UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MATTHEW H. LEBER
United States Air Force

ACM S30241 (f rev)

20 September 2005

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, Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Antony B. Kolenc, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Major Michelle M. McCluer.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

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 $500.00 pay per month for 8 months, and

reduction to E-1. The convening authority approved the bad-conduct discharge, confinement for 6 months, forfeiture of $500.00 pay per month for 8 months, and reduction to E-1. On appeal, we found error and set aside the action of the convening authority.[1] *United States v. Leber*, ACM S30241 (A.F. Ct. Crim. App. 2004) (unpub. op.).

The case comes before us now with a new assignment of error: Whether the appellant is entitled to sentence relief or a new post-trial action where no effort was made to serve the new staff judge advocate's recommendation (SJAR) on the appellant. Again, we must set aside the action of the convening authority and return the record of trial for a new SJAR and action.

In response to this Court's decision on 17 August 2004, the staff judge advocate (SJA) drafted a new SJAR,[2] dated 17 September 2004, for the new convening authority. The SJA attached the same error-laden Report of Result of Trial[3] to the SJAR. The form erroneously reports the appellant's plea to the Specification of Charge III. The accused actually pled guilty by exceptions and substitutions. The finding for Charge III is missing the word "neck." The form also erroneously reflects the geographical location in the specifications of Charges I and III, whereas it was omitted on the Department of Defense Form 458, Charge Sheet.

On 22 February 2005, an addendum to the new SJAR was drafted containing the following language: "The defense counsel as well as the legal office made several unsuccessful attempts to contact [the appellant]. Consequently, there were no matters submitted in clemency by the defense counsel or the accused." Neither the new SJAR nor its addendum was served on the appellant. The government avers they were unable to locate the appellant, despite their efforts.

The appellant indicates in his post-trial declaration that, had he been given an opportunity to do so, he would have submitted clemency matters. In particular, he would have re-submitted his first clemency package and would have supplemented the package with his post-trial rehabilitative progress. He asserts he has successfully served his confinement, earning good-conduct credit while there. Furthermore, he has since been a law-abiding citizen. He has also worked to support his family and he is using the skills he learned in the Air Force in his current job as an electrician. Finally, he would have asked the convening authority to disapprove his punitive discharge.

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[1] Specifically, the convening authority's action contained a latent ambiguity concerning the waiver of forfeitures for the benefit of the appellant's dependents. Other errors in the promulgating order and Report of Result of Trial, Air Force Form 1359, were also cited in this Court's opinion.

[2] Although the appellate government counsel argues that this is a second Addendum to the first SJAR, we find that it is a new SJAR.

[3] We also note that the date on the top of the Report of Result of Trial is incorrect.

Rule for Courts-Martial (R.C.M.) 1106(f)(1) requires the SJA or legal officer to serve a copy of the SJAR on the counsel of the accused and the accused. Further, R.C.M. 1106(f)(1) states:

> If it is impracticable to serve the recommendation on the accused for reasons including but not limited to the transfer of the accused to a distant place, the unauthorized absence of the accused, or military exigency, or if the accused so requests on the record at the court-martial or in writing, the accused's copy shall be forwarded to the accused's defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

Having carefully considered the post-trial submissions, we are not convinced that the government exerted due diligence to find and serve this appellant. Oddly enough, the legal office was successful in locating the appellant in May 2005 when they served him with the new Special Court Martial Order #4. Hence, we find it was not impracticable to find the appellant in August 2004 and serve the SJAR on him, and hold the failure to do so was error.

To resolve a claim of error connected with the convening authority's post-trial review, the appellant must first allege the error at the Court of Criminal Appeals; second, he must make "some colorable showing of possible prejudice" as a result of the error; third, he must show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288-89 (C.A.A.F. 1998).

The appellant has alleged error. Furthermore, we find the appellant has made a "colorable showing of possible prejudice." Armed with an accurate Report of Result of Trial and submission of matters from the appellant and his counsel, the new convening authority may have granted some relief. Because we cannot speculate what relief that might have been, we reluctantly return the record of trial yet again for proper post-trial processing. Specifically, the Report of Result of Trial must be corrected and substituted as an attachment to the SJAR. Furthermore, the SJAR needs to be served on the appellant and his counsel so they may have an opportunity to respond in accordance with R.C.M. 1105. We also note the promulgating order contains errors as well and should be corrected.[4]

[4] The words "was arraigned at" were inadvertently deleted from the opening paragraph. The Specification of Charge I should reflect the amendment at trial. The Specification of Charge III should reflect the appellant's plea by exceptions and substitutions. The finding of guilty by exceptions and substitutions of the Specification of Charge III is missing the word "neck." *See* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 10.1.6 and Figure 10.2 and 10.8 for guidance (26 Nov 2003).

Accordingly, the action of the convening authority is set aside. The record of trial will be returned to The Judge Advocate General for submission to the appropriate convening authority for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court