UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BOBBIE J. ARRINGTON
United States Air Force

ACM 37698

25 March 2013

Sentence adjudged 26 March 2010 by GCM convened at Grand Forks Air Force Base, North Dakota. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; and Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Lentendre; Major Naomi N. Porterfield; Major Charles G. Warren; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

Contrary to her pleas, the appellant was convicted at a general court-martial comprised of officers of one specification of making a false official statement, two specifications of wrongful use of Dilaudid, one specification of wrongful use of cocaine, one specification of wrongful distribution of ecstasy, and two specifications of wrongful solicitation to distribute Percocet and morphine in violation of Articles 107, 112a, and

134, 10 U.S.C. §§ 907, 912a, 934.[1] The adjudged sentence consisted of a bad-conduct discharge, confinement for 12 months, forfeitures of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the finding of guilty for Specification 1 of Charge IV (solicitation to distribute Percocet) but approved the remaining findings of guilty. The convening authority approved the bad-conduct discharge, 12 months of confinement, and reduction to E-1, but disapproved the adjudged forfeitures. He further waived mandatory forfeitures for the benefit of the appellant's family.

The appellant raises four issues for our consideration: (1) whether the appellant received ineffective assistance of counsel; (2) whether the Article 134, UCMJ, solicitation specification failed to state an offense; (3) whether the staff judge advocate (SJA) erred by recommending a meaningless remedy to the convening authority; and (4) whether the convening authority abused his discretion by failing to provide meaningful sentence relief.

Ineffective Assistance of Counsel

After being interviewed by agents of the Air Force Office of Special Investigations (OSI) concerning wrongful drug use, the appellant agreed to provide a urine sample. The sample was collected and tested by the Air Force Drug Testing Laboratory (AFDTL) and subsequently reported positive for cocaine above the Department of Defense (DoD) threshold. Prior to the selection of the members, the military judge admitted the drug testing report (DTR) into evidence without trial defense counsel objection. The following day, trial defense counsel informed the military judge that the Court of Appeals for the Armed Forces (CAAF) had issued its opinion in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010). Apart from notifying the military judge of the new opinion, trial defense counsel did not request the military judge reconsider the admission of the DTR.

The DTR was provided to each member of the court. Page 1 of the report declared that the appellant's urine specimen contained the cocaine metabolite benzolecgonine (BZE) at a concentration level of 614 ng/mL, in excess of the DoD cutoff level of 100 ng/ML. A laboratory certifying official signed the cover memorandum. Page 2 of the DTR included a handwritten entry indicating that the appellant's sample tested positive for "COC."

Dr. Turner testified for the Government as an expert in forensic toxicology. He was employed by AFDTL as a forensic toxicologist and laboratory certifying official, but was not personally involved in any of the tests associated with the appellant's urine sample. Dr. Turner testified specifically about laboratory procedures and the information

[1] The appellant was acquitted of one specification of violating Article 107, UCMJ, 10 U.S.C. § 907, five specifications of violating Article 112a, UCMJ, 10 U.S.C. § 912a, one specification of violating Article 121, UCMJ, 10 U.S.C. § 921, and one specification of violating Article 134, UMCJ, 10 U.S.C. § 934.

contained with the drug testing report (although he did not specifically read the contents of the cover memorandum to the members). He testified that the appellant's sample was positive for BZE at a level of 614 ng/mL. Dr. Turner's testimony and the DTR were the only evidence offered to prove the appellant's wrongful use of cocaine.

On appeal, the appellant argues that his trial defense counsel's failure to object to the admission of the DTR amounted to ineffective assistance. Specifically, the appellant claims that because the DTR was the sole evidence offered to prove her wrongful use of cocaine and because the DTR contained inadmissible testimonial hearsay, her trial defense counsel should have requested the military judge reconsider his decision to admit the DTR.

We review claims of ineffective assistance of counsel de novo, *United States v. Wiley*, 47 M.J. 158 (C.A.A.F. 1997), under the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984).[2] We start with the proposition that defense counsel are presumed to be competent. *United States v. Anderson*, 55 M.J. 198 (C.M.A. 2001). The appellant bears the heavy burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004).

The appellant contends that his trial defense counsel should have objected to the admission of the DTR because it contained inadmissible testimonial hearsay: "Not only did the trial defense counsel fail to object in advance of trial to the admission of the DTR, but even when armed with the *Blazier* opinion, the trial defense counsel did not request that the military judge reconsider his ruling admitting the DTR in an attempt to have the cover memorandum removed nor did trial defense counsel appear to factor *Blazier's* outstanding issue regarding expert testimony into their trial strategy." Applying the *Strickland* test, we find the appellant has not met her burden of establishing that her trial defense counsel was ineffective.

In a post-trial affidavit, trial defense counsel explained that the defense's strategy was not to attack the scientific basis of the urinalysis test or the findings of the test itself. Rather, their approach was to argue that Dr. Turner did not have firsthand knowledge of the facts and did not conduct the testing himself, rendering the results unreliable. Additionally, defense counsel emphasized throughout Dr. Turner's cross-examination that the DTR results did not prove the appellant knowingly used cocaine. During closing argument, trial defense counsel maintained the Government failed to provide sufficient evidence to show a knowing ingestion of the substances found in the appellant's urine:

[2] To prevail on claims of ineffective assistance of counsel, the appellant must show: 1) his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and 2) his counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668 (1984).

"Dr. Turner couldn't tell you whether or not [the appellant] actually used it or that if she had used it, how she used it, or, if she had used it, whether her use was wrongful. All he can tell you is that there's BZE in a sample that was tested at the Brooks Laboratory. That's it." Trial defense counsel stated that she chose not to object to the DTR cover memorandum because it did not adversely impact the defense's case, given their theory that Dr. Turner's testimony could not conclusively prove a knowing ingestion of cocaine.

The trial defense counsel's strategic decision to pursue an unknowing ingestion defense was not unreasonable under the facts of this case. The fact that other defense counsel had objected to admission of the DTR on Confrontation Clause grounds in different cases does not therefore cause the trial defense counsel's performance in this case to be deficient. It is certainly not uncommon in urinalysis cases for counsel to pursue a defense based on what a laboratory results could not show – that the appellant *knowingly* used drugs. The fact that it was not ultimately successful does not invalidate the defense strategy. Appellate courts give great deference to trial defense counsel's judgments, and "presume counsel's conduct falls within the wide range of reasonable professional assistance." *United States v. Morgan*, 37 M.J. 407, 409 (C.M.A. 1993) (citations omitted); *United States v. Mazza*, 67 M.J. 470, 475 (C.A.A.F. 2009) (As a general matter, the court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." (internal quotation marks and citations omitted)). Based on the facts before us, we find trial defense counsel acted within the expected norms of competency.

Because the trial defense counsel, with full knowledge of our superior court's decision in *Blazier*, intentionally chose not to object to the admission of the DTR for tactical and strategic reasons, we find the appellant waived the confrontation issue on appeal.

Staff Judge Advocate Recommendation & Convening Authority Action

In Specification 1 of Charge IV, the appellant was charged with and convicted of wrongfully soliciting another Airman to provide her with Percocet, a Schedule II controlled substance, between 28 January 2009 and 11 February 2009. During its case-in-chief, the prosecution submitted evidence of solicitations taking place before, during, and after the charged time period. After the members found the appellant guilty of soliciting Percocet, but prior to the conclusion of the court-martial, the military judge opined that the evidence introduced at trial did not establish that the appellant's multiple requests for Percocet over a four to five month period were "so closely connected in time as to constitute a single transaction." Concerned that the appellate courts could not discern which instance the members used to find the appellant had solicited the other Airman, the military judge recommended the convening authority disapprove the findings of guilty with respect to Specification 1 of Charge IV and reassess the sentence.

In his post-trial recommendation, the SJA advised the convening authority of the military judge's concerns and recommended the convening authority disapprove the findings of guilty for Specification 1 of Charge IV and reassesses the sentence by reducing the adjudged confinement by two months. The trial defense counsel responded to the SJA's recommendation (SJAR) by arguing that "the proper remedy for this legal error is to set aside the finding of guilty to Specification 1 of Charge IV and disapprove the adjudged bad conduct discharge . . . or in the alternative reduce the adjudged confinement to 6 months." The trial defense counsel pointed out that reducing the appellant's adjudged confinement by two months would in fact be detrimental because it would render the appellant ineligible for parole, in effect increasing the length of time she would remain in confinement if she received no clemency at all.

