UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ZACHARY A. GOODING
United States Air Force

ACM S32337

6 December 2016

Sentence adjudged 22 May 2015 by SPCM convened at Aviano Air Base, Italy. Military Judge: Donald R. Eller, Jr. (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Isaac C. Kennen and Major Virginia M. Bare.

Appellate Counsel for the United States: Major Collin F. Delaney; Captain Matthew L. Tusing; and Gerald R. Bruce, Esquire.

Before

MAYBERRY, SPERANZA, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

A special court-martial composed of a military judge sitting alone found Appellant guilty, in accordance with his pleas, of one specification of conspiracy to distribute 3,4 methylenedioxymethamphetamine (MDMA), one specification of wrongfully possessing MDMA on divers occasions, one specification of wrongfully distributing MDMA on divers occasions, one specification of wrongfully using MDMA on divers occasions, two specifications of wrongfully using cocaine on divers occasions, and one specification of

wrongfully using tetrahydrocannabinol, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§ 881, 912a. The court-martial sentenced Appellant to a bad-conduct discharge, confinement for eight months, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before us, Appellant raises three assignments of error: that the staff judge advocate provided inaccurate advice to the convening authority regarding the impact of a bad-conduct discharge on Appellant; that the addendum to the staff judge advocate's recommendation (SJAR) to the convening authority raised new matter to which Appellant was not afforded an opportunity to respond; and that Appellant was subjected to unlawful post-trial punishment with regard to his pay and allowances. In addition, although not raised by the parties, we address an error in the staff judge advocate's advice to the convening authority regarding the maximum imposable punishment in this case.[1] We find the staff judge advocate's erroneous advice regarding the maximum imposable sentence prejudiced Appellant, and we order new post-trial processing.[2]

Background

While stationed at Little Rock Air Force Base, Arkansas, Appellant began using MDMA in the summer of 2013 after he observed other Air Force members inhaling the drug at a party. He obtained MDMA from another Airman, Senior Airman (SrA) M, and he often used the drug with other Airmen and civilians. On two occasions in September or October of 2013, Appellant and SrA M used cocaine together. SrA M purchased the cocaine from a civilian when he could not obtain MDMA. In October 2013, SrA M asked Appellant if he would help SrA M sell MDMA to civilians. Appellant agreed. Appellant received a bag from SrA M containing two to three grams of MDMA, which Appellant would package in capsules and sell to civilians at parties he attended; he would then return the proceeds to SrA M. This process occurred multiple times before Appellant's assignment to Aviano Air Base, Italy in December 2013.

Appellant's drug abuse temporarily abated after his transfer to Italy. However, during a visit back to Arkansas in September 2014, Appellant met up with SrA M and they again used cocaine together. Then in late December 2014 in Italy, Appellant used cocaine again on consecutive nights with a mixed group of Airmen and civilians. On one of those nights, Appellant also took two puffs from a cigarette containing marijuana.

[1] This court specified the following issue for the parties to brief: WHAT IF ANY REMEDY SHOULD THIS COURT PROVIDE AS A RESULT OF THE STAFF JUDGE ADVOCATE'S ADVICE TO THE CONVENING AUTHORITY ON THE MAXIMUM IMPOSABLE SENTENCE FOR THE OFFENSES FOR WHICH THE ACCUSED WAS CONVICTED?

[2] We note the promulgating order contains one misspelling each of "methylenedioxymethamphetamine" and "tetrahydrocannabinol." Because we order new post-trial processing on other grounds, these discrepancies are moot.

Appellant entered into a pretrial agreement whereby the convening authority agreed to refer Appellant's case to a special court-martial. In return, Appellant agreed to plead guilty to certain charges and specifications, to be tried by a military judge alone, to enter into a stipulation of fact, and to cooperate in the investigation and prosecution of certain other named individuals, among other commitments. The agreement did not include any limitation on the sentence the convening authority would approve. The charges and specifications were duly referred to a special court-martial, and Appellant was tried and sentenced by a military judge sitting alone on 22 May 2015.

On 16 July 2015, the staff judge advocate signed the SJAR. Among other contents, the SJAR noted the sentence imposed by the military judge and went on to state: "The maximum imposable sentence for the offenses for which the accused was convicted is reduction to the grade of E-1, 7 years of confinement, a dishonorable discharge, and total forfeitures." The SJAR then described the terms of the pretrial agreement, noted that no further action by the convening authority was required by the pretrial agreement, and recommended the convening authority approve the sentence as adjudged.

