UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic THOMAS A. MATICH
United States Air Force

ACM 34607

25 April 2003

Sentence adjudged 21 June 2001 by GCM convened at Dover Air Force Base, Delaware. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for Appellant: Major Jefferson B. Brown (argued), Colonel Beverly B. Knott, and Major Terry L. McElyea.

Appellate Counsel for the United States: Captain Peter J. Camp (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E. Judge:

The appellant, pursuant to his pleas, was convicted of one specification of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, one specification of attempted wrongful use of 3,4-methylenedioxymethamphetamine, also known as ecstasy, and one specification of attempted distribution of ecstasy, in violation of Article 80, UCMJ, 10 U.S.C. § 880. A military judge sitting alone sentenced him to a bad-conduct discharge and confinement for 8 months. The convening authority approved the findings and the sentence. On appeal, the appellant alleges three errors and requests that we either remand the case for new post-trial processing and an opportunity to submit additional clemency matters, or that we reassess the sentence. We affirm the findings and the sentence.

Background

The appellant was sentenced on 21 June 2001 and signed a request for deferment and waiver of automatic[1] or adjudged forfeitures of pay and allowances, "so his family could survive until he was released from confinement."[2] His wife, an active duty E-3, was pregnant with their first child, and the appellant stated that supporting his family was the most important priority in his life. The appellant also attached a financial statement prepared by a financial counselor in anticipation of his court-martial. On 27 June 2001, the base legal office received the appellant's request for deferment together with a letter from his trial defense counsel, and the financial analysis of his income and expenses prepared by his financial counselor. The staff judge advocate (SJA) forwarded a written recommendation to disapprove the request for deferment and waiver of forfeitures to the convening authority on 28 June 2001. The SJA's written forfeiture advice stated the appellant's child was "soon-to-be born'' and recommended disapproval.

Pursuant to Rule for Courts-Martial (R.C.M.) 1106, the SJA served his recommendation (SJAR) on trial defense counsel the next day. The SJAR states that the appellant is married to another Air Force member and has no dependents. However, the SJA did not serve a copy of his forfeiture advice on the appellant or his counsel. The convening authority denied the appellant's request for deferment and waiver of automatic forfeitures on 30 June 2001. The convening authority's one-sentence decision does not provide a rationale for and/or the criteria he used to arrive at his decision.

In accordance with Article 60, UCMJ, 10 U.S.C. § 860, and R.C.M. 1105, on 9 July 2001, the appellant's trial defense counsel submitted clemency matters that included a second request by the appellant asking the convening authority to waive automatic forfeitures. In making this request, the appellant stated, "My wife does not make enough money as an E-3 to raise a baby by herself and pay all of the bills.'' He also let the convening authority know that his son was recently born. Additionally, the trial defense counsel pointed out that the SJAR was not correct since the appellant now had a dependent son. The appellant once again attached his financial statement. In addition, his submission included statements from his wife, mother, and mother-in-law, indicating financial need, as well as the personal financial statement prepared by the financial counselor substantiating the family's financial needs. The SJA prepared an addendum to the SJAR, dated 9 July 2001, that stated the appellant now had one dependent and was asking for a waiver of the automatic forfeitures. On 11 July 2001, the convening

[1] Our superior court in *United States v. Emminizer*, 56 M.J. 441 (2002) refers to automatic forfeitures as mandatory forfeitures. For ease of understanding, we will use the term automatic since that is the term used by the parties in this case.

[2] Because his sentence included a punitive discharge and confinement, a forfeiture of all his pay and allowances would go into effect 14 days after the sentence was adjudged, unless the convening authority granted him a deferment. *See* Article 58b(a), UCMJ. 10 U.S.C. § 858b(a).

authority approved the adjudged sentence. The convening authority took no further action concerning the waiver of automatic forfeitures.

The appellant avers on appeal that: (1) The SJA erred by failing to serve all portions of the SJAR on the appellant and his defense counsel; (2) The SJA erred by failing to serve the waiver of automatic forfeitures recommendation on the appellant and his counsel when the recommendation contained new matter; and (3) The SJAR failed to properly address the difference between deferment and waiver of forfeitures. For the reasons set out below, we affirm.

SJA's Failure to Serve all Portions of the SJAR

The appellant asserts that a request for waiver of automatic forfeitures is a request for clemency, and as such, the SJA must follow the processing requirements of Article 60, UCMJ. Specifically, Article 60(d), UCMJ, states, in part, "[b]efore acting under this section on any general court-martial case or any special court-martial case that includes a bad-conduct discharge, the convening authority . . . shall obtain and consider the written recommendation of his staff judge advocate or legal officer." Under Article 60(b)(1), UCMJ, the appellant is entitled to submit written matters to the convening authority "within 10 days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of the staff judge advocate or legal officer under subsection (d)."

