UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUSTIN O. ILLING
United States Air Force

ACM S31808

18 April 2013

Sentence adjudged 10 October 2009 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Jennifer L. Cline.

Approved sentence: Bad-conduct discharge and confinement for 60 days.

Appellate Counsel for the appellant: Lieutenant Colonel Gail E. Crawford and Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Lauren N. DiDomenico; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of assault consummated by a battery under Article 128, UCMJ, 10 USC § 928.[1] The appellant was sentenced to a bad-conduct discharge and 60 days of confinement. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues that: (1) his sentence was inappropriately severe, (2) he is entitled to relief under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006),

[1] The court-martial acquitted the appellant of a second specification alleged under the same charge.

and *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), for unreasonable post-trial processing delays, and (3) his case should be returned to the convening authority for a new action due to errors in the Staff Judge Advocate's Recommendation (SJAR). Finding no error, we affirm.

Background

On the evening of 6 September 2009, the appellant and Airman First Class (A1C) SB argued after the appellant took two of A1C SB's beers without her permission. A1C SB knew the appellant was enrolled in the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT) at the time and was adamant that he return the beers to her. After the appellant refused A1C SB's repeated requests to do so, A1C SB grabbed the appellant's shirt and tried to retrieve the beers before he left the area with them. In response, the appellant grabbed and pushed her, and did not relent until a bystander called out for help.[2]

Sentence Severity

The appellant argues that the adjudged and approved bad-conduct discharge is inappropriately severe for the crime of which he was convicted, which he describes as a "minor Article 15-type assault conviction." We review sentence appropriateness de novo, *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005), making such determinations in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial, *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988). Given the nature of all the facts and circumstances of this case, we have no reason to conclude that a bad-conduct discharge is inappropriately severe for this offense and this offender, whose disciplinary history included the following: a prior conviction by summary court-martial (which sentenced him to 30-days confinement and reduction to E-1); two nonjudicial punishment proceedings under Article 15, UCMJ, 10 U.S.C. § 815, four letters of reprimand, and three letters of counseling. Any sentence relief under these circumstances would amount to clemency. *Healy*, 26 M.J. at 396.

[2] The members, by exceptions and substitutions, found the appellant guilty of unlawfully grabbing and pushing Airman First Class SB on the neck and chest with his hands and arms, but not of striking and pushing her on the neck, jaw, chest, back and buttocks with his hands, arms, and foot.

Errors in the SJAR and Addendum to the SJAR

The appellant argues that errors in the Addendum to the SJAR merit setting aside the convening authority's action and returning the case to the convening authority for a new action. Specifically, he asserts the Addendum incorrectly stated the appellant had not alleged any legal errors in his clemency submission when, in fact, the appellant had contended he was subjected to unreasonable post-trial delay based on the Government's delay in transcribing his record of trial.

We review de novo alleged errors in post-trial processing. *United States v. Sheffiel*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004). When the post-trial recommendation to the convening authority is prepared by a staff judge advocate (SJA):

> [T]he staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under [Rule for Courts-Martial (R.C.M.)] 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required.

R.C.M. 1106(d)(4).

Unlike his role in clemency, the convening authority's role relative to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton*, 47 M.J. 32, 35 (C.A.A.F. 1997). Although a convening authority has the power to remedy an accused's claim of legal error (and is encouraged to act in the interest of fairness to the accused and efficiency of the system), he is not required to do so. *Id.* Defective advice by an SJA about a claim of legal error that leads a convening authority to not provide relief can be corrected through appellate litigation of the claimed error. *Id.* Accordingly, it is appropriate for an appellate court to look for any prejudice that may have flowed from misadvice about a defense claim of legal error. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). An appellate finding that those alleged errors have no merit precludes a finding that the SJA's advice prejudiced the appellant. *Hamilton*, 47 M.J. at 35.

The Court of Appeals for the Armed Forces has established the following process for resolving claims of error connected to post-trial review: "First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

The crux of the appellant's argument is that by saying the defense raised "no legal errors" in the Addendum to the SJAR and that, by failing to comment about whether correction of such error was required, the SJA thereby "buried" the error and thwarted the convening authority's ability to make an informed decision with respect to the appellant's sentence. We disagree. We note, as a threshold matter, that there must first be an error in the SJAR. We find no error in the case before us.

