UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW J. HERMRECK
United States Air Force

ACM 36010

8 July 2005

Sentence adjudged 18 May 2004 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Barbara E. Shestko (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Captain John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Carrie E. Wolf, and Clayton O'Connor (legal intern).

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, pursuant to his pleas, of using methamphetamine in violation of Article 112(a), UCMJ, 10 U.S.C. § 912(a). His adjudged and approved sentenced was a bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances for 5 months, and reduction to the grade of E-1.

This case was initially presented to this Court on its merits on 7 March 2005. On 10 March 2005, we specified the following issues:

> I. WHETHER THE RECORD OF TRIAL IS COMPLETE, AS REQUIRED BY RULE FOR COURTS-MARTIAL (R.C.M.) 1103(b)(2)(D)(IV),[1] WHERE TWO PROSECUTION EXHIBITS ADMITTED INTO EVIDENCE, SPECIFICALLY, THE PERSONAL DATA SHEET AND ENLISTED PERFORMANCE REPORT (EPR), ARE MISSING FROM THE RECORD.
>
> II. WHETHER THE STATEMENT THAT THE APPELLANT HAD NO EPRS IN THE STAFF JUDGE ADVOCATE'S RECOMMENDATION (SJAR) WAS AN OBVIOUS ERROR THAT MATERIALLY PREJUDICED A SUBSTANTIAL RIGHT OF THE APPELLANT.

On 6 April 2005, we granted the government's unopposed motion to submit the two prosecution exhibits omitted from the record of trial. In accordance with R.C.M. 1103(b)(2)(D)(v), we conclude that the record of trial is now complete.

The SJAR

The SJAR stated that the appellant's commander characterized his service prior to the date of the offense charged as "acceptable and within Air Force standards." The appellant's personal data sheet containing accurate information was attached to the SJAR. The SJAR also stated that the appellant received a letter of reprimand for sleeping on duty. However, the SJAR also incorrectly asserted that the appellant had no EPRs.

Although the SJAR was served on both the appellant and his trial defense counsel, neither commented on the inaccurate statement about the EPR in their clemency submissions. Instead, the appellant requested that the convening authority disapprove his bad-conduct discharge and impose an administrative separation and defer a portion of the adjudged forfeitures. The appellant now asserts that his request for clemency might have been considered more favorably had the convening authority been properly informed of his EPR because the EPR contained several "laudatory" statements. The appellant also claims that the convening authority may have assumed he had "additional problems" because he had been in the service for two years and six months without receiving an EPR.

The government concedes that the SJAR erroneously stated that the appellant had no EPR, but argues that the error did not prejudice the appellant because the EPR was "mediocre." The government also points to unfavorable statements in the EPR indicating

[1] The correct citation is R.C.M. 1103(b)(2)(D)(v).

difficulties the appellant had with his personal finances and upgrade training. In addition, the government contends the convening authority was the same person throughout the court-martial process, from referral to action, and thus had a "cradle to grave" view of the facts and circumstances surrounding the appellant and his offense. Finally, the government argues that the trial defense counsel's failure to point out this error in the SJAR demonstrates that the defense did not view the appellant's past duty performance as a "viable weapon in their clemency arsenal."

When a sentence includes a punitive discharge or confinement for one year or more, the convening authority must receive a written recommendation from his or her staff judge advocate before taking action on the case. Article 60(d), UCMJ, 10 U.S.C. § 860(d); R.C.M. 1106(a). The President has issued detailed guidance as to the material that must be set forth in the SJAR, including a "summary of the accused's service record, to include length and character of service, awards and decorations received, and any record of non-judicial punishment and previous convictions." R.C.M. 1106(d)(3)(C).

If an accused does not make a timely comment on an error in the SJAR, the error is waived unless it is prejudicial under a plain error analysis. R.C.M. 1106(f)(6); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). We conduct a de novo review of this issue. *Id*. To prevail under a plain error analysis, the appellant must persuade this Court that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *Id*. (citing *United States v. Powell*, 49 M.J. 460, 463, 465 (C.A.A.F. 1998)).

In order to meet his burden to establish that the error materially prejudiced a substantial right, an appellant must make "some colorable showing of possible prejudice." *Kho*, 54 M.J. at 65 (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). "The low threshold for material prejudice with respect to an erroneous post-trial recommendation reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005). *See also Kho*, 54 M.J. at 65; *Wheelus*, 49 M.J. at 289.

Turning to the case before us, we conclude the appellant has not met his burden of establishing a colorable showing of prejudice. The EPR itself is less than stellar and contains less than flattering comments about his finances and upgrade training. Moreover, neither the appellant, nor his counsel, emphasized his past duty performance in their clemency submissions. Instead, they focused on the appellant's willingness to plead guilty, his acceptance of responsibility for his crime, and his significant efforts to redeem himself by cooperating with law enforcement officials. The appellant discussed his marital and financial difficulties and concluded that he had chosen the "worst way" he could to deal with his problems. He said that his wife could not pay all their bills and had

to sell many of their possessions, despite the fact that she worked two jobs. In sum, the appellant did not invite the convening authority to consider his past duty performance or connect his past duty with his financial difficulties. We hold the incorrect statement in the SJAR was not plain error.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court