UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman TRAVIS L. WHITE
United States Air Force

ACM 35566

14 June 2005

Sentence adjudged 21 February 2003 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory E. Pavlik.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of carnal knowledge, in violation of Article 120, UCMJ, 10 U.S.C. § 920. He was convicted, contrary to his pleas, of a second specification of carnal knowledge. The general court-martial, consisting of members, sentenced the appellant to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant has submitted two assignments of error: (1) Whether the addendum to the staff judge advocate's recommendation (SJAR) contains new matter and should

have been served upon the appellant; and (2) Whether the action is ambiguous in that the convening authority approved the sentence to total forfeitures while at the same time waiving mandatory forfeitures, contrary to *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Finding error, we order corrective action.

The evidence adduced at trial established that the appellant engaged in sexual relations with two girls, CDC and KS, both 14 years old at the time of the respective offenses. Despite the appellant's claim that he reasonably believed KS was past her 16th birthday, he was convicted.[1] During the prosecution's case on findings, KS testified that the appellant knew her age. In addition, an agent for the Air Force Office of Special Investigations (AFOSI) testified that, during an interview, the appellant stated to him that KS was under 16 years of age at the time of the sexual activity. In response, the defense presented evidence that attempted to suggest otherwise; for example, that KS's parents did not object to their daughter dating the appellant.

In his sentencing case, the appellant made an oral unsworn statement in which he apologized to the victims, his wife, and the Air Force for his crimes. He also submitted a longer written version of the statement, in which he stated that he did not know KS's age at the time of their relationship. The appellant included the written copy of this statement in his clemency matters, but not a transcript of the oral statement provided at trial. The written unsworn statement also contained the same apologies.

The addendum to the SJAR, in commenting upon the appellant's clemency petition, stated:

> In contrast to the character letters that laud [the appellant] as respectful and honorable, the facts of this case outline conduct that is most dishonorable. He had sex one time with a girl he knew to be 14 years old, and he had sex multiple times with a different girl [KS] that he knew to be 14 years old. . . . Furthermore, [the appellant's] presentation in court showed little or no remorse about his crimes.

The appellant contends that these statements constitute "new matter," in that one could believe that the appellant honestly, even if unreasonably, believed KS to be 16 years of age; and that the appellant did in fact show remorse in his unsworn statement.

New Matter in the Addendum to the SJAR

Whether comments in an addendum constitute "new matter" requiring service on the accused is a question of law to be reviewed de novo. *United States v. Key*, 57 M.J.

[1] *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 45c(2) (2002 ed.), for a discussion of the defense of mistake of fact as to a victim's age in a carnal knowledge case.

246, 248 (C.A.A.F. 2002). The Discussion to Rule for Courts-Martial 1106(f)(7) defines "new matter" as that which:

> includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

Examples of "new matter" include written comments by the convening authority's chief of staff that the accused (convicted of aggravated assault) was "[l]ucky he didn't kill" the victim and that he was a "thug" (*United States v. Anderson*, 53 M.J. 374, 375-76 (C.A.A.F. 2000)); reference to a positive urinalysis which was not presented at trial (*United States v. Chatman*, 46 M.J. 321, 322 (C.A.A.F. 1997)); and a statement that the accused's matters in extenuation and mitigation had been considered by "the seniormost military judge in the Pacific" (*United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997)). However, discussion in the addendum of comments raised by the appellant in post-trial submissions is not "new matter." *See United States v. Komorous*, 33 M.J. 907 (A.F.C.M.R. 1991); *United States v. Wixon*, 23 M.J. 570 (A.C.M.R. 1986), *aff'd*, 25 M.J. 370 (C.M.A. 1987).

If a comment constitutes "new matter," and if the appellant "makes some colorable showing of possible prejudice," *Chatman*, 46 M.J. at 323-24, then he or she will be entitled to relief. *See also United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Regarding the age of KS, we find that the record contains testimony from which a reasonable person could infer that the appellant knew her age at the time of the offense. As stated above, KS herself testified to that fact, and an AFOSI agent related the appellant's statement to similar effect. Therefore, we conclude that this portion of the addendum is not "new matter," insofar as it does not address a matter outside the record. Additionally, the appellant himself raised this issue in his clemency submission, and the language in the addendum merely comments on an issue raised by the appellant.

Concerning the addendum's reference to the appellant's alleged lack of remorse, we conclude that it is an evaluative comment on a matter within the record, as well as on a matter raised by the appellant. While the comment could have been worded differently, we conclude that it addresses the apparent genuineness, or lack thereof, of the appellant's apologies. Even if one finds it to be "new matter," however, we conclude that the appellant has not made a "colorable showing of possible prejudice." The convening authority, in reading the unsworn statement, would have been aware of the appellant's apologies and would have assigned them whatever significance he believed they were due. We hold that the appellant is not entitled to new post-trial processing.

Ambiguous Action

This court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). After the trial, the convening authority waived mandatory forfeitures for a period of six months. The convening authority did not, however, disapprove or suspend the adjudged forfeitures, as required by *Emminizer*. In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that this is error requiring a new action.

Conclusion

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

Chief Judge PRATT participated in this decision prior to his retirement.

OFFICIAL

ANGELA M. BRICE
Clerk of Court