UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DEANNA T. THORNTON
United States Air Force

ACM S31692 (rem)

17 August 2011

Sentence adjudged 04 June 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Barbara G. Brand.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $933.00 pay per month for 4 months, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Darrin K. Johns, Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen, Colonel Douglas P. Cordova, Major Charles G. Warren, Captain Matthew D. Talcott, and Gerald R. Bruce, Esquire.

Before

ORR, WEISS, and SARAGOSA
Appellate Military Judges

PER CURIAM:

Appellant's case is before us for a second time, on remand from our superior court for a new review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), before a new panel of this Court. *United States v. Thornton*, 69 M.J. 178 (C.A.A.F. 2010) (mem.) (vacating the decision in *United States v. Thornton*, ACM S31692 (A.F. Ct. Crim. App. 21 October 2009) (unpub. op.)). In accordance with her plea of guilty to one specification of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, a special court-martial composed of officer members sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of $933.00 pay per month

for 4 months, and a reprimand. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts the military judge erred by failing to instruct the members not to rely on the possibility of mitigating action by the convening authority or higher authority as required by Rule for Courts-Martial (R.C.M.) 1005(e)(4). Finding error, but no prejudice to the appellant, we affirm the findings and sentence.

Background

Based on her conviction and sentence to confinement at a prior special court-martial for wrongful use of methamphetamine, the appellant provided a urine specimen for drug testing when she in-processed the confinement facility. That urine sample tested positive for methamphetamine and led to the appellant's second special court-martial conviction for wrongful use of methamphetamine which is the subject of this appeal. Following the arguments of counsel, the military judge gave sentencing instructions to the court members. The military judge gave the standard instructions, but did not instruct the members that they may not rely on the possibility of any mitigating action by the convening or higher authority. At the conclusion of her instructions, the military judge asked, "Do counsel object to the instructions as given or request other instructions?" Both trial and defense counsel responded in the negative. Appellant waived her right to submit matters for the convening authority's consideration before the convening authority took action on the sentence.

Sentencing Instructions

This Court reviews the completeness of required instructions de novo. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007) (citations omitted); *United States v. Miller*, 58 M.J. 266, 269 (C.A.A.F. 2003). "The military judge bears the primary responsibility for ensuring that mandatory instructions . . . are given and given accurately." *Miller*, 58 M.J. at 270. Instructions on sentencing must include, "[a] statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." R.C.M. 1005(e)(4); *see also* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (15 September 2002) ("You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority."). The military judge did not give the *Benchbook* instruction, nor did she instruct the court members in any other manner about not relying on possible mitigation by higher authority. Although trial defense counsel did not object to the military judge's instructions, or call the missing instruction to the military judge's attention, the waiver rule of R.C.M. 1005(f) is "inapplicable to certain mandatory instructions," such as the one required under R.C.M. 1005(e)(4). *Miller*, 58 M.J. at 270. We therefore conclude that the military judge erred by failing to instruct the court members as required by R.C.M. 1005(e)(4).

Discussion

A finding of error, however, does not end our inquiry. We are required to test for prejudice. *See Miller*, 58 M.J. at 271. The military judge correctly instructed the court members they were solely responsible for determining an appropriate sentence only for the offense for which the appellant was found guilty and based on the evidence presented at trial and the military judge's instructions on the applicable law. Also, in examining the record, we note there is no evidence that either party raised even an inference of the possibility of post-trial sentence mitigation so as to make that a likely consideration in the minds of the court members.

The maximum sentence authorized was a bad-conduct discharge, confinement for 12 months, and forfeiture of two-thirds pay per month for 12 months. Although the trial counsel argued for a bad-conduct discharge, confinement for six to eight months, and two-thirds forfeiture of pay per month for six to eight months, and despite the prosecution evidence of the appellant's prior court-martial conviction for a similar offense, the court members adjudged a sentence far less than the maximum and less than that requested by the trial counsel. Furthermore, the appellant waived her opportunity to submit clemency matters and, therefore, voluntarily chose not to petition the convening authority for a lower sentence. Under the circumstances of this case, we conclude that the error did not have a substantive influence on the sentence. *See United States v. McCollum*, 58 M.J. 323, 343 (C.A.A.F. 2003). We consider the sentence relatively favorable to the appellant, and the appellant was not prejudiced by the absence of the instruction required by R.C.M. 1005(e)(4). *Miller*, 58 M.J. at 271.

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; *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
Clerk of the Court