the appellant has suffered material prejudice to a substantial right. *United States v. Boyd,* 52 M.J. 758, 761 (A.F. Ct. Crim. App. 2000) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F 1998); s*ee also* Article 59(a), UCMJ, 10 U.S.C. § 859(a). Under plain error analysis, the appellant has the burden of persuading the court that there was plain error. *Powell,* 49 M.J. at 464-65.

Government counsel concedes, and we agree, that the military judge erred by considering an incorrect calculation of the maximum authorized confinement; however, the government further argues that the appellant has failed to show that the miscalculation caused him material prejudice. After considering the entire record of trial and submissions by counsel, we agree that the appellant has not met this burden.

The appellant pled guilty to being absent without leave, to escaping from confinement, and to divers wrongful use of methamphetamine, cocaine, and marijuana, in violation of Articles 86, 95, and 112a, UCMJ, 10 U.S.C. §§ 886,

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[*] The appellant's original second assignment of error asserted that "[T]he military judge committed plain error by erroneously considering, for sentencing purposes, a maximum punishment that included sixteen-and-one-half years of confinement where the correct maximum punishment for appellant's offenses was thirteen-and-one-half years." In his further review brief, the appellant specifically states that he does not waive review of this asserted error.

895, 912a. Prior to trial, he had accumulated three letters of reprimand and received nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815. After considering all this, the military judge sentenced the appellant to a term of confinement far below the correct authorized maximum amount of confinement available. The appellant did not object to the error in his clemency submissions. He did, however, obtain the benefit of the bargain he made with the convening authority in exchange for his pleas of guilty, and had his confinement reduced by two months. We find the adjudged confinement appropriate for this offender and his offenses, and not out of line with similarly situated cases that we have reviewed. Furthermore, considering the totality of the circumstances, we find that the appellant was not materially prejudiced by the military judge's error. *Powell*, 49 M.J. at 464-65.

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

JEFFREY L. NESTER
Clerk of Court