UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NEVIN T. MAURY III
United States Air Force

ACM 35190

14 September 2004

Sentence adjudged 16 April 2002 by GCM convened at RAF Mildenhall, United Kingdom. Military Judge: Linda S. Murnane (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for Appellant: Captain David P. Bennett (argued), Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, Major Bryan A. Bonner, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Captain Kevin P. Stiens (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Jennifer R. Rider.

Before

ORR, GENT, and MOODY
Appellate Military Judges

OPINION OF THE COURT

ORR, Senior Judge:

The appellant, pursuant to his pleas, was convicted of desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885. A military judge sitting alone sentenced him to a dishonorable discharge, confinement for 12 months, and reduction to E-1. The convening authority approved the findings, reduced the amount of confinement to 9 months (pursuant to a pretrial agreement), and approved the remainder of the sentence. On appeal, the appellant alleges two errors. He requests that we set aside the action and

return the case to the convening authority for new post-trial processing. Additionally, the appellant requests that we set aside the dishonorable discharge and substitute it with a bad-conduct discharge. Finding no error, we affirm.

Background

The appellant was a Security Forces member assigned to Royal Air Force (RAF) Mildenhall, United Kingdom. While assigned to temporary duty at Headquarters, United States Central Command, MacDill Air Force Base, Florida, the appellant failed to report to his place of duty on 17 January 2002, and instead flew to Huntsville, Alabama, to meet his family. After several days in Huntsville, Alabama, the appellant decided he no longer wanted to be in the military so he flew with his family to the Caribbean Island of Aruba. After a few days, the appellant and his family became disillusioned and bored with life in Aruba. The appellant talked to his parents and they encouraged the appellant and his family to return to Huntsville and work things out. On or about 26 February 2002, which was shortly after their arrival in Huntsville, the appellant was apprehended by two Huntsville police officers and an agent from the Air Force Office of Special Investigations.

The appellant was subsequently convicted and sentenced at a general court-martial on 16 April 2002. Because his sentence included a punitive discharge and confinement, a forfeiture of all his pay and allowances was to go into effect 14 days after the sentence was adjudged, unless the convening authority granted him a waiver of automatic forfeiture of pay and allowances. *See* Article 58b, UCMJ, 10 U.S.C. § 858b.

On 18 April 2002, the appellant requested a waiver of automatic forfeitures for the benefit of his wife and stepdaughter. The acting staff judge advocate (SJA) advised the convening authority to deny the request because the appellant's wife actively participated in the appellant's decision to desert. Specifically, the acting SJA wrote:

> According to the record of trial, the accused and his spouse had mounting debt in England and discussed ways to leave their debt and England behind. Mrs. Maury was under investigation by British Social Services for benefits fraud related to her rental of counsel [sic] housing. She fled with [the appellant] to Aruba and was with him at the time of his apprehension in Alabama. Mrs. Maury was, at a minimum, an active participant in [the appellant's] desertion and should not now benefit from the crimes for which her husband has been sentenced.

Trial defense counsel was not served with a copy of this advice. On 2 May 2002, the convening authority denied the appellant's request for a waiver of automatic forfeitures.

On 21 May 2002, the staff judge advocate's recommendation (SJAR) was served on the appellant and his trial defense counsel. On 30 May 2002, the 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, "The waiver of forfeitures would help ease the burden that my wife and daughter are now undergoing." The appellant also argued that his stepdaughter "has been totally innocent in this situation" and asked the convening authority not to punish her for his and his wife's mistakes. The SJA prepared an addendum to the SJAR, dated 31 May 2002, that stated the appellant was asking the convening authority to reconsider the denial of the appellant's request for a waiver of the automatic forfeitures. The addendum was not served on the appellant or his trial defense counsel. On 4 June 2002, the convening authority reduced the amount of confinement to 9 months, in accordance with the pretrial agreement, and approved the remainder of the adjudged sentence. The convening authority took no further action concerning the waiver of automatic forfeitures. As a result, his 2 May 2002 memorandum denying the waiver of automatic forfeitures remained in effect.

Issue I

WHETHER THE APPELLANT IS ENTITLED TO NEW POST-TRIAL ACTION WHERE THE SJA ADVISED THE CONVENING AUTHORITY ON THE APPELLANT'S REQUEST FOR WAIVER OF AUTOMATIC FORFEITURES USING INFORMATION OUTSIDE THE APELLANT'S REQUEST AND OUTSIDE OF THE RECORD BUT THEN FAILED TO SERVE THIS ADVICE UPON THE APPELLANT.

Discussion

Our superior court has stated that the standard of review for determining whether there is a legal requirement to serve the SJA's advice in response to an accused's request for a waiver of automatic forfeitures and whether the SJA's advice contained "new matter" is de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002); *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). *See also* 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999).

Article 60(d), UCMJ, 10 U.S.C. § 860(d), requires the SJAR be served on the appellant, who may submit any matter in response. While this article does not mention the same requirement for an addendum to the SJAR, Rule for Courts-Martial (R.C.M.) 1106(f)(7), specifically states that if the SJA supplements the original recommendation by providing the convening authority with new matter, the new matter must be served on the counsel in order to ensure compliance with the opportunity to comment. *See also United States v. Brown*, 54 M.J. 289, 291 (C.A.A.F. 2000).