On 7 August 2015, trial defense counsel submitted a request for clemency consisting of over 60 pages, including a six-page memorandum from the defense counsel and numerous attachments. Trial defense counsel specifically requested the convening authority reduce Appellant's term of confinement from eight to six months and disapprove his reduction in rank. In the context of arguing that the requested clemency would still leave Appellant with a substantial punishment, trial defense counsel stated the bad-conduct discharge would "deprive[] [Appellant] of all military service benefits going forward." Among the listed attachments to trial defense counsel's memorandum was a two-page document described as a "Benefits Eligibility Table." This document, whose origin was not explained, was entitled "U.S. Government Benefits Eligibility Based on Type of Discharge." In pertinent part, it purported to show that a bad-conduct discharge adjudged by a special court-martial generally requires a "determination of the Administrating Agency" before various "Veterans Benefits" and certain other benefits may be received, and renders the individual "ineligible" for a number of "Military Benefits" and "Other Benefits." Trial defense counsel's memorandum noted the maximum sentence a special court-martial may impose includes confinement for 12 months, forfeiture of two-thirds pay for 12 months, reduction to E-1, and a bad-conduct discharge. However, trial defense counsel did not specifically object to or comment on the maximum punishment advice in the SJAR.

On 12 August 2015, the staff judge advocate signed an addendum to the SJAR. Paragraph 4 of the addendum reads as follows:

> Finally, the defense overstates the impact of the Bad Conduct Discharge by asserting it will result in the loss of Veterans' Benefits. This is simply untrue. As [Appellant] completed a

> prior enlistment on 8 May 2013, he would be able to apply for a DD Form 214, *Certificate of Release or Discharge from Active Duty*, from that enlistment and use it to claim all the benefits available to an honorable discharge. 38 CFR 21.7020(b)(6)(vi).[3]

The convening authority took action the same day the addendum was signed, approving the findings and sentence as adjudged.

Additional facts are included as necessary in the discussion below.

Staff Judge Advocate Advice Regarding Bad-Conduct Discharge

Appellant takes issue with the staff judge advocate's assertion in the addendum that Appellant would be able "to claim all the benefits available to an honorable discharge," notwithstanding his bad-conduct discharge, based on his completion of a prior honorable term of enlistment. Essentially, Appellant argues the advice is misleading because it suggests Appellant's benefits will not be impacted when, in fact, determination of benefits is a complex process and an individual's right to a particular benefit cannot be said to exist until the relevant agencies have made their determinations. The Government counters that the substance of the advice is not inaccurate; that the staff judge advocate was not required to comment on the effect of a bad-conduct discharge at all, so Appellant cannot claim the advice was not detailed enough; that the addendum and the clemency request must be read together in assessing the depth of the advice the convening authority received; and that even if there was error, Appellant was not prejudiced.

The proper completion of post-trial processing is a question of law, which this court reviews de novo. *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (citing *United States v. Sheffield,* 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citation omitted)). "Absent defense waiver or forfeiture [], erroneous advice on substantial matters of fact or law will invalidate the action when the error prejudices the accused." *United States v. Kerwin,* 46 M.J. 588, 590 (A.F. Ct. Crim. App. 1996) (citations omitted). To establish prejudice due to errors impacting an appellant's request for clemency from the

[3] 38 C.F.R. 21.7020(b)(6)(vi) reads as follows:

> If the second period of active-duty service referred to in paragraph (b)(6)(iv) [relating to individuals released or discharged from active duty after serving less than 12 months] or (b)(6)(v) [relating to former enlisted members and warrant officers who were assigned to officer training school and thereafter accepted a commission as an officer] of this section is of such nature or character that, when aggregated with the earlier period of service referred to in that paragraph, it would cause the individual to be divested of entitlement to educational assistance otherwise established by the earlier period of active duty, the two periods of service will not be aggregated and will not be considered a single period of continuous active duty.

convening authority, the appellant must make "some colorable showing of possible prejudice . . . ." *LeBlanc*, 74 M.J. at 660 (citing *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005)).

Based on the record before us, Appellant has not demonstrated that the staff judge advocate's advice with respect to the effect of a bad-conduct discharge was substantively inaccurate. The information trial defense counsel submitted to the convening authority with respect to the effect of a bad-conduct discharge on Appellant was vague and incomplete—what Appellant concedes was an "imperfect summary." The staff judge advocate responded by advising the convening authority that, contrary to trial defense counsel's claim that Appellant's bad-conduct discharge "would" deprive Appellant of future benefits derived from his military service, Appellant could in fact seek benefits based on his completion of a prior term of honorable service. Nothing before the court indicates this advice, as applied to Appellant, was wrong. It is true that the staff judge advocate did not provide an extensive analysis of a complicated process. However, the fact that the addendum did not include more information does not by itself render the information provided erroneous.

