

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUSTIN A. AUBERT
United States Air Force

ACM S31420

26 November 2008

Sentence adjudged 19 November 2007 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of \$867.00 pay per month for 6 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried at Little Rock Air Force Base, Arkansas. In accordance with his pleas, he was found guilty of wrongfully using cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for six months, forfeiture of \$867.00 pay per month for six months, and a reprimand. The convening authority approved the adjudged sentence. On appeal the appellant asks the Court to set aside the Action and order new post-trial processing that affords the appellant the opportunity to submit additional clemency matters because there is no addendum to the Staff Judge Advocate's Recommendation (SJAR) in the record of trial and there is no way to know if the

convening authority received or considered all of the appellant's clemency submissions. Finding no error, we affirm.

Consideration of Clemency Matters

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)). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989); Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(iii). The preferred method of documenting a convening authority's review of clemency submissions is completion of an addendum to the SJAR. *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990).

The addendum should: (1) inform the convening authority that the accused has submitted matters and that they are attached to the addendum; (2) inform the convening authority that he must consider the matters submitted by the accused before taking action on the case; and (3) list as attachments the matters submitted by the accused. *Id.* (citing *United States v. Foy*, 30 M.J. 664, 665 (A.F.C.M.R. 1990)). While such an addendum is not required,¹ in its absence the Court "must have some reliable means of verifying that the convening authority actually considered the appellant's submissions." *Id.* at 812 (citing *Craig*, 28 M.J. at 325).

In response to appellate defense counsel's brief on this issue, appellate government counsel submitted affidavits from the convening authority and the convening authority's staff judge advocate. These affidavits are an approved method to demonstrate compliance with R.C.M. 1107. *Id.* These affidavits clearly highlight that prior to taking action in the appellant's case, the convening authority considered the appellant's clemency submissions and that the convening authority was advised he must consider the matters submitted by the accused before taking action on the case. Accordingly, we find that the convening authority received and considered the appellant's clemency submissions prior to taking action on the appellant's case.

Action

Although not raised as an assignment of error, we note that in the Action, dated 17 December 2007, the convening authority approved the sentence as adjudged. However, there was no reprimand language in the Action or the promulgating order. A reprimand, if approved, must be in writing in the convening authority's Action. R.C.M. 1003(b)(1) and 1107(f)(4)(G). Nothing in the record indicates the convening authority's intention to reprimand the appellant. Accordingly, we affirm only that portion of the sentence

¹ Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.17 (21 Dec 2007) requires an addendum when matters are submitted by the defense. The Action in this case was signed on 17 December 2007.

consisting of a bad-conduct discharge, confinement for six months, and forfeiture of \$867.00 pay per month for six months. *United States v. Casey*, 32 M.J. 1023 (A.F.C.M.R. 1991).

Conclusion

The approved findings and sentence, as modified, 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, as modified, are

AFFIRMED.

OFFICIAL



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