**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman VONIQUA B. MASSEY**
**United States Air Force**

**ACM S30651**

**29 March 2006**

Sentence adjudged 27 May 2004 by SPCM convened at Langley Air Force Base, Virginia. Military Judge: Daryl E. Trawick (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Major James M. Winner, Captain David P. Bennett, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Michael E. Savage and Major John C. Johnson.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was convicted, in accordance with her pleas, of one specification of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. She was sentenced by a military judge sitting alone to a bad-conduct discharge, confinement for 3 months, forfeiture of $500.00 pay per month for 3 months, and reduction to the grade of E-1. The convening authority approved the findings and sentence as adjudged. On appeal, she asserts that she was never served with a copy of the

addendum to the staff judge advocate's recommendation (SJAR). She also asserts that her sentence is inappropriately severe.[1] Finding no error, we affirm.

*Discussion*

The appellant was served a copy of the SJAR in accordance with Rule for Courts-Martial (R.C.M) 1106. She made a timely request for clemency to the convening authority, in which she explained her drug use as follows: "I tried to get out of my poor environment, but was not strong enough to resist the temptation that my family and friends presented me with. It is pretty sad when your family members use drugs in your presence and constantly offer them to you." Her counsel wrote a cover letter that referred to the appellant's environment growing up as one "where drugs are readily available and family support lacking."

The staff judge advocate (SJA) summarized these matters in the addendum to the SJAR as follows: The appellant's "clemency request and unsworn statement, as well as the memo written on her behalf by her defense counsel all note that [the appellant] experienced difficulties at home related to a 'dysfunctional' environment and drug use among family members. The military judge considered this argument presented in the form of [the appellant's] unsworn statement when delivering [her] sentence." The SJA concluded the addendum by reiterating his initial recommendation that the sentence be approved as adjudged.

Before us, the appellant argues that the addendum "introduced new issues, namely that the defense arguments had been considered by the military judge." She contends that she was entitled to service of the addendum, and an opportunity to respond to it, under R.C.M. 1106(f)(7) because of these "new" matters. We are unpersuaded. While the addendum notes that certain arguments raised in the appellant's clemency matters were also raised at trial, information from the record of trial does not constitute a new matter requiring service on the accused. *See* R.C.M. 1106(f)(7), Discussion; *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). *See also United States v. Key*, 57 M.J. 246, 249 (C.A.A.F. 2002) (no service required where comment "did not inject anything from outside the record").

The appellant further argues that the addendum suggests "what role, if any, the military judge's evaluation of Appellant's sentencing evidence should play in the convening authority's assessment of the clemency request." On the contrary: the addendum's recitation of the matters raised at trial is both accurate and facially neutral. This is not a case like *United States v. Gilbreath*, 57 M.J. 57, 61 (C.A.A.F. 2002), where the addendum touted the findings of a non-existent "jury," or *United States v. Catalani*, 46 M.J. 325, 328 (C.A.A.F. 1997), where the addendum incorrectly alleged that the

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

appellant's clemency matters were raised at trial and for the first time invoked the seniority of the military judge. We will not ascribe malign motives to the SJA for correctly summarizing the evidence as it was presented at trial. Our decision in this regard is reinforced by the fact that the SJA here properly advised the convening authority that he *must* consider the matters raised by the appellant before taking action. Further, the convening authority's indorsement states that he did so. *See* R.C.M. 1107(b)(3)(A)(iii).

Finally, the appellant insists that the addendum is "misleading" in its claim that the appellant's submissions about her home environment and drug use among her family members were raised at trial. Through her appellate defense counsel, she has provided a sworn declaration from her trial defense counsel who flatly denies that such evidence was provided to the court-martial: "At no time did [the appellant] say that she came from a family that did drugs during her court-martial." Unfortunately, the trial defense counsel's declaration is at odds with the transcript of the appellant's court-martial; the appellant's signed, sworn statement to the Air Force Office of Special Investigations (AFOSI) that was offered and admitted at trial; and a stipulation of fact that he, as trial defense counsel, signed.

The appellant testified during the *Care* inquiry[2] that she smoked marijuana at her parents' home on at least three occasions. She stipulated at trial that her sister is "both a user and a dealer of drugs," and told the AFOSI that she used drugs with her sister on at least one occasion. She further stipulated that her sister provided her with marijuana, that her boyfriend was a drug dealer, and that she used marijuana with at least five friends at her mother's home. She stated during her unsworn statement that her family "is dysfunctional" and that her "parents and siblings have many problems." Trial defense counsel, in argument on sentence, lauded the appellant for her willingness not only to work toward her own rehabilitation, but also to try to "fix [her] brothers and sisters." On reviewing the entire record, including the declaration, we are satisfied that the addendum is not misleading.[3]

Trial defense counsel's declaration avers that, had he been given the opportunity to respond to the addendum, he would have pointed out that the cited arguments were not raised at trial, and recommended the convening authority be "directed" to consider all the matters in the clemency package. As noted above, however, trial defense counsel's representations concerning what was raised at trial were inaccurate; moreover, the convening authority's indorsement to the addendum states that he *did* consider all of the clemency matters. Therefore, regardless of the merits of the appellant's other arguments,

[2] *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

[3] We are troubled by the discrepancies between trial defense counsel's declaration and the record of trial; however, we do not consider the appellant responsible for them, and our concerns played no part in our decision. We simply remind counsel of the importance of providing factual information to this, and every, Court.

we conclude the appellant has not met her burden of making a colorable showing of possible prejudice. *See United States v. Brown*, 54 M.J. 289, 292-93 (C.A.A.F. 2000).

Finally, we have evaluated the appellant's claim that her sentence is too severe. Given her 10-20 admitted uses of marijuana and her prior disciplinary record, we resolve this issue against the appellant, as well. *See United States v. Peoples*, 29 M.J. 426, 427 (C.M.A. 1990); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

*Conclusion*

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

STONE, Senior Judge (concurring in part, dissenting in part):

I concur in the majority's holding that the appellant's sentence is appropriate. However, contrary to the majority's holding, I conclude the appellant has established prejudicial error in the post-trial review of her case. The majority's attempt to distinguish *Gilbreath* and *Catalani* is unpersuasive. The clear import of these cases is that it is new matter whenever an SJA advises the convening authority—expressly or by implication—that he or she should defer to the judgment of the military judge or court members. *Gilbreath*, 57 M.J. at 57; *Catalani*, 46 M.J. at 327-28. Although the language used in the present case is not as strong as that found in *Gilbreath* or *Catalani*, the message was clear: The appellant had already made her case to the military judge, who was not persuaded, and therefore the convening authority should not be persuaded either. The appellant has established a colorable showing of prejudice: "If the SJA's addendum had been served on appellant and her counsel, appellant would have had the opportunity to focus the convening authority's attention on the differences between the responsibilities of the military judge and the convening authority, as well as the different types of information that could be considered." *See Catalani*, 46 M.J. at 328. For these reasons, I

conclude the appellant was entitled to respond to the addendum to the SJAR and the case should be returned to the convening authority to afford her that opportunity.