UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LUCAS W. BOYKEN
United States Air Force

ACM S30087

2 April 2004

Sentence adjudged 26 October 2001 by SPCM convened at RAF Lakenheath, United Kingdom. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Jennifer R. Rider, and Spencer R. Fisher (legal intern).

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

The appellant was convicted, in accordance with his pleas, of using psilocybin mushrooms on divers occasions, using marijuana on divers occasions (in two specifications), using ecstasy on divers occasions, and distribution of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and a reduction to E-1. The appellant assigns two errors concerning the post-trial processing of his case. First, he asserts that the convening authority's action is ambiguous because it failed to explicitly approve the adjudged bad-conduct discharge.

Second, he argues that the staff judge advocate (SJA) erred when he failed to include the military judge's clemency recommendation in the staff judge advocate recommendation (SJAR). For the reasons discussed below, we find it necessary to return this case for a new action and promulgating order.

I. Failure to Mention Clemency Recommendation in SJAR

For ease of analysis, we will first address the appellant's second assignment of error. After announcing the sentence, the military judge stated that if the appellant elected to volunteer for the Air Force Return to Duty Program, she would "recommend that the convening authority seriously consider that [he] be given that opportunity." She added, however, that if the appellant did not volunteer for the program, her "sentence would not change one bit." She said that, "This recommendation should not be misunderstood as a recommendation for any other type of clemency, and it does not impeach the bad conduct discharge I have adjudged, nor any other element of this sentence."

The SJA prepared a recommendation to the convening authority and served it on the defense. The SJAR did not mention the military judge's clemency recommendation. The trial defense counsel did not comment upon the absence of this information in his submission to the convening authority. However, the trial defense counsel did explain the military judge's clemency recommendation and he stated that the appellant elected not to apply for the Return to Duty Program. The trial defense counsel asked the convening authority to reduce the appellant's confinement if he approved the bad-conduct discharge.

The addendum to the SJAR made no mention of the military judge's clemency recommendation or the trial defense counsel's request for clemency. The addendum did, however, contain the defense submissions as attachments. The SJAR and addendum urged the convening authority to approve the sentence as adjudged. They also advised the convening authority that he "must consider" the defense submissions before taking action on the case.

Rule for Courts-Martial (R.C.M.) 1106(f)(6) provides that defense counsel's failure to comment on any matter in the SJAR waives a later claim of error "in the absence of plain error." We review application of the plain error doctrine de novo, as a question of law. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). To prevail under a plain-error analysis, the appellant has the burden of persuading this Court that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id.* Because of the highly discretionary nature of the convening authority's action on a sentence, we may grant relief if an appellant presents "some colorable showing of possible prejudice." *Id.* (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

We first review for obvious error. In R.C.M. 1106(d)(3)(B), the President specifically directed that an SJA advise the convening authority of such recommendations. The rule states that an SJAR shall include concise information as to, "A recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence[.]" Our superior court has also held that a recommendation by the military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence. *United States v. Lee*, 50 M.J. 296 (C.A.A.F. 1999) (citing *United States v. Clear*, 34 M.J. 129 (C.M.A. 1992)). Therefore, it was an obvious error for the SJA to fail to advise the convening authority of the military judge's clemency recommendation, made at the time of sentencing.

We next test for prejudice. Because the trial defense counsel mentioned the military judge's clemency recommendation in the clemency petition, and the clemency petition is listed as an attachment to the addendum, we may presume the convening authority reviewed it. *United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1990). We are further persuaded that the convening authority examined the defense submissions because he approved only 4 of the 6 months of adjudged confinement, contrary to the recommendation of the SJA. Since the convening authority was made aware of the military judge's clemency recommendation, the appellant has failed to carry his burden of making a colorable showing of prejudice. Finally, the military judge's recommendation was expressly made conditional upon the appellant's application for the Return to Duty Program. However, the appellant declined the opportunity to do so, therefore the clemency recommendation would have been of little value. For these reasons, we find the appellant has failed to carry his burden of making a colorable showing of prejudice. We find no plain error.

II. Ambiguous Action

The action signed by the convening authority stated in pertinent part:

> [O]nly so much of the sentence as provides for reduction to the grade of E-1 and confinement for 4 months is approved and except for that part of the sentence extending to a bad conduct discharge, will be executed. The Air Force Corrections System is designated for the purpose of confinement, and the confinement will be served therein or elsewhere as the Director, Air Force Corrections, may direct. Unless competent authority otherwise directs, upon completion of sentence to confinement [sic], A1C Boyken will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review of the conviction.

We review de novo the accuracy and effect of a convening authority's action. *United States v. Loft*, 10 M.J. 266 (C.M.A. 1981); *United States v. Otero*, 26 M.J. 546 (A.F.C.M.R. 1988).

The convening authority may "approve, disapprove, commute, or suspend the sentence, in whole or in part." Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2). The formal action by the convening authority is used to indicate the sentence approved and to order the sentence executed. A bad-conduct discharge may not be ordered executed until appellate review is completed, or the appellant waives or withdraws his case from such review. *See* Article 71(c)(1), UCMJ, 10 U.S.C. § 871(c)(1).

R.C.M. 1107(g) permits this Court to instruct a convening authority to withdraw an incomplete, ambiguous, or erroneous action and substitute a corrected action. We, therefore, must first determine whether the action is ambiguous. The first portion of the language in the action quoted above suggests that the convening authority only intended to approve 4 months of confinement and a reduction to E-1. However, the second portion relating to the execution of the sentence "except for the bad conduct discharge," implies that the convening authority intended to approve the bad-conduct discharge. Furthermore, the action provided that the appellant "will be required, under Article 76a, UCMJ, to take leave pending completion of appellate review of the conviction," a requirement which would only be necessary if the bad-conduct discharge was approved. For these reasons, we conclude that the action of the convening authority is ambiguous.

We ordered an affidavit from the convening authority to determine what sentence he intended to approve. *See United States v. Lower*, 10 M.J. 263, 265 (C.M.A. 1981) ("[S]ome indication of the meaning of the published approval of sentence can only be forthcoming from the authority who drafted it. We decline to lay down a hard rule as to the evidentiary form this need take."). The convening authority stated it was his intention to approve the bad-conduct discharge, 4 months of confinement, and a reduction to E-1. We, therefore, find that the convening authority intended to approve only so much of the sentence as included a bad-conduct discharge, confinement for 4 months, and a reduction to E-1.

Since the action fails to unambiguously state the intent of the convening authority, it must be corrected. *United States v. Vogle*, ACM S29646 (f rev) (A.F. Ct. Crim. App. 8 Feb 2001), *aff'd*, 53 M.J. 428 (C.A.A.F. 2000) (summary disposition); *United States v. Scott*, 49 M.J. 160 (C.A.A.F. 1998) (summary disposition); *United States v. Madden*, 32 M.J. 17 (C.M.A. 1990) (summary disposition); *Otero*, 26 M.J. at 549; *United States v. Schiaffo*, 43 M.J. 835, 837 (Army Ct. Crim. App. 1996).

Accordingly, we return the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the ambiguous action and substitute a

corrected action and promulgating order. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

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