Addressing the trial defense counsel's concerns, the SJA amended his recommendation and advised the convening authority to approve the adjudged 12 months of confinement, but disapprove the adjudged total forfeitures of pay and allowances and to waive mandatory forfeitures for a period of two months for the benefit of the appellant's dependents. In a further reply, trial defense counsel stated that disapproving the forfeitures would be a "mere symbolic gesture" and would not provide the appellant "any substantive relief" because the appellant's pay and allowances stopped as a result of Article 58b, UCMJ, 10 U.S.C. § 858b, and the expiration of the appellant's obligated term of service.[3] In response, the SJA provided another addendum to his recommendation, again advising the convening authority to disapprove the adjudged forfeitures and waive the mandatory forfeitures. The convening authority approved the bad-conduct discharge, 12 months of confinement, and reduction in grade, and disapproved the adjudged forfeitures of pay and allowances. He further waived all mandatory forfeitures required by operation of Article 58b, UCMJ, "for a period of 2 months or release from confinement or expiration of term of service, whichever is sooner." The convening authority directed that the appellant's pay and allowances be paid to her dependents.

On appeal, the appellant argues that the recommendation to disapprove the adjudged forfeitures and waive the mandatory forfeitures required by Article 58b, UCMJ, amounted to a "meaningless remedy." The appellant further argues that the convening authority abused his discretion and failed to provide "meaningful sentence relief" after disapproving the finding of guilty for Specification 1 of Charge IV. The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

[3] The appellant completed her obligated term of service on 11 April 2010. Because she was in confinement, she stopped receiving pay and allowances as of that date. *See* Department of Defense Financial Management Regulation 7000.14-R, Volume 7A, *Military Pay Policy and Procedures*, Chapter 48, § 480702 (December 2012).

Before a general court-martial convening authority takes action under Rule for Courts-Martial (R.C.M.) 1107, the convening authority's SJA must provide a recommendation pursuant to R.C.M. 1106. Among the items required in the SJAR is the SJA's personal recommendation as to the specific action the convening authority should take on the sentence. R.C.M. 1106(d)(3). If the SJA notes legal error, he or she must state whether, in his or her opinion, corrective action on the findings or sentence should be taken. A full analysis regarding the legal error is not required. R.C.M. 1106(d)(4).

The action to be taken on the findings and sentence is a matter of command prerogative and within the sole discretion of the convening authority. The convening authority is not required to review the case for legal errors or factual sufficiency. R.C.M. 1107(b)(1). Before taking action, the convening authority must consider, amongst other items, the SJAR and any R.C.M. 1105 matters submitted by the accused.

In *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), our superior court established the process for resolving claims of error connected with a convening authority's post-trial review. An appellant must allege prejudicial error and show what he would do to resolve the error if given such an opportunity. "Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id*. at 289 (citing *United States v. Chatman*, 46 M.J. 321, 323–24 (C.A.A.F. 1997)); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) ("in the context of a post-trial recommendation error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant must make 'some colorable showing of possible prejudice." (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

In *United States v. Capers*, 62 M.J. 268 (C.A.A.F. 2005), our superior court found plain error when the SJA recommended that the convening authority suspend adjudged forfeitures and waive automatic forfeitures to assist the accused's family where the accused had completed his period of obligated service and was sentenced to confinement, and thus was not entitled to pay. Turning to the prejudice prong, the Court found there had not been a colorable showing of possible prejudice because the appellant had only vaguely referred to the possibility that a properly informed convening authority might have provided an undefined amount of "reduced confinement" so that the appellant, when unconfined, could have assisted the family with their financial needs. The Court said that given the nature of the appellant's offense (rape), the period of adjudged confinement, and the appellant's inability to identify a remedy with reasonable precision, the appellant had not provided an adequate description of what a properly advised convening authority might have done to structure an alternative form of clemency. *Id*. at 270.

In the case before us, we find the appellant has made a colorable showing that the convening authority intended to grant clemency, but that intent may have been thwarted

by improper advice from the SJA. The SJA clearly indorsed the appellant's request to receive some form of sentence relief for the legal error occurring during the trial. In his initial recommendation, the SJA specifically states, "I recommend you reduce the adjudged confinement by two months, *as an appropriate remedy to address the above-mentioned error of law*." (Emphasis added.). After the trial defense counsel pointed out the consequences the decrease in confinement would have on the appellant, the SJA amended his advice to disapprove the adjudged forfeitures and waive the mandatory forfeitures for the benefit of the appellant's dependents. Unfortunately, the SJA's advice failed to fully consider the impact Article 58b, UCMJ, and the appellant's end of obligated service would have on the convening authority's ability to provide the requested relief. The SJAR was therefore inaccurate and misleading because it intended to advise the convening authority of a remedy that was not available. While it is possible that the convening authority intended to grant hollow relief, it is more probable that he intended to grant meaningful relief but was not properly advised of how the provisions of Articles 57(a), 10 U.S.C. § 857(a), and 58b, UCMJ, would affect his action.[4] The convening authority must be provided an accurate analysis of his options so that he may choose what, if any, corrective actions to take in approving the sentence. Whether he ultimately elects to provide relief is matter left to his discretion, but the appellant was entitled to have the convening authority properly advised as to whether she could in fact receive the relief recommended by the SJA.

