

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Major BRENDA M. BRENNAN
United States Air Force**

ACM 34189

5 February 2002

Sentence adjudged 24 May 2000 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Barbara G. Brand.

Approved sentence: Dismissal and confinement for 60 days.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Christa S. Cothrel.

Before

**SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges**

OPINION OF THE COURT

ROBERTS, Judge:

The appellant was convicted, pursuant to her pleas, of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a dismissal and confinement for 60 days. The Secretary of the Air Force (Secretary) remitted the dismissal on 19 January 2001. Consequently, the appellant's sentence consists of confinement for 60 days.

The appellant raised the following issues on appeal: (1) whether this Court has jurisdiction to review the appellant's case after the Secretary remitted the dismissal; (2) whether the trial judge committed plain error when she sua sponte failed to instruct the court members that any adjudged forfeitures would have been assessed against the appellant's retired pay upon her retirement; (3) whether automatic forfeitures triggered by

operation of Article 58b, UCMJ, 10 U.S.C. § 858b, violated the Double Jeopardy Clause of the Fifth Amendment; and (4) whether automatic forfeitures assessed against the appellant by operation of Article 58b, UCMJ, must be returned to the appellant in light of the fact that the Secretary remitted the appellant's dismissal.

AIR FORCE COURT OF CRIMINAL APPEALS JURISDICTION

The Air Force Judge Advocate General referred the appellant's case to this Court pursuant to Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1), and Rule for Court-Martial (R.C.M.) 1201(a)(2). While the case was pending before this Court, the Secretary remitted the adjudged, but unexecuted, dismissal. The appellant avers, and the government concurs, that this Court still retains jurisdiction over the appellant's case. We agree. Once a Court of Criminal Appeals has jurisdiction over a case, no action by a convening authority diminishes it. *United States v. Johnson*, 45 M.J. 88, 90 (1996). The Secretary is the senior convening authority in the Air Force. Article 22(a)(4), UCMJ, 10 U.S.C. § 822(a)(4).

INSTRUCTIONAL ERROR

The appellant next claims that the trial judge should have sua sponte instructed the court members that any adjudged forfeitures would be taken from the appellant's retired pay as well as active duty pay. We note that the appellant did not request such an instruction at trial, nor did she object to the instructions given by the trial judge. Therefore, the appellant forfeited appellate review of this issue on appeal, absent plain error. *United States v. Guthrie*, 53 M.J. 103, 106 (2000) (citing *United States v. Maxwell*, 45 MJ 406, 426 (1996)); see also R.C.M. 920(f). Plain error is error that is clear and obvious, and "materially prejudices the substantial rights of the [appellant]." *United States v. Powell*, 49 M.J. 460, 464 (1998). While we may act on plain error, we are required to correct a plain error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)). See also Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We find that the trial judge did not err when she failed to sua sponte give the instruction raised by the appellant on appeal. There is no evidence in the record of trial that the court members were confused about the available sentencing options. We note that the court members did not adjudge forfeitures. Consequently, the appellant, in effect, asks this Court to speculate as to what effect a non-requested instruction may have had on a sentencing option that the court members did not adjudge. This we decline to do, particularly in light of the Secretary's remission of the dismissal, which moots this claimed error.

AUTOMATIC FORFEITURES AND THE DOUBLE JEOPARDY CLAUSE

Our superior court decided this assigned error adverse to the appellant, and we decline to further address it. *United States v. Promin*, 54 M.J. 467 (2001).

RETURN OF AUTOMATIC FORFEITURES

The appellant's last claim is that the automatic forfeitures, assessed pursuant to Article 58b, UCMJ, should be returned to her. In particular, the appellant contends that, by virtue of the Secretary's remission of the dismissal, she no longer has a sentence that falls within the automatic forfeiture provisions. As noted by the appellant, automatic forfeitures are to be returned if the sentence "as finally approved" does not provide for a punishment that triggers the automatic forfeitures. Article 58b(c), UCMJ. The Secretary's remission of the unexecuted dismissal canceled it. Therefore, the automatic forfeiture provisions of Article 58b, UCMJ, will not be triggered, and the automatic forfeitures previously collected from the appellant must be returned to her. Article 58b(c), UCMJ. *See also United States v. Indri*, 51 M.J. 508, 510 (C.G. Ct. Crim. App. 1999). Consequently, the convening authority will have to accomplish a new action and court-martial order to reflect the Secretary's remission of the dismissal and the return of automatic forfeitures. *See Air Force Instruction 51-201, Administration of Military Justice*, ¶¶ 10.5. and 10.6.1.6 (2 Oct 1997). We return the record of trial to the Judge Advocate General for a new convening authority action. The record of trial does not need to be returned to this Court after the action is done.

CONCLUSION

The approved findings 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court