UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman GABRIELA BALSAMO
United States Air Force

ACM S30071

5 August 2003

Sentence adjudged 20 November 2001 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

PER CURIAM:

A special court-martial consisting of officer members tried the appellant at Lackland Air Force Base on 19 and 20 November 2001. In accordance with her pleas, the court-martial found her guilty of wrongful use of methylenedioxymethamphetamine, also known as ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to her pleas, the court-martial found her guilty of wrongfully and falsely making military identification cards, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was acquitted of conspiring to falsely make military identification cards. Article 81, UCMJ, 10 U.S.C. § 881. The sentence adjudged and approved was a bad-conduct discharge, confinement for 3 months, forfeiture of $500 pay per month for 3 months, and reduction to E-1. The appellant avers that the omission of certain documents from the

post-trial record makes it impossible for this Court to conclude that the post trial processing was conducted properly. For the reasons set forth below, we agree.

The staff judge advocate (SJA) completed his post-trial recommendation to the convening authority on 10 December 2001 and served it on the appellant and counsel the same day. On 19 December 2001, trial defense counsel submitted a letter responding to the staff judge advocate's recommendation (SJAR) and requested clemency on behalf of the appellant. The petition for clemency listed 11 attachments. On 20 December 2001, the SJA forwarded an addendum to the SJAR, informing the convening authority that he must consider the matters submitted by the defense before taking final action on the sentence. The addendum listed as attachments the defense petition for clemency and the same 11 attachments. The convening authority took final action on 21 December 2001.

This Court received the record of trial for review under Article 66(c), UCMJ, 10 U.S.C. § 866(c). It appears the Personal Data Sheet (PDS), listed as an attachment to the SJAR, was not included in the record of trial among the materials supplied to the convening authority. Also, certain documents, listed as attachments to the addendum, were not included with the appellant's clemency submissions in the record of trial. Specifically, the character statements from Staff Sergeants Higgenbotham and Lujan, the commander's indorsement forwarding the charge sheet, an excerpt from Department of the Army Pamphlet (DA Pam) 27-9 (1 Apr 2001), and a newspaper article were not included with the defense clemency submissions in the record of trial. There is no other evidence that the convening authority reviewed these documents prior to taking action.

We consider first the PDS missing as an attachment to the SJAR. Rule for Courts-Martial (R.C.M.) 1106(d)(3)(C) states that the SJAR must include "[a] summary of the accused's service record, to include length and character of service, awards and decorations received, and any records of non-judicial punishment and previous convictions." We have previously excused missing attachments to the SJAR where the SJAR itself contained the information in the missing attachments. *See United States v. Monroe*, ACM 32592, (A.F. Ct. Crim. App. 14 May 1998). In this case, however, the information contained in the missing PDS is not discussed in the recommendation. Had the PDS been attached to the SJAR, the requirements set forth in R.C.M. 1106(d)(3)(C) would be met. As a result of its omission, however, the SJAR does not contain the required information. This was error.

We next consider the documents missing from the appellant's clemency submission. Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2), states in pertinent part that "Action on the sentence of a court-martial shall be taken by the convening authority . . . only after consideration of any matters submitted by the accused . . . ." "[T]he record of trial must clearly show that the convening authority did in fact consider any post-trial matters properly submitted by the accused . . . before taking action on the case." *United States v. Godreau*, 31 M.J. 809, 811 (A.F.C.M.R. 1990) (citing *United States v. Craig*, 28

M.J. 321, 325 (C.M.A. 1989)). This Court will not "'guess' as to whether clemency matters prepared by the defense counsel were attached to the recommendation or otherwise considered by the convening authority," *Craig*, 28 M.J. at 325 (quoting *United States v. Hallums*, 26 M.J. 838, 841 (A.C.M.R. 1988)), especially when the omitted documents include a favorable recommendation by the appellant's commander.

The government asserts that because the missing attachments are included in other sections of the record of trial, the convening authority must have reviewed them. We reject this argument. The convening authority is not required to review the record of trial, and there is no indication he did so in this case.

In the past, we have allowed the government to "enhance the paper trail" by submitting documents and affidavits on appeal clarifying that the convening authority considered the submitted documents. *See United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989). However, the government has not offered such matters for our consideration in this case.

Recognizing that "the post-trial review and the action of the convening authority . . . is oftentimes the most critical [step] of all for an accused because of the convening authority's broad powers which are not enjoyed by boards of review or even by [our superior] [c]ourt," we find that the omission of the listed attachments to the SJAR and the addendum was prejudicial error requiring a remand. *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958); Article 59a, UCMJ, 10 U.S.C. § 859a. Therefore, we set aside the action. The record of trial is returned to The Judge Advocate General for submission to the appropriate convening authority for new post-trial processing.

OFFICIAL

HEATHER D. LABE
Clerk of Court