The initial SJAR, dated 19 March 2010, specifically addressed the post-trial processing delay, and informed the convening authority that "[o]ver 120 days will have elapsed between the completion of the trial and when you take action on this case. . . . The Court of Appeals for the Armed Forces stated they would presume an unreasonable delay if action is not taken on a case within 120 days of the completion of trial," citing to *United States v. Moreno*, 63 M.J. 139 (C.A.A.F 2006). However, having reviewed the court reporter's progress in preparing the record of trial (found in the reporter's chronology, which he attached for the convening authority's consideration), the SJA continued "[t]he reasons for the delay rebut the presumption of unreasonableness; therefore, no remedy is warranted." Trial defense counsel's 1 April 2010 R.C.M. 1105 submission referenced this same untimely post-trial processing, in combination with the appellant's positive duty performance since his trial, as a basis upon which the convening authority should disapprove the appellant's bad-conduct discharge. The SJA's Addendum to the SJAR, which was submitted to the convening authority along with the defense's clemency submission, included a sentence that read, in pertinent part, "[t]he defense has not raised any allegations of legal error."

The SJA clearly and unambiguously brought the allegation of potential legal error to the convening authority's attention, before it was raised by the defense counsel. Whether he did this in anticipation that "an allegation of legal error [would be] raised in matters submitted under R.C.M. 1105 [or because he] otherwise deemed [it] appropriate," R.C.M. 1106(d)(4) is unclear on the record. What is clear is that the SJA concluded—as noted in the SJAR—that the facts and circumstances in this case rebutted any *Moreno*-based adverse presumption, and that no corrective action should be taken. In the Addendum to the SJAR, the SJA confirmed he had reviewed the clemency matters submitted by the defense, and unequivocally stated his earlier recommendation remained unchanged. Under the totality of these circumstances, we do not find merit in the appellant's argument.

Even assuming we were to have found error based on the wording in the Addendum to the SJAR, we would still affirm. "[A] Court of Military Review is free to affirm when a defense allegation of legal error would not foreseeably have led to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority." *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988). The appellant must make some colorable showing of possible prejudice. *United*

States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005). The convening authority was made aware of the legal issues regarding post-trial delay through the SJAR and the appellant's R.C.M. 1105 submissions. The SJA disagreed with the defense counsel's assertions and concluded no legal error occurred as a result of the post-trial processing delay. His advice in the SJAR was consistent with that conclusion. Further, the appellant has failed to make a colorable showing of possible prejudice. Based on the facts of this case, we will not assume the convening authority would have been inclined to approve a different sentence had the SJA's addendum been worded differently. Furthermore, to the extent the clemency submission does constitute a claim of legal error, we have evaluated those same claims as part of his appeal and found them to be non-meritorious. Given that, any misadvice by the SJA did not prejudice the appellant. *Welker*, 44 M.J. 85.

Post Trial Processing Delays

The appellant's court-martial was completed on 10 October 2009, and the convening authority acted on the sentence on 28 April 2010, 200 days later. The case was docketed with this Court 43 days later, on 10 June 2010. The appellant argues his bad-conduct discharge should be set aside because, in combination with what he asserts to be the error in the Addendum to the SJAR, these delays are facially unreasonable and reflect a larger pattern of untimely post-trial processing issues in Third Air Force.

We review de novo claims that an appellant was denied his due process right to a speedy post-trial review and appeal. *Moreno*, 63 M.J. at 135. In conducting this review, we assess the four factors laid out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Id*. (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). Because both delays noted in the appellant's assignment of errors, as well as the delay in excess of 18 months it has taken this Court to render a decision, are facially unreasonable, we would customarily analyze each factor and determine whether the factor weighs in favor of the Government or the appellant, then balance our analysis of the factors to determine whether there has been a due process violation. However, when we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record in light of the *Barker* factors, we conclude that any denial of the appellant's right to speedy post-trial review and his appeal was harmless beyond a reasonable, and that relief is not otherwise warranted. *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. at 224.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court