UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ROBERT B. SWINGLE, JR.
United States Air Force

ACM 37256

23 March 2009

Sentence adjudged 05 April 2008 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Steven Ehlenbeck (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Marla J. Gillman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Michael T. Rakowski.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of wrongful appropriation of a motor vehicle, one specification of damage to non-military property, and one specification of reckless driving, in violation of Articles 121, 109, and 111, UCMJ, 10 U.S.C. §§ 921, 909, 911. The adjudged and approved sentence consists of a bad-conduct discharge, five months confinement, and a reduction to E-1.[1]

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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 not to approve confinement in excess of 36 months.

On appeal the appellant asks this Court to set aside the Action and remand his case for new post-trial processing. The basis for his request is that the record of trial is not complete because it does not contain three attachments to the staff judge advocate recommendation (SJAR)—namely the report of the result of trial, the personal data sheet, and the pretrial agreement—and without those, the convening authority was without the ability to properly take action on the appellant's case. We disagree. Finding no error, we affirm.

Background

On 3 November 2007, after consuming approximately ten beers, the appellant broke into a local business and borrowed a 17-foot van. During the process of borrowing the van, the appellant crashed through and damaged the fence that was surrounding the local business. After knocking down the fence, the appellant went on a joy ride in the van through the streets of Albuquerque, New Mexico. On his joy ride, the appellant was driving twice the posted speed limit, weaving in and out of traffic, and ran a red light. An Albuquerque police officer saw the appellant run through a red light and began pursuit. The appellant attempted to evade the police officer but eventually crashed into an embankment and was knocked unconscious. The police officer apprehended and revived the appellant. After a proper rights advisement, the appellant waived his rights and confessed to borrowing the vehicle and crashing it through the fence of a local business.

On 29 May 2008, the staff judge advocate prepared her SJAR. In her SJAR, the staff judge advocate advised the convening authority of the adjudged findings and sentence and advised the convening authority of the effect the pretrial agreement would have on his action. The staff judge advocate also listed the following documents as attachments to her SJAR: the report of the result of trial, the personal data sheet, and the pretrial agreement. On 11 July 2008, the convening authority took action on this case. In taking action, the convening authority averred he considered the SJAR prior to taking action. However, there is no indication in the record that the aforementioned documents were provided to and considered by the convening authority prior to taking action. In fact, the appellate defense counsel avers that the documents were not part of the SJAR in the record of trial they reviewed.

Discussion

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)). The SJAR must be attached to the record of trial and the SJAR must include: (1) the adjudged findings and sentence; (2) a summary of the appellant's service record; and, if there is a pretrial agreement, (3) the action the convening authority is obligated to take or a statement of reasons why the convening authority is not obligated to take certain action. *See* Rules for Court-Martial (R.C.M.) 1103(b)(3)(G), 1106(d)(3).

In the case at hand, the SJAR adequately advised the convening authority of the adjudged findings and sentence and his options on the action relative to the pretrial agreement. What is lacking in the SJAR is a complete summary of the appellant's service record. However, the government has submitted an affidavit from the staff judge advocate, and she asserts that she provided her SJAR and its attachments—the report of the result of trial, the personal data sheet, and the pretrial agreement—to the convening authority, and he considered these documents prior to taking action. Based on the foregoing, we are convinced the convening authority was provided and considered the SJAR, the report of the result of trial, the personal data sheet, and the pretrial agreement prior to taking action. Accordingly, we find that the record of trial comports with the requirements of Article 54, UCMJ, 10 U.S.C. § 854, and R.C.M. 1103 and that the record of trial is complete.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] 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

[2] The Court notes that the Court-Martial Order (CMO), dated 11 July 2008, incorrectly identifies the appellant as Airman Basic ROBERT B. SWINGLE when in fact the appellant should be identified as Airman ROBERT B. SWINGLE, JR. Additionally, the CMO states the appellant pled not guilty to the Specification of Charge III but guilty to a lesser included offense. The appellant actually pled guilty to and was found guilty of the Specification of Charge III by exception and substitution. The Court orders the promulgation of a corrected CMO.