

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant OMORO HERRING
United States Air Force

ACM S31246

31 March 2008

Sentence adjudged 08 December 2006 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: Jennifer A. Whittier (sitting alone).

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

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Christopher L. Ferretti, Captain Chadwick Conn, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Jason M. Kellhofer.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Consistent with his pleas, the appellant was convicted by special court-martial of one specification each of being absent without leave (AWOL)*, dereliction of duty, wrongful use of marijuana, and wrongful use of cocaine, in violation of Articles 86, 92, and 112a UCMJ, 10 U.S.C. §§ 886, 892, and 912a. A military judge sentenced him to a bad conduct discharge, eight months confinement, and reduction to E-1. The convening

* The AWOL was charged as being "terminated by apprehension", but the military judge declined to accept that portion of the appellant's guilty plea and the government did not thereafter pursue the matter.

authority approved the sentence as adjudged. The appellant received 144 days credit for pre-trial confinement.

The appellant asserts three errors: (1) The Staff Judge Advocate's Recommendation (SJAR) failed to mention the military judge's clemency recommendation; (2) The appellant's trial defense counsel was ineffective, in that he failed to request deferral and waiver of automatic forfeitures and failed to draw attention to the military judge's clemency recommendation; and (3) The record does not reflect that the convening authority was provided or considered the appellant's clemency submissions. We find error and return the case for new post-trial processing.

Discussion

Rule for Courts-Martial (R.C.M.) 1106(d)(3)(B) requires that the SJAR include reference to any clemency recommendation made by the sentencing authority in conjunction with the announced sentence. In this case, trial was by military judge alone. After announcing sentence, the judge said: "I would also recommend that the convening authority defer any forfeitures or automatic forfeitures before action and waive any after action for the benefit of Staff Sergeant Herring's dependents." That recommendation was not included in the SJAR or otherwise brought to the attention of the convening authority. The appellant asserts, and the government concedes, that the omission was prejudicial error. We concur. *United States v. Lee*, 50 M.J. 296, 297-98 (C.A.A.F. 1999); *United States v. Clear*, 34 M.J. 129, 132 (C.M.A. 1992). Our finding on this issue, along with the corrective action ordered in our decretal paragraph, renders the appellant's ineffective assistance of counsel claim moot and we do not address it further.

As to the appellant's third assignment of error, the record submitted for appellate review did not include evidence that the convening authority had been provided, or considered, clemency matters submitted by the appellant. The government subsequently submitted a copy of an SJAR Addendum, which, in the absence of defense objection, we admitted for consideration as part of the appellate record. The Addendum is addressed to the convening authority and is dated prior to action. It indicated that the clemency matters submitted by the appellant were attached and correctly advised the convening authority that she had to consider all such matters before taking action. Nothing more is required. *United States v. Gaddy*, 54 M.J. 769, 773 (A.F. Ct. Crim. App. 2001); *United States v. Foy*, 30 M.J. 664, 665-66 (A.F.C.M.R. 1990). We accordingly find no error with respect to this issue, but note that all such matters should again be presented to the convening authority for consideration prior to any new action in accordance with this opinion.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). The action of the convening authority is set aside. The record of trial is returned to the Judge Advocate General for remand to the court-martial convening authority for new post-trial processing consistent with this opinion. Article 66(b), UCMJ, 10 USC § 866(b), will apply.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of the Court