The Discussion following R.C.M. 1106(f)(7) provides a good definition for what constitutes 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 of the correctness of the initial defense comments on the recommendation.

In *Chatman*, 46 M.J. at 323-24, our superior court required the appellant to demonstrate a "colorable showing of possible prejudice" when alleging that an SJAR contained "new matter." They, in essence, established a two-part test for determining whether the appellant is entitled to service. First, whether the SJAR contained "new matter," and second, if so, was the appellant prejudiced by the "new matter." *Id*.

There has been no constitutional or statutory articulation of whether the appellant should be provided with notice of and an opportunity to respond to any written submissions from the SJA to the convening authority with respect to deferment or waiver of forfeitures. *Brown*, 54 M.J. at 292; *Key*, 57 M.J. at 248. In noting this absence, the Court 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 at this time 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.

Brown, 54 M.J. at 292.

We need not reach the constitutional or statutory interpretation issues in this case, either, because we hold that the acting SJA's comments in her advice to the convening authority regarding the request for waiver of automatic forfeitures were not "new matter." *Key*, 57 M.J. at 249.

The acting SJA's advice, dated 30 April 2002, merely summarized evidence that would later be found in the completed record of trial. The stipulation of fact and the

appellant's unsworn statement both indicated that the appellant's wife was an active participant in the appellant's decision to leave the military. As a result, they were not new issues.

However, even if there was "new matter" in the advice to the convening authority regarding the request for waiver of automatic forfeitures, 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. *See also* Article 59(a), UCMJ, 10 U.S.C. § 859(a) (error must materially prejudice substantial rights of the appellant).

The threshold for showing prejudice is low and as a long as the appellant makes a colorable showing of prejudice, he or she will be given the benefit of the doubt. *Chatman*, 46 M.J. at 323-24. On appeal, the appellant's counsel submitted an affidavit summarizing the matters he would have submitted, if the acting SJA had given him a copy of her advice on automatic forfeitures. In the affidavit, the appellant's trial defense counsel stated that:

> Had I seen what the GCMCA [General Court-Martial Convening Authority] was being told about Mrs Maury, I believe I would have addressed this specific issue at clemency. In my opinion, this unilateral assessment of Mrs Maury may have served to obviate [the appellant's] right to due process post-trial. Had I been given a fair and timely opportunity to rebut these allegations, it is likely that the GCMCA would have seen they lacked foundation and, more important, he would have presented with all the facts and circumstances as to why the Maurys left and why they returned to the States. Karina and Jade Maury are not villains; if the GCMCA had been given a complete picture, I think he just might have waived the [automatic forfeitures].

While the statements in this affidavit could be viewed as a colorable showing of prejudice in some cases, the facts of this case do not support the trial defense counsel's assertions of prejudice. In the case sub judice, the appellant, through his trial defense counsel, submitted his initial request for waiver of automatic forfeitures on 18 April 2002. In the trial defense counsel's initial request, he stated that the appellant's wife and stepdaughter would be left without adequate support without a waiver of automatic forfeitures. After the appellant's request for waiver was denied on 2 May 2002, the appellant's trial defense counsel included a second request for a waiver of automatic forfeitures with the submission of clemency matters. In the submission of clemency matters, he again emphasized that the appellant's stepdaughter "played absolutely no part in her parents' actions."

Based on these facts, we are confident that the convening authority was well aware of the appellant's financial situation and that the appellant's stepdaughter was an innocent

child. While the convening authority had the discretion to waive the automatic forfeitures to provide support to the stepdaughter, he chose not to. *See* Article 58b, UCMJ.

Further, the trial defense counsel's affidavit asserts that if the appellant had been served with the acting SJA's advice concerning automatic forfeitures, and he had an opportunity to submit matters, the convening authority then might have waived the automatic forfeitures. We disagree. His affidavit primarily offered to explain Mrs. Maury's involvement with the case. However, this response does not provide sufficient information to rebut the facts found in the stipulation of fact. Although the standard for prejudicial error under *Chatman* is low, it "does not include sheer speculation about factual matters that are within the normal investigative capabilities of counsel." *Brown*, 54 M.J. at 293. Therefore, we find no prejudice to the appellant. Additionally, we hold that the convening authority did not abuse his discretion by denying the appellant's request. Therefore, we see no need to remand the case for new post-trial processing.

Issue II

WHETHER THE APPELLANT'S SENTENCE TO A DISHONORABLE DISCHARGE WAS INAPPROPRIATELY SEVERE IN LIGHT OF APPELLANT'S SINGLE OFFENSE AND POSITIVE SERVICE RECORD.

In order to determine the appropriateness of the sentence, this Court must consider the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The appellant pled guilty to deserting his unit during a time of national crisis, specifically, Operation Enduring Freedom. Moreover, his desertion status was terminated when he was apprehended by civilian, as well as military authorities, despite many opportunities to turn himself in. The appellant asks this Court to reduce his dishonorable discharge to a bad-conduct discharge. We decline to do so. Considering, the character of the offender, the nature and seriousness of the offense, and the entire record, the appellant's sentence is not inappropriately severe.

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 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court