UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GODFREY S. DAY
United States Air Force

ACM 35448

6 January 2004

Sentence adjudged 6 April 2002 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 27 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Robert V. Combs.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of dereliction of duty and one specification of graft, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. He was convicted, contrary to his pleas, of conspiracy, suffering a prisoner to escape, and bribery, in violation of Articles 81, 96, and 134, UCMJ, 10 U.S.C. §§ 881, 896, 934. He was acquitted of one specification of dereliction of duty. The general court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 30 months, and reduction to E-1. The convening authority disapproved and dismissed the charge and specification pertaining to conspiracy and approved only so much of the sentence as provided for a dishonorable discharge, confinement for 27 months, and reduction to E-1. Although the appellant submitted the case on its merits, we find error and order corrective action.

The appellant was a member of the 2d Security Forces Squadron at Barksdale Air Force Base, Louisiana. His place of duty was the confinement facility on that base. The charges and specifications in this case arose from the appellant's improper relationship with a pretrial confinee, Senior Airman (SrA) Broussard, and his cooperation with SrA Broussard's plan to escape. The specification of the conspiracy charge alleged that the appellant:

> [D]id, at or near Barksdale Air Force Base, Louisiana, from on or about 11 May 2001 to on or about 23 June 2001, conspire with Senior Airman Jeremy Broussard to commit an offense under the Uniform Code of Military Justice, to wit: escape from pretrial confinement, and in order to effect the object of the conspiracy the said [appellant] removed a window screen.

The military judge found the appellant guilty of this charge and excepted the words "removed a window screen" from the specification, substituting the words "arranged for Airman Broussard's access to the room from which he escaped." Subsequently, the staff judge advocate's recommendation (SJAR) advised the convening authority that this finding by exception and substitution was legally insufficient, insofar as the substituted language was more than a minor variance from the excepted language.[*]

The SJAR went on to advise that "[b]ased on the disapproval of guilty for Charge I and its Specification, I further recommend that you reduce the period of confinement by three months." The adequacy of this advice is the issue to be considered in this opinion. Specifically, the issue is whether the convening authority was properly advised of the standard to be applied in reassessing the appellant's sentence, as set forth in *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

This Court reviews post-trial processing de novo. Neither trial nor appellate defense counsel objected to the adequacy of the SJAR advice on this matter, although the trial defense counsel, in his request for clemency on behalf of the appellant, requested that the sentence be reduced by more than three months. "Failure of counsel for the accused to comment on any matter in the [SJAR] . . . in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error." Rule for Courts-Martial 1106(f)(6). Plain error is error that is clear or obvious and that operates to the material prejudice of the substantial rights of the accused. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). *See also United States v. Blodgett*, 20 M.J. 756 (A.F.C.M.R. 1985).

[*] This Court is not addressing the accuracy of this legal conclusion.

Because the convening authority modified a finding of guilt, he was required to reassess the sentence. *Reed*, 33 M.J. at 99. When the convening authority cured the error and consequently reassessed sentence, he was governed by the same rules set forth in *Sales* for appellate authorities. *Id.*

"[I]f the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *Sales*, 22 M.J. at 308. In other words, in reassessing sentence, the court or convening authority must put the accused in the position he or she would have been in had there been no error to begin with. Absent proper legal guidance to this effect, the convening authority's action on the sentence will appear arbitrary. *Reed*, 33 M.J. at 100. In the case sub judice, the SJAR provided no guidance at all to the convening authority as to the standard he was to apply in reassessing the sentence. The advice was inadequate as a matter of law and, therefore, clearly erroneous.

As to the question of material prejudice, had the convening authority been properly advised, he might have concluded that he was required to adjust the sentence to one less severe than that actually approved, in order to put the appellant in the position the appellant would have been in had the error not occurred. In any event, a consequence of this lack of guidance is that the convening authority is not shielded from the appearance of arbitrariness. We conclude that the error in the SJAR acted to the material prejudice of the appellant's substantial rights and, therefore, constitutes plain error.

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator