UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW H. LEBER
United States Air Force

ACM S30241

17 August 2004

Sentence adjudged 10 July 2002 by SPCM convened at Edwards Air Force Base, California. Military Judge: Bryan T. Wheeler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $500.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

In accordance with his pleas, the appellant was convicted of one specification of willfully damaging military property, two specifications of illegal drug use, and one specification of assault consummated by a battery, in violation of Articles 108, 112a, and 128, UCMJ, 10 U.S.C. §§ 908, 912a, 928. A special court-martial composed of a military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 8 months, forfeiture of $500 pay per month for 8 months, and reduction to E-1. The convening authority approved a bad-conduct discharge, confinement for 6 months, forfeiture of $500 pay per month for 8 months, and reduction to E-1.

The appellant raises two errors for our consideration: (1) The military judge abused his discretion by accepting the guilty plea to willfully damaging military property where the appellant stated he did not intend to cause damage to the military property, and (2) The appellant is entitled to sentence relief or a new post-trial action in light of defective post-trial processing and an ambiguous action. We find error and set aside the action of the convening authority.

Issue I

Regarding the first issue, we find adversely to the appellant. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). The appellant was charged with willfully damaging military property by punching a hole in a bedroom door and two holes in a garage dry wall. The appellant does not challenge the intent element as it relates to the damage to the *bedroom door*. He challenges whether the intent element is met to prove he intentionally damaged the *garage dry wall.* The garage dry wall was damaged when the appellant intentionally pushed his wife against the door, which in turn caused the two holes in the garage dry wall. The appellant asserted he did not intend for the doorstop or the doorknob to go through the wall. After much prodding from the trial judge, the appellant did, however, admit that he knew something could happen to the garage dry wall behind the door if he used enough force when he pushed his wife against the door. Although the appellant may not have intended to damage the garage dry wall, per se, he knew that the damage to the wall would naturally and probably occur as a result of him forcefully pushing his wife into the door. He pushed her into the door despite the likely consequences of his actions. The appellant's testimony during the *Care*[1] inquiry was sufficient to satisfy the intent element in Charge I. *See United States v. Johnson*, 24 M.J. 101, 105 (C.M.A. 1987). The appellant's plea to Charge I is provident. The military judge did not abuse his discretion. We hold that there is not "a substantial basis in law and fact" for questioning the appellant's plea. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Issue II

The appellant's second issue has merit. Despite the plethora of cases highlighting defective post-trial processing, we continue to see the same lack of attention to detail. Although we noted several errors,[2] we need only address one.

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[2] The promulgating order does not reflect the changes made on the record to the specifications of Charges I and III. Also, the promulgating order does not reflect the appellant's plea to the Specification of Charge III. The Air Force Form 1359, Report of Result of Trial, erroneously reflects geographic location in the specifications of Charges I and III, whereas it was omitted on the Department of Defense Form 458, Charge Sheet. The form also inaccurately reflects the appellant's plea and findings concerning the Specification of Charge III.

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000).

The appellant argues the convening authority's action contained a latent ambiguity. We agree. Six days after trial, on 16 July 2002, the appellant specifically requested "deferment of the adjudged forfeitures" and "waiver of the automatic forfeitures." On 19 July 2002, the convening authority acted on the request with the following language:

> You are currently scheduled to begin forfeiting $500.00 pay per month for 8 months starting 24 Jul 02 as a result of the sentence adjudged against you by special courts-martial [sic] on 10 Jul 02. I have reviewed your request that I waive those forfeitures and your request is approved. Pursuant to Article 57, Section (a)(2), and 58b, Section (a)(1), Uniform Code of Military Justice, all of the adjudged forfeitures are hereby waived and all of the mandatory forfeitures are deferred until such time that I take action in your case so you may continue to provide adequate support for your dependents.

On 4 November 2002, the convening authority took action. She approved the bad-conduct discharge, confinement for 6 months, forfeiture of $500 pay per month for 8 months, and reduction to E-1. She deferred all of the adjudged forfeitures and mandatory forfeitures from 24 July 2002 until the date of the action. There was no mention of waiver of the mandatory forfeitures. The appellant complains his family did not receive the waived forfeitures.

The problem with this case is the incorrect usage of particular terms of art. "Waiver" and "deferral" of "adjudged" or "automatic" (or "mandatory") forfeitures have specific and different definitions and cannot be used interchangeably. Automatic forfeitures can be deferred (upon written request from the accused) or waived for the benefit of dependents *before* the convening authority takes action. Article 58b(a)(1), UCMJ, 10 U.S.C. § 858b(a)(1); Rule for Courts-Martial (R.C.M.) 1101(d)(1). Adjudged forfeitures, however, cannot be *waived*, but can be *deferred* before action. R.C.M. 1101(c) and (d). The appellant specifically asked the convening authority to defer adjudged forfeitures and waive mandatory forfeitures. In response to the appellant's request, the convening authority seemingly approved the waiver of mandatory forfeitures. However, in the last sentence of the memorandum the convening authority appears to have approved a *deferral* of *mandatory* forfeitures and a *waiver* of *adjudged* forfeitures. We do not know what the convening authority intended by her memorandum. Likewise, we do not know what legal advice the convening authority received prior to making her decision about forfeitures on 19 July 2002. Furthermore, the staff judge advocate's recommendation and the addendum are not helpful in that they are silent concerning the

waiver or deferral of forfeitures. Although we believe the convening authority approved the waiver of mandatory forfeitures, we cannot be certain. The action contains a latent ambiguity[3] and we therefore find error. Furthermore, this error prejudiced the appellant in that it appears the appellant's family was deprived of the income (waived forfeitures) from the date of the convening authority's action to the date the appellant was released from confinement. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Accordingly, the action of the convening authority is set aside. The record of trial is returned for a new staff judge advocate's recommendation and action. *United States v. Lee*, 50 M.J. 296, 298 (C.A.A.F. 1999). Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[3] Although the government does not concede that the action contains an ambiguity, they admit the action conflicts with the convening authority's earlier memorandum regarding the waiver of forfeitures.