UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DUSTIN R. KOEHN
United States Air Force

ACM S31021

2 March 2007

Sentence adjudged 27 June 2005 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: William A. Kurlander (sitting alone).

Approved sentence: Confinement for 12 months, forfeiture of $500.00 pay per month for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Chadwick A. Conn, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Captain Jamie L. Mendelson.

Before

BROWN, BECHTOLD, and BRAND
Appellate Military Judges

OPINION OF THE COURT

BECHTOLD, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of marijuana, one specification of wrongful use of marijuana on divers occasions, one specification of wrongful use of ecstasy, one specification of wrongful use of cocaine, and one specification of wrongful use of methamphetamines, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence consists of confinement for 12 months, forfeiture of $500.00 pay per month for 12 months, and reduction to E-1.

On appeal, the appellant requests that the case be returned to the convening authority to ensure the intent of the convening authority is satisfied while still fulfilling

the requirements of Articles 57(a) and 58b, UCMJ, 10 U.S.C. §§ 857(a), 858b. For the reasons set forth below, we agree and return the case for new post-trial processing.

Background

After his trial, the appellant requested clemency in the form of reduced forfeitures to allow him to pay his bills while in confinement. According to an uncontested declaration by the appellant that was submitted to this Court, the convening authority contacted the appellant at the confinement facility to inquire into his financial situation. At the end of the conversation, the convening authority told the appellant that he was going to grant him relief. According to the addendum to the staff judge advocate's recommendation (SJAR), the convening authority requested a financial statement from the appellant. In response to that request, the trial defense counsel submitted an itemization of the appellant's expenses. Also in that memo, the trial defense counsel addressed the forfeitures that were already occurring, stating that they were more than expected. Accordingly, the appellant revised his request and asked that forfeitures not exceed $300.00 per month to make up for what had already been taken. The appellant also stated he needed $495.00 per month to pay his bills. In his addendum, the staff judge advocate (SJA) appropriately noted the appellant's submissions and then recommended against granting any clemency. Contrary to the SJA's recommendation, the convening authority reduced forfeitures to $500.00 pay per month for 12 months. However, under operation of Article 58b, UCMJ, the appellant forfeited two-thirds, or $820.00, pay per month. The effect of this provision was to negate the clemency granted by the convening authority. The appellant has no dependents and is, therefore, ineligible to benefit from the waiver provisions of Article 58b, UCMJ.

The appellant now contends, and the government concurs, that the intent of the convening authority appears to be thwarted. The only meaningful clemency the convening authority could have granted consistent with his intent was to defer automatic and adjudged forfeitures until action. There is nothing in the record to indicate the convening authority was ever advised of the effect of the operation of Articles 57(a) and 58b, UCMJ, or the impact they might have on his intent to grant financial relief; however, it is clear he intended to grant that relief.

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 (C.A.A.F. 2000)).

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. 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. "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 a low threshold for 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.

Under Article 57(a), UCMJ, forfeiture of pay and/or allowances that is part of an adjudged sentence of a court-martial takes effect 14 days after the sentence is adjudged or on the date of the convening authority's action approving the sentence, whichever is earlier. Additionally, even if no forfeiture is adjudged, if an adjudged sentence includes: (1) death, (2) confinement for more than six months, or (3) confinement for six months or less and a punitive discharge, then automatic forfeiture similarly begins 14 days after the sentence is adjudged or on the date of the convening authority's action approving the sentence, whichever is earlier, in accordance with Article 58b, UCMJ.

As our sister court noted, "[t]he purpose of this statute was to ensure 'that the desired punitive and rehabilitative impact on the accused occurred more quickly. Congress, however, desired that a deserving accused be permitted to request a deferment of any adjudged forfeitures or reduction in grade, so that a convening authority, in appropriate situations, might mitigate the effect of Article 57(a).'" *United States v. Zimmer,* 56 M.J. 869, 872 (Army Ct. Crim. App. 2002) (quoting Drafter's Analysis, *Manual for Courts-Martial, United States*, A21-78 (2000 ed.)). To allow for that mitigation, Congress amended Article 57 to allow a convening authority to defer forfeitures prior to taking formal action. Prefatory to that mitigation authority in Article 57(a)(2) is a proviso that deferment is considered "[o]n application by an accused".

Our superior court definitively clarified the application of Articles 57(a) and 58b and their effect on the discretion of the convening authority. "In contrast to the power that a convening authority may exercise with respect to forfeitures adjudged as part of a court-martial sentence, the convening authority is not empowered to disapprove, modify, or suspend mandatory forfeitures required by Article 58b during periods of confinement or parole. The convening authority has two limited powers with respect to mandatory forfeitures. First, upon application of the accused, the convening authority may defer a mandatory forfeiture until the date on which the convening authority approves the sentence under Article 60, and may rescind such deferment at any time. [Articles 58b(a)(1) and 57(a)(2), UCMJ]. Second, if the accused has dependents, the convening authority has discretion to provide transitional compensation to such dependents for a limited period of time." *United States v. Emminizer,* 56 M.J. 441, 443 (C.A.A.F. 2002).

Since the appellant in the instant case did not have dependents, the mitigating effects of Article 58b, UCMJ, are unavailable to him.

In the case *sub judice*, it is unclear whether the appellant ever requested deferment of forfeitures as outlined in Article 57(a)(2), UCMJ. The government posits that such a request is implicit in the memorandum from the appellant's defense counsel that contained the financial data requested by the convening authority. What is clear is that the appellant has made a colorable showing that the convening authority intended to grant clemency, but that intent may have been thwarted in the execution. While it is possible that the convening authority intended to grant hollow relief, it is more probable that he intended to grant meaningful relief but was not advised of how the provisions of Articles 57(a) and 58b, UCMJ, would effect his action. The convening authority should be provided the opportunity to take corrective action to implement his intent. Since the appellant was not eligible under Article 58b, UCMJ, and the deferment provisions of Article 57, UCMJ, terminate upon action, the only solution is to return this case to allow the convening authority to grant deferment retroactively and prior to action. Presumably, he will have a less ambiguous request for deferment upon which to act and more specific guidance on the limitations of his clemency authority under Articles 57(a) and 58b, UCMJ.

Conclusion

Accordingly, we return the record of trial to The Judge Advocate General for remand to the appropriate convening authority for a new action. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator