UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY D. MAYS
United States Air Force

ACM 35310

25 August 2004

Sentence adjudged 29 July 2002 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

PER CURIAM:

The appellant, pursuant to his pleas, was convicted of dereliction of duty and wrongful use of methamphetamine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a, respectively. A general court-martial composed of a military judge sitting alone, sentenced him to a bad conduct discharge, confinement for 4 months, and reduction to E-1. The convening authority approved the adjudged findings and sentence. On appeal, the appellant alleges that the staff judge advocate's (SJA) failure to advise the convening authority that the appellant had been subject to pretrial restraint is error. We affirm the findings and set aside the convening authority's action.

Background

The appellant was subject to 141 days restriction prior to his court-martial. At trial, the appellant and his defense counsel told the military judge that the restriction did not amount to pretrial punishment and that the appellant was not entitled to any sentencing credit. On 19 August 2002, the appellant received a copy of the staff judge advocate's recommendation (SJAR). The SJA did not mention the appellant's pretrial restraint in the SJAR or in the addendum to the SJAR. In addition, the personal data sheet attached to the SJAR indicated that the section relating to the nature of pretrial restraint was not applicable. Neither the appellant's clemency request nor the appellant's trial defense counsel's submission raised any objections to the SJAR or requested any additional credit for the pretrial restriction.

Discussion

The issue before this Court is whether the SJA's failure to advise the convening authority that the appellant had been subject to pretrial restraint prejudiced the appellant's opportunity to receive clemency from the convening authority. Because the SJAR was properly served on the defense counsel and the appellant, and the trial defense counsel failed to comment on the error, we review the omission for plain error. *See* Rule for Courts-Martial (R.C.M) 1106(f)(6). We review application of the plain error doctrine 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); 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review*, § 7.05 (3d ed. 1999). To prevail under a plain error analysis, the appellant has the burden of showing that (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced the appellant's substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Because of the highly discretionary nature of the convening authority's action on a sentence, we may grant relief if an appellant presents "some colorable showing of possible prejudice." *Id.* (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)).

We first review for obvious error. R.C.M 1106(d)(3)(D) requires the SJA to include a statement concerning the nature and duration of any pretrial restraint in the SJAR. Failure to include this information is error. *Wheelus*, 49 M.J. at 285. In the instant case, the government concedes this point and we too find that there was error and it is plain and obvious.

We next test for whether the error resulted in prejudice to the appellant's substantial right to have a request for clemency judged on the basis of an accurate record. We will not speculate on what the convening authority would have done if he had been presented with an accurate record. *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F 2003) (citing *United States v. Jones*, 36 M.J. 438, 439 (C.M.A. 1993)). There

is a significant difference between an accused who did not have any type of pretrial restraint imposed and an accused who was subject to 141 days of pretrial restriction. We, therefore, conclude that the appellant has demonstrated a "colorable showing of prejudice" in that the convening authority did not have a complete and accurate record, which ultimately could have impacted his decision regarding the appellant's clemency request when post-trial action was taken.

In *Wheelus*, 49 M.J. at 289, our superior court stated, "If the appellant makes such a showing [of prejudice], the Court of Criminal Appeals must either provide meaningful relief or return the case to the Judge Advocate General concerned for a remand to a convening authority for a new post trial recommendation and action." *See also Wellington*, 58 M.J. at 427. Accordingly, while we could reduce the appellant's confinement by a month, as requested by the appellant, we decline to do so. We are reluctant to grant such relief in the absence of a showing of bad faith by the government. Moreover, we do not want to give trial defense counsel the impression that when they fail to raise obvious errors in the SJAR in their clemency submissions, their clients are automatically entitled to meaningful relief from this Court. Therefore, in this case, to avoid the aforementioned, as well as "speculation concerning the consideration of such matters which are command prerogative," we believe the best course of action is to return the case to the convening authority. *Jones*, 36 M.J. at 439.

The convening authority's action 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