UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DEREK J. HARROP-MILLER
United States Air Force

ACM S30114

19 December 2003

Sentence adjudged 27 March 2002 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $700.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Jennifer R. Rider.

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 attempted larceny, larceny, forgery, and stealing and opening mail, in violation of Articles 80, 121, 123, and 134, UCMJ, 10 U.S.C. §§ 880, 921, 923, 934. The special court-martial, consisting of a military judge sitting alone, sentenced the appellant to a reduction to E-1, forfeiture of $700.00 pay per month for 6 months, confinement for 6 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, except for the sentence to confinement, of which he approved only 4 months. The appellant submitted one assignment of error: the staff judge advocate's recommendation (SJAR) was

erroneous in that it failed to advise the convening authority of the military judge's recommendation for clemency. We find error and order corrective action.

The appellant worked in the mail center at Keesler Air Force Base, Mississippi. During the times alleged in the charges and specifications, he opened mail belonging to three other members stationed at Keesler, Airman First Class (A1C) M, Airman (Amn) D, and Airman Basic (AB) L. Specifically, he took A1C M's ATM card with the associated personal identification number, Amn D's tax return, and AB L's checkbooks. The appellant and an associate forged a total of six checks, depositing them into A1C M's credit union account. The appellant subsequently withdrew money from A1C M's account using the stolen ATM card. These acts formed the basis of the charges and specifications of which the appellant was convicted.

After announcing the sentence in the case, the military judge recommended on the record that the convening authority consider waiving, for the benefit of the appellant's dependent child, an appropriate portion of the forfeitures mandated by Article 58b, UCMJ, 10 U.S.C. § 858b. The SJAR and its subsequent addendum contained no mention of this recommendation by the military judge. In addition, there was no mention of it in the clemency matters submitted by the appellant, although he did ask the convening authority to "defer and/or waive the forfeitures adjudged." In acting on the sentence, the convening authority did not waive mandatory forfeitures.

This court reviews errors in post-trial processing de novo. Rule for Courts-Martial 1106(d)(3)(B) requires that the SJAR include information concerning a "recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence." Our superior court has held this includes a requirement that the SJAR advise the convening authority of a military judge's recommendation for waiver of mandatory forfeitures. *United States v. Lee*, 50 M.J. 296 (C.A.A.F. 1999). Therefore, we conclude that the SJAR in this case was erroneous.

Having found error, we must determine whether it materially prejudiced the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a). In reviewing claims of an inaccurate or erroneous SJAR, this Court has held "there must not only be error, there must also be prejudice to the rights of the accused." *United States v. Blodgett*, 20 M.J. 756, 758 (A.F.C.M.R. 1985). "Whether or not an appellant was prejudiced by a mistake in the SJAR generally requires a court to consider whether the convening authority plausibly might have taken more favorable action had he or she been provided accurate or more complete information." *United States v. Alis*, 47 M.J. 817, 827 (A.F. Ct. Crim. App. 1998) (citing *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R. 1988), *aff'd*, 28 M.J. 452 (C.M.A. 1989)).

Had the convening authority been advised of the recommendation of the military judge, it is plausible that he might have been persuaded to waive mandatory forfeitures or

that he might have granted some other form of clemency. *See United States v. Clear*, 34 M.J. 129, 132 (C.M.A. 1992). Therefore, we conclude that the error in the SJAR was materially prejudicial to the substantial rights of the appellant.

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

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Documents Examiner