However, the staff judge advocate's reference to 38 CFR 21.7020(b)(6)(vi) to support his advice was inapposite. We are not persuaded by the Government's contention that this provision was "directly germane to matters raised by Appellant." So far as the record indicates, Appellant was neither released nor discharged after serving less than 12 months, nor did he attend officer training school as an enlisted member and subsequently accept a commission; therefore, this provision has no evident bearing on Appellant's case.[4] To the extent the staff judge advocate cited it as direct support for his advice, the reference is erroneous.

Still, we find no prejudice to Appellant from this error. As stated above, Appellant has not demonstrated that the substance of the staff judge advocate's advice was wrong. The reference to 38 C.F.R. 21.7020(b)(6)(vi) neither supports nor undermines the advice; it is merely irrelevant as applied to Appellant. We find no colorable showing that Appellant's position was worse than it would have been had the error not occurred.

New Matter in the Addendum to the SJAR

Appellant next contends the staff judge advocate's advice in the addendum regarding the effect of a bad-conduct discharge was new matter that should have been served on Appellant and his counsel, and Appellant should have been given 10 days to respond in accordance with Rule for Courts-Martial (R.C.M.) 1106(f)(7). The proper completion of post-trial processing is a question of law which this court reviews de novo. *LeBlanc*, 74 M.J. at 660 (citing *Sheffield*, 60 M.J. at 593). To obtain relief for new matter

[4] *See* Note 3, *supra*.

not properly served on an appellant and counsel, the appellant must show what would have been submitted in response to the new matter had it been properly provided. *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997) (citation omitted). However, the threshold is low, and the court will not speculate on what the convening authority might have done if defense counsel had been given an opportunity to comment so long as the appellant makes some colorable showing of possible prejudice. *Id.* at 323–24.

Appellant acknowledges that new matter "does not ordinarily include any discussion by the staff judge advocate . . . of the correctness of the initial defense comments on the [staff judge advocate] recommendation." R.C.M. 1106(f)(7), Discussion; *see United States v. Del Carmen Scott*, 66 M.J. 1, 3 (C.A.A.F. 2008); *United States v. Jones*, 44 M.J. 242, 243 (C.A.A.F. 1996). Appellant's clemency request commented—albeit in a passing and incomplete fashion—on the effect of a bad-conduct discharge on Appellant's future ability to claim service-related benefits. Appellant contends, nevertheless, that his clemency request did not discuss the impact of Appellant's previous period of honorable service on the effect of the bad-conduct discharge. Therefore, Appellant argues, the staff judge advocate raised new matter when he addressed the effect of Appellant's completed prior term of honorable service in the addendum. We disagree.

Trial defense counsel specifically addressed the effect of a bad-conduct discharge on Appellant in the clemency request. He did not address what, if any, effect Appellant's prior enlistment would have on his ability to claim future benefits, but the fact of Appellant's prior enlistment was plainly in the record. Any relevant analysis of the effects of a bad-conduct discharge as applied to Appellant would have taken this into account. When trial defense counsel purported to describe the effects a bad-conduct discharge would have on Appellant, he implicitly represented these impacts took into account Appellant's prior service history. The staff judge advocate's comments regarding the bad-conduct discharge were a discussion of the correctness of trial defense counsel's potentially misleading description; they were not new matter.

Illegal Post-Trial Punishment

Appellant was sentenced by a special court-martial to a bad-conduct discharge, confinement for eight months, and reduction to E-1. Because Appellant was sentenced to a punitive discharge and a term of confinement, by law he forfeited two-thirds of his pay, but not his allowances, during his confinement. Article 58b, UCMJ, 10 U.S.C. § 858b. However, the 5 June 2015 memorandum from the servicing legal office addressed to the base finance office mistakenly advised Appellant's punishment included forfeiture of two-thirds pay *and allowances*. The error was later identified and on 5 August 2015 the legal office sent a corrected memorandum to the same addressees, specifically noting the error and requesting Appellant receive all appropriate back payment. Appellant raised the issue in his request for clemency, acknowledging the error was in the process of correction but asserting nevertheless that Appellant's spouse had suffered severe hardship.

Appellant contends he was subjected to illegal post-trial punishment which the legal office's corrective action failed to fully remedy. He points to his spouse's clemency memorandum for the convening authority expressing anxiety about being able to pay her own bills and Appellant's during Appellant's confinement. Appellant requests meaningful sentence relief both to rectify the harm to Appellant and his family and to send a "message" regarding the importance of attention to detail at every step of the court-martial process.

