UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JARED D. KNIGHT
United States Air Force

ACM S31614

28 June 2010

Sentence adjudged 8 January 2009 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: William M. Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of $933.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Jamie L. Mendelson, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Senior Judge:

In accordance with the appellant's pleas,[1] a military judge sitting as a special court-martial found the appellant guilty of one specification of larceny of military property, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The appellant's adjudged

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[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the Charge and its Specification in return for the convening authority's promise to refer the Charge and its Specification to a special court-martial and to not approve confinement in excess of ten months.

and approved sentence consists of a bad-conduct discharge, eight months of confinement, forfeiture of $933 pay per month for eight months, and reduction to the grade of E-1.

On appeal, the appellant asks this Court to return the record of trial to The Judge Advocate General for remand to the convening authority for a new staff judge advocate recommendation (SJAR) and a new Action. The appellant also asks that we set aside his bad-conduct discharge or grant other meaningful relief. As the basis for his request, he asserts that: (1) the convening authority's Action should be set aside because there are numerous substantial errors in the post-trial processing of his case, to include errors in the SJAR, an inaccurate Report of Result of Trial, and a failure to give his trial defense counsel the opportunity to review the record of trial prior to authentication and (2) his sentence to a bad-conduct discharge is inappropriately severe.[2] Finding no prejudicial error, we affirm the findings and sentence.

Background

In late July 2008, the appellant found approximately $10,600 worth of military property[3] in an off-base dumpster. Rather than return the property to military authorities, the appellant kept the property for his personal use. On 6 August 2008, the property was recovered from the appellant when local law enforcement officials arrested him for impersonating a Texas Parks and Wildlife Department law enforcement officer.

At trial, the appellant providently pled guilty to and was found guilty of larceny by withholding the aforementioned property.[4] After announcing the sentence, the military judge made a clemency recommendation to the convening authority. In his clemency recommendation, the military judge stated: "If [the appellant] has been diagnosed with Post Traumatic Stress Disorder [PTSD] resulting from his combat service in Iraq, then I recommend that the convening authority, at the time he takes action on the record of trial, approve only so much of the adjudged confinement as will have been served by that date."

On 5 February 2009, the military judge authenticated the record of trial. There is no evidence in the record of trial to show that the appellant's trial defense counsel was

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[2] The second issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The appellant found one laser range finder, two Motorola radios, a pair of binoculars, and an infrared camera.

[4] Though the appellant found the property in an off-base dumpster, he stated that he believed the property was not abandoned. Thus, we are not confronted with the issue of whether the property could be the subject of a larceny or whether the appellant had the requisite *mens rea* for the offense. *See generally United States v. Swords*, 35 C.M.R. 889 (A.F.B.R. 1965) (noting that abandoned property cannot be the subject of a larceny). Additionally, during his plea inquiry with the military judge, the appellant agreed that as a security forces member and Air Force member he had a duty to return the property to military authorities. Thus, his failure to do so qualifies as a wrongful withholding. In short, "[n]othing in the record presents a substantial basis in law and fact for questioning the [appellant's] guilty plea." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)).

given an opportunity to review the record of trial prior to its authentication, as required by Rule for Courts-Martial (R.C.M.) 1103(i)(1)(B). On 10 February 2009, the staff judge advocate provided his recommendation to the convening authority. Attached to the SJAR was a Report of Result of Trial that erroneously indicated the offense occurred between on or about 20 June 2006 and on or about "30 May 2008 30 July 2008."[5]

In his SJAR, the staff judge advocate provided the following advice to the convening authority: (1) while the military judge recommended a reduction in the appellant's period of confinement if the appellant had been diagnosed with PTSD resulting from his combat service in Iraq, his combat service "has not been identified as the cause of the PTSD;" (2) the basis of the appellant's conviction "consisted of a pre-trial agreement of his guilty plea and a stipulation of fact;" and (3) the "maximum imposable sentence for the offense for which the [appellant] was convicted is Dishonorable Discharge, 10 years [of] confinement, and forfeiture of all pay and allowances." The appellant asserts for the first time on appeal that this advice to the convening authority was incorrect.[6]

On 23 February 2009, the appellant's trial defense counsel submitted the appellant's clemency request. In the request, the appellant's trial defense counsel failed to note the non-compliance with R.C.M. 1103(i)(1)(B), the alleged SJAR errors, and the Report of Result of Trial error.

