UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic GREGORY D. WATERS
United States Air Force

ACM S32075

18 October 2013

Sentence adjudged 07 June 2012 by SPCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen (sitting alone).

Approved Sentence: Bad-conduct discharge and confinement for 50 days.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of a military judge sitting alone, convicted the appellant, in accordance with his pleas, of two specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921.[1] The court sentenced the appellant to a bad-conduct discharge and confinement for 50 days. The convening authority approved the adjudged sentence.

[1] The appellant was charged with and found not guilty of one specification of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928.

Before this Court, the appellant raises two assignments of error: (1) The convening authority's Action should be set aside because of a substantive error in the Staff Judge Advocate's Recommendation; and (2) The military judge abused his discretion when he admitted Prosecution Exhibit 5 in violation of Rule for Courts-Martial (R.C.M.) 1001(b)(2). Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

During the providence inquiry, the appellant testified that sometime between 13 March 2012 and 15 March 2012, while working at the Travis Air Force Base (AFB) gym, he stole $500 in cash and an IPod from a backpack belonging to Staff Sergeant LG. According to the appellant, he and his wife were experiencing financial problems and they did not have enough money to pay their rent. Additionally, the appellant testified that on 28 March 2012, while working in the base gym, he saw a duffle bag in an unlocked locker in the men's locker room and decided to move it to another locker that he secured with his own lock. He never returned for the duffle bag, but he informed the military judge he had no intention of returning the duffle bag to its rightful owner. The appellant subsequently learned the duffle bag belonged to Lance Corporal WB.

Post-Trial Processing

On 16 July 2012, the Staff Judge Advocate (SJA) signed the Staff Judge Advocate Recommendation (SJAR). In paragraph 4, the SJA erroneously stated, "The maximum imposable sentence for the offenses for which the accused was convicted is a bad conduct discharge, five years confinement, forfeiture of all pay and allowances, and reduction to E-1." As the appellant was tried pursuant to a special court-martial, the maximum punishment authorized was a bad-conduct discharge, one year confinement, forfeiture of two-thirds pay per month for one year, and reduction to E-1. R.C.M. 201(f)(2)(B)(i). The trial defense counsel did not object to the SJAR. On appeal, the appellant asserts that as a result of this error, the convening authority's Action should be set aside and the record of trial returned for a new Action.

Proper completion of post-trial processing is a question of law this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to timely comment on matters in the SJAR or on matters attached to it waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). In the context of a post-trial recommendation error, the appellant must make a colorable showing of possible prejudice in terms of how the error potentially affected his opportunity for clemency. *Scalo*, 60 M.J. at 436-37.

Although the SJAR incorrectly stated the maximum punishment included confinement for five years and forfeiture of all pay and allowances, the appellant waived

this error by failing to raise the issue. Therefore, we review for plain error. The error certainly occurred and it was plain and obvious. The real issue is whether a substantial right of the appellant was prejudiced. In review of the entire record, we conclude the appellant was not prejudiced.

In his clemency submission, the only relief the appellant requested was for the convening authority to set aside the bad-conduct discharge, which was correctly cited as a maximum punishment in the SJAR. Considering the appellant's serious misconduct in taking advantage of his position while working at the Travis AFB gym and stealing personal items from two other military members, along with his record of previous disciplinary actions, which includes nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for stealing a computer, three letters of reprimand, and two letters of counseling, and the military judge imposing a sentence well below the maximum authorized for a special court-martial, we are convinced that knowledge of the correct maximum punishment would not have impacted the convening authority's decision. Accordingly, after carefully considering the entire record, we find the appellant has not made a colorable showing of possible prejudice. *See United States v. Flores*, 69 M.J. 651, 657 (A.F. Ct. Crim. App. 2010), *aff'd*, 69 M.J. 366 (C.A.A.F. 2011) (holding SJAR that incorrectly referenced maximum punishment of 15 years confinement in a special court-martial was plain, but not materially prejudicial, error).

Aggravation Evidence

In sentencing, the Government offered Prosecution Exhibit 5, Record of Nonjudical Punishment Proceedings, under Article 15, UCMJ. On 5 March 2012, the appellant, who at the time was in the grade of E-3, was offered nonjudicial punishment for stealing a tablet computer belonging to the United States Air Force and for making a false official statement. On 15 March 2012, the appellant's commander, Major CR, found the appellant committed the charged offenses and imposed punishment consisting of forfeiture of $745.00 pay per month for two months, a reduction to E-1, and 30 days extra duty. On 20 March 2012, the appellant elected to appeal the imposed punishment but did not submit any matters or request any particular relief. Also on 20 March 2012, Captain SS, who replaced Major CR as the appellant's commander, denied the appeal and forwarded it to the appellate authority, Colonel DC, who denied the appeal on 21 March 2012. Trial defense counsel did not object to the record of the Article 15, UCMJ, proceedings, and the military judge admitted Prosecution Exhibit 5.

In the absence of objection at trial to the admission of sentencing evidence, an appellant must show (1) that error occurred, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right. *United States v. Cary*, 62 M.J. 277 (C.A.A.F. 2006); *see also United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998).

During the sentencing phase of the trial, the Government is permitted to present evidence of, among other matters, disciplinary actions of the appellant, including Article 15, UCMJ, actions. R.C.M. 1001(b)(2). The appellant contends that it was error for the military judge to admit Prosecution Exhibit 5. He argues that Captain SS was unauthorized to act on the appeal because, due to his rank, he could not have imposed the punishment given by Major CR, noting that a captain is limited to imposing a maximum punishment consisting of 14 days extra duty, forfeiture of 7 days of pay, and reduction of one grade. We disagree. Under Air Force Instruction (AFI) 51-202, paragraph 3.10.2, if a change in commander occurs after imposition of punishment but before the appeal decision has been made, "such a change neither impacts the former commander's action nor affords the member additional rights." Therefore, the change in commander had no effect on the former commander's punishment decision. Further, even if Captain SS was not authorized to act, the appeal was ultimately denied by Colonel DC, who was clearly authorized to act on the appeal.

Accordingly, under the circumstances of this judge alone trial, we find no plain error and no material prejudice in the admission of Prosecution Exhibit 5.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).[2] Accordingly, the approved findings and sentence, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] The Court notes that the Court-Martial Order (CMO), dated 2 August 2012 incorrectly reports that the appellant pled guilty and was found guilty of the Specification of the Additional Charge. In fact, he pled not guilty and was found not guilty of that Specification and that Charge. Accordingly, the Court orders the promulgation of a corrected CMO.