The standard of review for determining whether there is a legal requirement to serve the SJA's advice on a deferment request and whether the SJAR contained "new matter" is de novo. *United States v. Key*, 57 M.J. 246 (2002); *United States v. Chatman*, 46 M.J. 321, 323 (1997); 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999). Article 60(d), UCMJ, requires that the SJAR be served on the appellant, but does not mention the service of an addendum to a SJAR. As a result, service of an addendum is only required if it contains new matter. *See* R.C.M. 1106(f)(7). In *Chatman,* our superior court held that even if there were "new matter" in an addendum to the SJAR, when the appellant complains about the SJA's failure to serve an addendum containing new matter on him or her, the appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter or explain' the new matter." *Chatman*, 46 M.J. at 323.

Neither the SJA's waiver of automatic forfeiture advice nor the addendum to the SJAR were served on the appellant. The SJA's forfeiture advice and the SJAR were both dated 28 June 2001. Although it is not clear which document the SJA prepared first, the appellant was served with the SJAR on 29 June 2001 and the legal office processed them as two separate actions. The request for deferment and wavier of automatic forfeitures was sent directly to the convening authority, while the SJAR was processed as required according to R.C.M. 1106.

The appellant asserts that the SJA's legal review concerning deferment and waiver of automatic forfeitures is part of the SJAR. We disagree. In *United States v. Spears*, 48 M.J. 768 (A.F. Ct. Crim. App. 1998), *overruled in part on other grounds by United States v. Owen*, 50 M.J. 629 (A.F. Ct. Crim. App. 1998) (en banc), *overruled in part on other grounds by United States v. Emminizer*, 56 M.J. 441 (2002), this Court said that any legal review of a case for the convening authority, including those of a forfeiture waiver request, prepared prior to the SJAR should be served on the accused along with the SJAR. The Court went on to say that any legal review of a case for a convening authority, including those of a forfeiture waiver request, prepared after the SJAR is served on the accused should be treated as an addendum to the original SJAR and served on the accused for comment. *Id.* at 776. One matter that is clear and still holds from *Spears* is that, although we recommend service of any written advice concerning automatic forfeitures, the SJAR and the advice on forfeitures are two separate documents. *Id.* This Court in *Spears* was very careful to emphasize that there was no requirement for an SJA to prepare a legal review of an appellant's request for waiver of forfeitures. *Id.* However, if an SJA chose to prepare a written legal review, we encouraged service, but this Court did not make service of the legal review mandatory. *Id.* Our rationale, in *Spears,* was premised on trying to "avoid needless appellate litigation" about whether the legal review contained matters outside the record. *Id.*

Our superior court has agreed that an SJA's written advice concerning the deferment of automatic forfeitures is not a part of the SJAR. *United States v. Brown*, 54 M.J. 289, 292 (2000). In *Brown*, 54 M.J. at 292, the Court of Appeals for the Armed Forces (CAAF) stated:

> We note that Congress has recognized the serious impact that such forfeitures would have on the family of the accused by providing the authority for deferment and waiver. The issue before us raises questions involving constitutional due process and statutory interpretation. . . . [W]e need not decide whether the requirements of notice and an opportunity to comment apply to requests for deferment of adjudged forfeitures or waiver of automatic forfeitures. . . . Rather than attempt to resolve them in the present case, we believe the most prudent course of action is for the Executive Branch to consider whether, as a matter of law or policy, and consistent with due process considerations, such requests to the convening authority should be followed by a recommendation from the SJA and service on the accused with an opportunity to respond.

In *Key*, the CAAF once again noted the absence of a specific statutory or regulatory requirement for an SJA to serve his or her recommendation on a request for deferment of forfeitures. *Key*, 57 M.J. at 248, *citing Brown*, 54 M.J. at 292. However,

the CAAF stated that there may be a constitutional requirement for service on an accused if the recommendation contained "new matter." *Id.* at 249.

The addendum to the SJAR dated 9 July 2001 contained no new matter. If anything, it highlighted the fact that the SJAR was no longer correct since the appellant's wife had given birth to their son. It also summarized the appellant's second request for waiver of automatic forfeitures. Therefore, there was no requirement for the SJA to serve the addendum on the appellant. We hold that the advice concerning forfeitures is not part of the SJAR. We next address whether the SJA advice on forfeitures contains any new matter.

Whether the SJA's forfeiture advice contained new matter

The appellant asserts that he is entitled to respond to the following comments included in the SJA's advice dated 28 June 2001:

> [T]he deferment of any forfeitures would be paid directly to the accused and he would then have the discretion to provide the money to his wife. The accused's wife is an active duty military member currently receiving military pay. She is entitled to assistance in her own right, from the military should she need any. Although the defense counsel notes that the accused believes that supporting his family is his most important priority, he has not previously demonstrated any willingness, on his part, to provide for his family. In fact, prior to these offenses he was disciplined for assaulting his pregnant wife. Clearly, the accused has only now conveniently put the needs of his family above his own desires. Therefore, we do not believe this is an appropriate case for either a deferment or waiver of forfeitures.

The appellant asserts that the SJA's comments above are new matter. We disagree.

