UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANDRE S. JAMES
United States Air Force

ACM 36740

16 February 2007

Sentence adjudged 24 March 2006 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

BROWN, SCHOLZ, and BECHTOLD
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BECHTOLD, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of cocaine, one specification of wrongful use of methamphetamines, and one specification of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence consists of a bad-conduct discharge, confinement for 7 months, and reduction to E-1.

On appeal, the appellant asserts that he is entitled to new post-trial processing or other appropriate relief because memoranda from the Special Court-Martial Convening Authority

(SPCMCA) and his staff judge advocate (SPCM/JA) were appended to the staff judge advocate's recommendation (SJAR) in his case. The appellant contends that these memoranda amounted to "new matter" that were not disclosed to him and to which he had a right to rebut. *See* Rule for Courts-Martial (R.C.M.) 1106(f)(7). He also argues that these memoranda constituted "matters adverse to the [appellant] from outside the record" and he had a right to be notified of and provided an opportunity to rebut the information contained therein. *See* R.C.M. 1107(b)(3)(B)(iii). For the reasons set forth below, we find error and return the case for new post-trial processing.

Background

The appellant pled guilty in a General Court-Martial (GCM) in accordance with a pretrial agreement (PTA) in which the General Court-Martial Convening Authority (GCMCA) had agreed not to approve confinement in excess of 7 months. His adjudged sentence included 12 months confinement. Upon completion of the record, the staff judge advocate for the GCM convening authority (GCM/JA) prepared a routine recommendation that was duly served upon the appellant and his counsel. In turn, the appellant submitted clemency matters in which he asked that his confinement be further reduced below the cap set in the PTA.

Although this was a GCM, the SPCM/JA prepared an undated memorandum, entitled "Clemency Request – *U.S. v. AB Andre S. James*," which appears to be a mini addendum to the recommendation prepared by the GCM/JA. In this gratuitous "addendum", the SPCM/JA correctly notes the confinement limitation of 7 months contained in the PTA signed by the GCMCA. However, the "addendum" also recommends that the SPCMCA forward the appellant's clemency request to the GCMCA with a recommendation that he deny the appellant's request and approve the sentence *as adjudged*, which was 5 months in excess of the GCMCA's obligation under the PTA. This "addendum" from the SPCM/JA was provided to the SPCMCA. The SPCMCA, in turn, signed a letter to the GCMCA stating "I have reviewed the clemency matters submitted by the accused. Pursuant to R.C.M. 1107(d), I recommend you deny the accused's request and approve the sentence *as adjudged.*" (Emphasis added).[1]

The "addendum" and SPCMCA letter were never served on the appellant or his counsel and they were never given an opportunity to respond. The GCM/JA addendum, which lists all clemency matters, does not list or otherwise refer to either the SPCM/JA memorandum or the recommendation letter from the SPCMCA.

It is unclear from the record whether the convening authority ever received the SPCMCA recommendation and SPCM/JA "addendum". However, these documents are included in the record of trial between the addendum to the GCM SJAR and the appellant's clemency matters. In his assignment of error, the appellant states that "[a]s they were properly included in the record of trial, it is fair to conclude they were forwarded to the

[1] It is unclear under what provision of R.C.M. 1107(d) the SPCMCA relied on to make this recommendation.

convening authority for his consideration with the [SJAR] and its Addendum." The government is silent as to whether these documents were ever forwarded to the convening authority and proceeds, in its answer, on the assumption that they were so forwarded. Accordingly, this Court will proceed on the same assumption.

Discussion

The standard of review for determining whether post-trial processing was properly completed is 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). In this case, the issue is whether the appellant should have been provided the opportunity to respond to the memoranda from the SPCMCA and the SPCM/JA. Both R.C.M. 1106(f)(7) and 1107(b)(3)(B)(iii), require notice to the appellant. R.C.M. 1106(f)(7) allows the staff judge advocate (SJA) to:

> [S]upplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment. When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments.

The Discussion under R.C.M. 1106(f)(7) provides guidance on "new matter" and states that it includes "matters from outside the record of trial . . ." R.C.M. 1107(b)(3)(B)(iii), provides that "if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut." It has been argued that, since neither memorandum contains matters from outside the record and are merely the opinions of subordinate officers, they are not per se new matters. This may put too fine a definition on "new matter." Ultimately, the issue is whether the appellant may have been prejudicially precluded from commenting on matters which were submitted to the convening authority for consideration.

