UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet NATHAN D. VAN VLIET
United States Air Force

ACM 36005 (f rev)

24 November 2009

Sentence adjudged 13 May 2004 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dismissal and confinement for 19 months.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, Major David P. Bennett, Captain Marla J. Gillman, and Frank J. Spinner, Esquire (civilian counsel).

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Jeremy S. Weber, Major Jefferson E. McBride, Captain Michael T. Rakowski, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

Consistent with his pleas**,** a general court-martial, consisting of a military judge sitting alone, convicted the appellant of one specification of making a false official statement, two specifications of larceny, and one specification of housebreaking, in violation of Articles 107, 121, and 130, UCMJ, 10 U.S.C. §§ 907, 921, 930. The military

judge sentenced the appellant to a dismissal and confinement for 19 months. On 27 July 2004, the convening authority initially approved the sentence as adjudged.

This case is before this Court for a second time. The appellant was tried on 13 May 2004. Following his court-martial, on 24 June 2004, the appellant submitted both a resignation for the good of the service (commonly known as a resignation in lieu of trial or RILO) and his request for clemency from the convening authority. On 9 July 2004, the staff judge advocate (SJA) at the United States Air Force Academy (USAFA) completed an addendum to his staff judge advocate recommendation (SJAR) wherein he stated that the appellant's RILO was "untimely" and should be treated as a clemency request. On 19 July 2004, the appellant's trial defense counsel filed a response to the addendum to the SJAR asserting that the RILO was not untimely and should be forwarded to the Secretary of the Air Force (Secretary) prior to the convening authority taking action on the appellant's case. On 23 July 2004, the SJA completed a second addendum to the SJAR, in which he disagreed with the trial defense counsel. On 27 July 2004, the convening authority took action approving the adjudged sentence without ever forwarding the RILO to the Secretary.

On 6 November 2006, in this Court's original decision, we found error in the SJA's advice to the convening authority. *United States v. Van Vliet*, 64 M.J. 539 (A.F. Ct. Crim. App. 2006). In a published opinion, this Court held that the applicable Air Force Instructions at the time authorized the appellant to submit a RILO after his trial. *Id*. at 543. Accordingly, this Court set aside the convening authority's action and returned the record of trial (ROT) to the Judge Advocate General for new post-trial processing consistent with our opinion.

On 27 April 2009, the convening authority issued a new action in this case, approving the adjudged sentence. The case was re-docketed with our Court on 16 June 2009. The appellant now raises three new assignment of errors: (1) the appellant's due process right to timely post-trial processing was violated when the government took an unreasonable 951 days to return the record of trial after this Court ordered new post-trial processing to allow the appellant to submit a RILO and for that request to be properly acted on prior to the convening authority taking action; (2) the appellant is entitled to relief because the SJA and convening authority failed to properly comply with this Court's remand to conduct new post-trial processing and did not properly complete the new post-trial processing of the appellant's case; and (3) the unreasonable delay in the post-trial processing of the appellant's case renders the findings and approved sentence inappropriate. Finding that the convening authority took action on remand without affording the appellant an opportunity to present additional matters, we remand the case for new post-trial processing. We defer a decision on the appellant's other two assignments of error until the case is returned to this Court upon completion of the new post-trial processing.

Background

On 11 December 2006, after this Court's initial decision, the ROT was returned to the USAFA legal office (USAFA/JA) for new post-trial processing. In January 2007, USAFA/JA was advised that the RILO would have to be processed through to the Secretary prior to the new post-trial processing taking place. On 20 March 2007, USAFA/JA was advised by the appellant's civilian appellate defense counsel that the military area defense counsel (ADC), Captain (Capt) MB, would be handling the processing of the RILO. On 29 June 2007, USAFA/JA was notified by Capt MT that he was the ADC who would be representing the appellant for the post-trial processing. In an e-mail to USAFA/JA on 29 June 2007, Capt MT stated, "Before we resubmit his RILO, I need to see a copy of his original RILO request." In July 2007, Capt AL replaced Capt MT as the appellant's ADC.

The USAFA SJA signed the legal review for the RILO on 4 January 2008. The RILO was then routed through command channels to the Secretary. On 1 April 2008, the Secretary denied the appellant's 24 June 2004 RILO request. For a variety of reasons, no further action was taken in this case until 20 April 2009, when the new USAFA SJA signed a third addendum to the SJAR which was sent directly to the convening authority. The third addendum was never served on the appellant or his defense counsel. On 27 April 2009, the convening authority issued a new action in this case, approving the adjudged sentence. The case was re-docketed with our Court on 16 June 2009. In June 2009, the appellant first learned about the Secretary's denial of his 24 June 2004 RILO submission and that a new action had been accomplished by the convening authority.

Post-Trial Action

The appellant asserts that he is entitled to relief because the USAFA SJA did not serve the third addendum to the SJAR on the appellant and his defense counsel in compliance with Rules for Court-Martial (R.C.M.) 1105, 1106, and 1107, as well as Article 60(d), UCMJ, 10 U.S.C. § 860(d). The appellant requests this Court remand his case to allow the appellant the opportunity to re-submit his RILO and for new 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 (C.A.A.F. 2000)). "Before taking action on a case, the convening authority 'shall consider,' among other things, the [SJAR] under R.C.M. 1106 and any matters submitted by the accused under R.C.M. 1105." *United States v. Mendoza*, 67 M.J. 53, 55 (C.A.A.F. 2008). A new action requires both a new SJAR under R.C.M. 1106 and the opportunity for the appellant to submit additional matters under R.C.M. 1105. *Id*.

The government concurs that new post-trial processing is warranted but disagrees that the appellant has a right to re-submit his RILO. We concur that new post-trial processing is warranted. However, whether or not the appellant should be afforded an opportunity to re-submit his RILO is not a proper issue before this Court.

Conclusion

Accordingly, we return the record of trial to the Judge Advocate General for new post-trial processing consistent with this opinion. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

AFFIRMED.

OFFICIAL

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