The Government counters that this court does not have jurisdiction to review this matter, pointing to our sister court's unpublished per curiam opinion in *United States v. Perez*, NMCCA 201100650 (N-M. Ct. Crim. App. 30 April 2012) (unpub. op.). We do not agree. The Government misinterprets the reasoning and significance of the Navy-Marine Corps Court of Criminal Appeals' (NMCCA) decision. Perez was convicted of larceny of $3,273.01, wrongful appropriation of a total of $300.00, and assault consummated by a battery. *Id.* at 1–2. His sentence included, *inter alia*, a fine of $6,500.00. *Id.* at 1. On appeal, Perez argued he was entitled to relief because his fine exceeded the amount of his unjust enrichment—he had made some restitution—and because administrative errors caused some non-payment of funds. *Id.* at 2. The NMCCA found no relief warranted under Article 66(c), UCMJ, reasoning in part that "the post-trial administrative errors that impacted his pay status had nothing to do with [his] misconduct, or with his failure to make restitution." *Id.* at 3–4. In a footnote, the NMCCA explained Perez's pay problems arose two years after he committed the larcenous actions, and did not impact his ability to make restitution during those intervening two years. *Id.* at 4 n.1. Contrary to the Government's suggestion, the NMCCA did not find it was foreclosed from considering the effect of administrative pay errors in conducting its Article 66(c) review; rather, it simply found those errors were not a compelling basis for relieving Perez of his fine under the facts of that case.

Essentially, Appellant invites us to exercise our broad authority and specific mandate under Article 66(c) to approve only so much of his sentence as we determine to be correct in law and fact, and that we find should be approved on the basis of the whole record. 10 U.S.C. §§ 866(c), 867(c); *see United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Our superior court has consistently recognized this "broad power" of a Court of Criminal Appeals "to moot claims of prejudice . . . ." *Tardif*, 57 M.J. at 223 (quoting *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998)) (citations omitted). Although this court does not engage in acts of clemency, *see United States v. Healy*, 26 M.J. 394, 396–97 (C.M.A. 1988), we have granted sentence relief when warranted for unlawful implementation of court-martial sentences and other flaws in the administration of the court-martial process. *See, e.g., United States v. Bodkins*, 60 M.J. 322, 324 (C.A.A.F. 2004) (Courts of Criminal Appeals have broad discretion to grant or deny relief for unreasonable delays in post-trial processing); *United States v. Gay*, 74 M.J. 736, 743–45 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016) (granting sentence appropriateness relief for conditions of post-trial confinement not amounting to cruel or

unusual punishment). Therefore, we cannot agree with the Government that the implementation of an element of Appellant's punishment—his partial forfeiture of pay—is beyond our consideration in conducting our Article 66(c) review.

Nevertheless, we do not find the administrative pay error warrants sentence relief in this case. The error was corrected two months after it occurred. The legal office directed Appellant receive back payment for the erroneously-withheld allowances. There is no evidence of malice towards Appellant or that this was anything other than an administrative error. The net effect was that Appellant was temporarily deprived of a portion of his allowances while he was confined. Appellant has not demonstrated any enduring harm or effect resulting from the error that would lead us to conclude his adjudged sentence should not be approved.

Maximum Punishment Advice

We do, however, find Appellant is entitled to relief on the specified issue. The proper completion of post-trial processing is a question of law which this court reviews de novo. *LeBlanc*, 74 M.J. at 660 (citing *Sheffield*, 60 M.J. at 593). Failure to timely comment on matters in the SJAR, or matters attached to the recommendation, forfeits any later claim of error in the absence of plain error. *Id.* (citing R.C.M. 1106(f)(6); *Scalo*, 60 M.J. at 436). To prevail under a plain error analysis, an appellant must show (1) there was an error; (2) the error was plain and obvious; and (3) the error materially prejudiced a substantial right. *Id.* However, even in the context of plain error analysis, the threshold for establishing prejudice from errors impacting an appellant's request for clemency from the convening authority is low; the appellant need only make "some 'colorable showing of possible prejudice.'" *Id*. (quoting *Scalo*, 60 M.J. at 437).

The staff judge advocate recommendation advised the convening authority that the maximum imposable sentence included a dishonorable discharge, seven years of confinement, total forfeiture of pay and allowances, and reduction to E-1. Except for the reduction, this advice was wrong on every count. Appellant was tried by a special court-martial, which could not impose a dishonorable discharge, confinement greater than one year, or forfeiture of pay exceeding two-thirds pay per month, not to include allowances, for more than 12 months. R.C.M. 201(f)(2)(b). In his clemency memorandum to the convening authority, trial defense counsel recited the correct maximum punishment a special court-martial could adjudge; however, he did not specifically comment on the error in the SJAR. The addendum to the SJAR also failed to note the error.