As our superior court stated in *United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000), "[t]he clear intent of [R.C.M. 1106(f)(7)] is to permit the [SJA] or legal officer (not the chief of staff or some other officer in the chain of command) to supplement the [SJAR]." *Id*. at 376. In *Anderson*, the Court considered a note appended to the record from the Chief of Staff and stated: "In our view, fair play dictates that the belated comments on appellant's case by a command officer be considered new matter." *Id.* at 377. Although the memoranda in the instant case do not contain the same kind of pejorative language as the Chief of Staff's note,[2] they do contain the recommendation that the GCMCA breach his agreement with the appellant. While it is likely that this was merely an administrative error and not the intended

[2] The Chief of Staff's note contained the language: "Lucky he didn't kill the SSgt. He's a thug, Sir." *Anderson*, 53 M.J. at 376 (C.A.A.F. 2000).

recommendation of either officer, it is nevertheless the recommendation that was provided to the GCMCA without comment or correction by his SJA.

As was noted in *United States v. Alis*, 47 M.J. 817 (A.F. Ct. Crim. App. 1998), "[t]he convening authority uses the SJAR and accompanying documents as an aid in determining what action to take on sentence; therefore, the SJA must provide correct information to the convening authority in these documents." *Id.* at 827 (citing *United States v. Kerwin*, 46 M.J. 588, 590 (A.F. Ct. Crim. App. 1996)). Additionally, the SPCM/JA memorandum appears to provide the GCMCA with an uncontradicted legal review. In *United States v. Spears*, 48 M.J. 768, 776 (A.F. Ct. Crim. App. 1998), *overruled in part by United States v. Owen*, 50 M.J. 629 (A.F. Ct. Crim. App. 1998) (en banc), we stated that "(a)ny legal review of a case for the convening authority, including those of forfeiture waiver requests, prepared after the SJAR is served on appellant should be treated as an addendum to the original SJAR and served on appellant for comment."

Our superior court has also recognized that "there is nothing in the UCMJ or the Manual for Courts-Martial prohibiting a convening authority from consulting with his subordinate commanders or members of his staff other than his SJA regarding a petition for clemency." *United States v. Cornwell*, 49 M.J. 491, 493 (C.A.A.F. 1998). In *Cornwell*, the Court also assumed, without deciding, that the subordinate commanders' recommendations should have been served on appellant sufficiently in advance of the convening authority's action to permit comment or rebuttal, however, the Court found that no error occurred which prejudiced appellant's substantial rights. *Id.* *Cornwell* is different from the case sub judice, because *Cornwell* did not involve a subordinate commander appearing to recommend that the convening authority breach his obligation under the PTA. Whether this recommendation was made in error or was intended to demonstrate that the SPCMCA and SPCM/JA were so emphatically opposed to clemency as to recommend the GCMCA breach his obligation under the PTA, is unknown. What is known is that the appellant was never given the opportunity to respond.

In *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), our superior court established the process for resolving claims of error connected with a convening authority's post-trial review. An appellant must allege prejudicial error and show what he would do to resolve the error if given such an opportunity. *Id.* at 286-87. If an appellant meets this threshold, it is incumbent upon this Court to remedy the error and provide meaningful relief or return the case to The Judge Advocate General for remand to the convening authority for new post-trial processing. *Id.* at 288-89. "Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id*. at 289 (citing *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)). In *Chatman*, the Court established that it is a low threshold for the appellant to meet and gives the appellant the benefit of the doubt without speculating on what the convening authority might have done if defense counsel had been given an opportunity to comment. *Chatman*, 46 M.J. at 323-24. In *United States v. Brown*, 54 M.J. 289 (C.A.A.F. 2000), the Court held that an SJAR must be provided to the appellant in order to provide "an opportunity to correct or

challenge any matter he deems erroneous, inadequate or misleading, or on which he otherwise wishes to comment." *Id*. at 291 (quoting *United States v. Goode*, 1 M.J. 3, 6 (C.M.A. 1975)). In *United States v. Gilbreath*, 57 M.J. 57, 62 (C.A.A.F. 2002), the Court again refused to speculate on what the convening authority would have done if the defense counsel had been properly served, and could have pointed out the faulty basis on which the SJA's recommendation against clemency had been based.

We likewise refuse to speculate. The appellant has asserted that he would have pointed out the discrepancy in the recommendations from the SPCMCA and the SPCM/JA. The fact that the GCMCA complied with the terms of the pretrial agreement is insufficient to determine whether he would have granted clemency but for the recommendation of a subordinate commander and his legal officer. As our superior court noted in *Wheelus*, post-trial clemency still plays "a vital role in the military justice system – even where pretrial agreements have been struck." *Wheelus*, 49 M.J. at 287. The appellant is entitled to have the convening authority consider his request without confused or misleading recommendations that are unchallenged.

Remaining Issues

Finally, we note, *sua sponte*, that the appellant's request for deferment of forfeitures was denied without reason, contrary to the provisions of *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1992) and its progeny. We further note that both the adjudged sentence and the action purport to reduce the appellant to the grade of E-1, the grade already held by the appellant. We find both of these issues to be harmless error.

Conclusion

The action of the convening authority is set aside. We return the record of trial to The Judge Advocate General for remand to the appropriate convening authority for a new recommendation and action on the sentence. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

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Chief Court Administrator