Although the SJA's advice on deferment and waiver of automatic forfeitures is not an SJAR, since they could be viewed as similar, we review whether the advice contains new matter de novo, as set forth in *Chatman,* 46 M.J. 323. In *Chatman*, the CAAF required the appellant to show prejudice when alleging that an SJAR contained "new matter." *Id*. The CAAF established what amounts to a two-part test for determining whether the appellant is entitled to service. *Id.* First, we must determine whether the SJA's advice contained "new matter," and second, if so, was the appellant prejudiced by the "new matter."

The Discussion following R.C.M. 1106(f)(7) provides a definition for "new matter." It states in part:

> "New matter" includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer on the correctness of the defense comments on the recommendation.

While the SJA's exact comments were not in the record of trial, the comments were inferences that could reasonably be drawn from evidence in the record of trial. As a result, they were not new issues. Even if the comments are considered "new matter," we find no prejudice.

In *Chatman,* the Court required an appellant to demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the new matter. *Chatman*, 46 M.J. at 323. The Court went on to say that the appellant's threshold for showing prejudice is low and as a long as the appellant makes a colorable showing of possible prejudice, he or she will be given the benefit of the doubt. *Id.* at 323-24.

On appeal, the appellant provided an affidavit summarizing the matters he would have submitted if the SJA had served him with a copy of his advice. In the affidavit, the appellant stated that he loved and cared for his wife. He also stated that he provided for his wife financially and he tried to be a responsible father and husband. Additionally, he stated his wife was having serious financial difficulties and although she was able to get a loan for $1100.00, there was no "free money" available to assist her. The appellant also expressed frustration that the SJA had attacked him without giving him an opportunity to explain that he was not a bad person. The appellant concluded the affidavit by stating that he believed he had a strong case for waiver of automatic forfeitures and that his wife and child were innocent.

While the statements in this affidavit could be a colorable showing of possible prejudice in some cases, this is not one of them. In this case, the appellant submitted his initial request on 21 June 2001. In his initial request he stated that supporting his family was the most important priority in his life. He then went on to explain his current financial situation and how the loss of his salary would result in a $712.00 monthly shortfall for his family. After the appellant's request for waiver was denied on 30 June 2001, the appellant made a second request for a waiver of automatic forfeitures along with the submission of his clemency matters.

In his clemency matters, he again emphasized that his wife did not make enough money to raise a baby and pay all the bills. The appellant also stated he was worried about his wife and his son and wanted an opportunity to become a better man. Attached to the clemency request was a copy of the appellant's financial status, as well as a letter from his mother and his defense counsel requesting the convening authority to help the appellant's family financially.

As stated before, the addendum to the SJAR also advised the convening authority that the appellant was asking for a waiver of automatic forfeitures. The SJA did not make a recommendation for or against approval of the automatic forfeitures in the addendum to the SJAR. Based on these facts, we are confident that the convening authority was well aware of the appellant's financial situation and his stated feelings about his family. As a result, the appellant did have an opportunity in his clemency submissions to comment on the issues he asserted were "new matters" in his affidavit. In addition, the information submitted by the appellant to show prejudice, was considered by the convening authority as part of the appellant's SJAR and clemency response after the convening authority received the SJA's forfeiture advice. In essence, the appellant had the "last word" concerning a waiver of automatic forfeitures before the convening authority took final action on the case. Therefore, we hold that there was no "new matter" in the SJA's advice. Even if we were to determine that there is "new matter" in the forfeiture advice, we hold no prejudice to the appellant caused by a lack of service. Article 59(a), UCMJ; 10 U.S.C § 859(a).

Whether the SJA's Forfeiture Advice failed to adequately address the differences between deferment and waiver of forfeitures

Finally, the appellant asserts that the SJA misled the convening authority when he advised the convening authority about a deferment and a waiver without adequately differentiating between the two. We disagree. We considered this matter a question of law and reviewed this matter de novo. Although the SJA's forfeiture advice is not a model of clarity, it does draw a distinction between the two.

Specifically, the first paragraph told the convening authority that he had the discretion to defer automatic forfeitures until the sentence was approved. It then correctly stated that any deferred amount would go to the appellant. Then, the letter stated that under Article 58b, UCMJ, the convening authority had the discretion to waive any or all of the automatic forfeitures for up to six months, for an "involuntary allotment" to support an accused's dependents. A plain reading of the SJA's advice is that it lets the convening authority know that any waiver of forfeiture of pay and allowances would go to the dependents of an accused.

The asserted lack of clarity is found in paragraph three. Here, the SJA recommended denying the request because the deferment of any forfeiture of pay or allowances would be paid directly to the appellant. Then, the SJA discussed why he believed the appellant's wife did not need financial assistance. The SJA ended his letter stating that he did not believe this was an appropriate case for either deferment or waiver. Since the SJA decided to prepare a written response and mentioned twice that deferred pay would go directly to the appellant, a better practice would have been to also reemphasize in the letter that a waiver of forfeitures would go directly to the appellant's

dependents. Nevertheless, we believe that the SJA made the convening authority aware of the differences between deferment and waiver and that the convening authority did not abuse his discretion by denying the appellant's request. Therefore, we see no need to either remand this case for post-trial processing or reassess the appellant's sentence.

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 (2000). Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge SCHLEGEL participated in this decision prior to his retirement.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Court Administrator