Because an accused's best hope for sentence relief lies with the convening authority, the SJAR plays a "pivotal role" in the accused's chance for relief. *United States v. Taylor*, 60 M.J. 190 (C.A.A.F. 2004) (citation omitted). Although the convening authority was not required to provide the appellant sentence relief due to legal error, our superior court has made clear that the SJA's advice must be accurate. Accordingly, we set aside the sentence and return the record of trial to The Judge Advocate General for remand to the appropriate convening authority for a new action.

Legal Sufficiency of the Article 134, UCMJ, Offense

The appellant argues that her conviction for solicitation of morphine, as alleged in Specification 3 of Charge IV, should be set aside and dismissed because it does not allege the Article 134, UCMJ, terminal element of being either prejudicial to good order and discipline (Clause 1) or service discrediting (Clause 2).

[4] Pursuant to Article 57(a), UCMJ, 10 U.S.C. § 857(a), forfeiture of pay and/or allowances that is part of an adjudged sentence of a court-martial takes effect 14 days after the sentence is adjudged or on the date of the convening authority's action approving the sentence, whichever is earlier. Additionally, even if no forfeiture is adjudged, if an adjudged sentence includes: (1) death, (2) confinement for more than six months, or (3) confinement for six months or less and a punitive discharge, then automatic forfeiture similarly begins 14 days after the sentence is adjudged or on the date of the convening authority's action approving the sentence, whichever is earlier, in accordance with Article 58b, UCMJ, 10 U.S.C. § 858b.

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (citing R.C.M. 307(c)(3))). Because the appellant did not request a bill of particulars or move to dismiss the specification for failure to state an offense, we analyzed this case for plain error and find that the failure to allege the terminal element was plain and obvious error which was forfeited rather than waived. *United States v. Humphries*, 71 M.J. 209, 215 (C.A.A.F. 2012); *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012), *cert. denied*, 133 S. Ct. 43 (2012) (mem.). A finding of error does not alone warrant dismissal, *Ballan*, 71 M.J. at 34, and whether a remedy is required depends on "whether the defective specification resulted in material prejudice to Appellee's substantial right to notice," *Humphries*, 71 M.J. at 215. The appellant has the burden of demonstrating such material prejudice. *Ballan*, 71 M.J. 34 n.6 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

"Mindful that in the plain error context the defective specification alone is insufficient to constitute substantial prejudice to a material right . . . we look to the record to determine whether notice of the missing element is somewhere extant in the trial record, or whether the element is 'essentially uncontroverted.'" *Humphries*, 71 M.J. at 215-16 (citations omitted). After a close review of the record, we find the appellant was not provided the requisite notice. As in *Humphries*, several salient weaknesses in the record highlight where notice was missing: (1) the Government presented no evidence or witnesses to show how the conduct satisfied either Clause 1, Clause 2, or both clauses of the terminal element; and (2) the Government made no attempt to link evidence or witnesses to either clause of the terminal element in either its opening statement or closing argument. Although the military judge's instructions to the members properly delineated the terminal elements of Article 134, UCMJ, this took place after the close of evidence, "and again, did not alert [the appellant] to the Government's theory of guilt." *Id*. (citing *Fosler*, 70 M.J. at 230). In sum, we can find nothing in the record, as required under *Humphries*, that reasonably placed the appellant on notice of the Government's theory as to which clause(s) of the terminal element of Article 134, UCMJ, she had violated. *Id*. at 216.

Consequently, the Government's failure to allege the terminal element in Specification 3 of Charge IV constituted material prejudice to the appellant's substantial rights to notice. *See* Article 59a, UCMJ, 10 U.S.C. § 859a. We therefore set aside the findings of guilty for Specification 3 of Charge IV.

Conclusion

The finding of guilty of Specification 3 of Charge IV is set aside and dismissed. The remaining findings are correct in law and fact.[5] The sentence is set aside. The record of trial will be returned to The Judge Advocate General for remand to the appropriate convening authority. A rehearing on sentence is authorized.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[5] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).