The parties agree the staff judge advocate's advice regarding the maximum punishment was error, and that it was plain error. We concur. However, the parties disagree as to whether there is a colorable showing of possible prejudice to Appellant's opportunity to obtain clemency from the convening authority.

The Government argues Appellant was not prejudiced because the pretrial agreement, whereby the convening authority agreed to refer the case to a special court-martial without any other sentence limitation, indicated the convening authority believed 12 months confinement and a bad-conduct discharge was an appropriate sentence. Therefore, the Government contends, any punishment up to the maximum would have been an acceptable result to the convening authority. We cannot agree with this logic, which strips important post-trial rights provided for in R.C.M. 1105, 1106, and 1107 of their purpose. The decision to refer charges to trial by a special court-martial indicates nothing more than a determination that a special court-martial is an appropriate forum. It is not an indication that the convening authority has determined that the maximum punishment, or any other punishment, is appropriate before the trial even takes place. The convening authority is not in a position to properly determine what sentence to approve until he can consider the result of the trial, the recommendation of his staff judge advocate, any matters submitted by the accused, and any other material he may appropriately consider under R.C.M. 1107.

The Government also asserts that Appellant's sentence was modest in light of the severity of his crimes, and therefore clemency was unlikely. We do not discount the seriousness of Appellant's offenses. However, his punishment was also substantial. The bad-conduct discharge and eight months confinement might have appeared even more substantial to the convening authority had the staff judge advocate correctly advised him the maximum possible confinement was only 12 months rather than seven years.

The Government also suggests that, notwithstanding the staff judge advocate's advice, the convening authority would have known the limits of his authority. The Government points to this court's unpublished opinion in *United States v. Knight*, ACM S31614 (A.F. Ct. Crim. App. 28 June 2010) (unpub. op.), where a facially similar error in the SJAR occurred. Under the circumstances in *Knight*, this court declined to find the erroneous advice prejudiced the appellant. *Id.* at 8. However, we are not convinced the error was harmless here. The Government also cites our recent unpublished decision in *United States v. Garcia*, ACM 38814 (A.F. Ct. Crim. App. 16 August 2016) (unpub. op.), where we also found an SJAR error regarding maximum punishment to be harmless. However, *Garcia* is easily distinguished from the present case. In that case, the SJAR mistakenly stated the maximum term of confinement at Garcia's general court-martial was 16 years, when in fact it was 8 years and 6 months. *Id.* at 3–4. In Appellant's case, the maximum confinement was exaggerated by a factor of seven. In *Garcia*, the other elements of the maximum punishment were stated correctly. *See id.* In Appellant's case, three out of the four possible punishments recited in the SJAR were wrong. Finally, Garcia's term of adjudged confinement was only three months, a tiny fraction—less than three percent—of either the actual or the erroneously-stated maximum confinement. *Id.* at 3–5. The error in Appellant's case distorted his eight-month term of confinement from its actual 67 percent of the maximum to less than ten percent; the errors with respect to the possible punitive discharges and forfeitures only amplify the distortion.

We find Appellant has made a colorable showing of possible prejudice. We are unwilling to discount the significance of the staff judge advocate's advice regarding the maximum imposable punishment in Appellant's case. Here, the distortion of the true maximum punishment was substantial. Appellant's clemency submission was also substantial, amounting to over 60 pages, including post-trial material from correctional personnel intended to show his extensive involvement in rehabilitative programs, model behavior, and positive attitude in confinement. We are not inclined nor required to speculate as to what exactly the convening authority would have done had the SJAR not misadvised him regarding the maximum punishment. It is enough that there is a colorable showing the error may have injured Appellant's "best hope for sentence relief." *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999) (citations and internal quotation marks omitted). "Because the threshold for showing prejudice is so low, it is the rare case where substantial errors in the SJAR, or post-trial process in general, do not require return of the case for further processing." *United States v. Parker*, 73 M.J. 914, 921 (A.F. Ct. Crim. App. 2014) (quoting *United States v. Lavoie*, ACM S31453 (recon), unpub. op. at 11 (A.F. Ct. Crim. App. 21 January 2009)). Appellant is entitled to be restored to the same position he would have occupied had the error not occurred. Therefore, a new SJAR is required, and Appellant will be afforded the opportunity to respond and make his case for clemency once again.

Conclusion

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

FOR THE COURT

KURT J. BRUBAKER
Clerk of Court