Post-Trial Processing

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000). Failure to timely comment on matters in the SJAR waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). The failure to give the appellant's trial defense counsel the opportunity to review the record of trial prior to its authentication was error. *See* R.C.M. 1103(i)(1)(B). However, the appellant's trial defense counsel had an opportunity to review the authenticated record of trial. Moreover, there is no indication that the authenticated record of trial is not accurate. In short, this error was harmless. *United States v. Munoz*, 54 M.J. 917, 918 (A.F. Ct. Crim. App. 2001) (remarking that the appellant and his counsel received a copy of the record of trial, counsel submitted clemency matters on behalf of the appellant, and there were no objections to the contents of the record of trial in the clemency submission).

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[5] The appellant asserts that this error—"30 May 2008 30 July 2008"—provides an additional basis for relief.

[6] We note that the staff judge advocate also failed to advise the convening authority of the reasons why he was not obligated to take specific action under the pretrial agreement. *See* Rule for Courts-Martial 1106(d)(3)(E) (noting that the staff judge advocate recommendation shall include, inter alia, "a statement of any action the convening authority is obligated to take under the [pretrial] agreement or a statement of the reasons why the convening authority is not obligated to take specific action under the [pretrial] agreement").

Concerning the alleged SJAR errors, the appellant's trial defense counsel failed to timely comment on the alleged SJAR errors thus the errors are waived in the absence of plain error. R.C.M. 1106(f)(6); *Scalo*, 60 M.J. at 436. "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Id*. at 436-37 (quoting *Kho*, 54 M.J. at 65).

The staff judge advocate properly advised the convening authority of the military judge's clemency recommendation and thus complied with the requirement of R.C.M. 1106(d)(3)(B). Additionally, while the language the staff judge advocate used in highlighting the basis for the appellant's conviction was unartful, it was not error. Third, although the staff judge advocate erroneously advised the convening authority on the maximum punishment, the error was harmless. The convening authority, as the special court-martial convening authority, was familiar with both the pretrial agreement he entered into with the appellant and the limits of his authority. Under the circumstances of this case, we do not believe correct advice on the maximum punishment would have foreseeably led to either a SJAR or Action favorable to the appellant. *See United States v. Hill*, 27 M.J. 293, 296-97 (C.M.A. 1988).

We likewise find that the staff judge advocate's non-compliance with R.C.M. 1106(d)(3)(E) was harmless. The pretrial agreement required the convening authority to refer the Charge and its Specification to a special court-martial and to approve no confinement in excess of ten months. There were no other pretrial agreement restrictions. Since the appellant was adjudged eight months of confinement, no action on the part of the convening authority was required in regard to the pretrial agreement.

Lastly, concerning the Report of the Result of Trial error, the record makes clear that the trial counsel, without defense objection, made a pen and ink change to the charge sheet to change the ending date of the offense from 30 May 2008 to 30 July 2008, and neglected to strike out the 30 May 2008 language from the Report of Result of Trial. The convening authority was not misled because the Report of Result of Trial correctly notes the Charge and its Specification to which the appellant pled and was found guilty. The erroneous language was a harmless administrative error that does not give the appellant a basis for relief.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make 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). Additionally, while we have a great deal of 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).

In this case, the appellant seriously compromised his standing as a military member. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense to which the appellant pled and was found guilty, we do not find that the appellant's sentence, one which includes a bad-conduct discharge, is inappropriately severe.

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

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