

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JUSTIN E. HIGGINBOTHAM
United States Air Force

ACM S31291

21 October 2008

Sentence adjudged 09 February 2007 by SPCM convened at Aviano Air Base, Italy. Military Judge: Adam Oler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Steven R. Kaufman, and Captain Coretta E. Gray.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of possession of morphine, using and distributing diazepam on two occasions, and introduction of both diazepam and morphine onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for three months, and reduction to E-1.

The appellant contends he is entitled to sentence relief because the record does not reflect that the convening authority considered the attachments to his trial defense

counsel's post-trial clemency submissions.* In response to this assertion, the appellee submitted an affidavit from the convening authority indicating that he, as a matter of routine practice, would have considered the attachments to the appellant's clemency submission.

We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider matters submitted by the accused under Rule for Courts-Martial (R.C.M.) 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989).

This is another case of sloppy post-trial processing. In addition to the fact that the attachments to trial defense counsel's clemency request were omitted from the record of trial, we note that the personal data sheet provided to the convening authority is not the one admitted at trial. It fails to state that the appellant is entitled to wear the National Defense Service Medal, and it fails to reflect his foreign service, despite the fact that the appellant was stationed overseas at the time of trial and had come from another overseas assignment. While troubling, it is clear that the convening authority would have been aware of both of these facts by virtue of the other submissions presented in clemency.

As for the appellant's specific claim, we note that his counsel precisely indicates the nature of his attachments in the body of his letter to the convening authority. It is also clear that the attachments are a compilation of documents previously admitted at trial. Having established exactly what the documents in question are, the only remaining question is whether or not we are satisfied that the convening authority considered them.

In this regard, we have the affidavit from the convening authority, upon which we rely. We also have the convening authority initialing the clemency letters from both the appellant and his counsel, exactly as the convening authority indicated was his practice in his affidavit. Considering all of the above, we are ourselves satisfied that the convening authority was provided and considered the attachments listed on trial defense counsel's clemency submission prior to taking action.

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).

* It is undisputed that the convening authority reviewed the clemency letters submitted by both the appellant and his counsel. The convening authority initialed both upon review.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court