

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

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**UNITED STATES**

**v.**

**Master Sergeant NICANOR E. REYES, JR.  
United States Air Force**

**ACM 38164**

**11 September 2013**

Sentence adjudged 31 May 2012 by GCM convened at Andersen Air Force Base, Guam. Military Judge: Michael A. Lewis (sitting alone).

Approved Sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen and Mr. Gerald R. Bruce, Esquire.

Before

**ORR, HARNEY, and MITCHELL**  
Appellate Military Judges

**OPINION OF THE COURT**

This opinion is subject to editorial correction before final release.

**HARNEY, Senior Judge:**

The appellant pled guilty to two specifications of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge sitting as a general court-martial accepted the appellant's pleas, convicted him of these offenses, and sentenced him to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error before this Court. First, he asserts that the staff judge advocate (SJA) erred when he submitted an incorrect Personal Data Sheet (PDS) to the convening authority as part of the Staff Judge Advocate's

Recommendation (SJAR). Second, the appellant asserts that his sentence consisting of a bad-conduct discharge is inappropriately severe. We disagree and affirm.

### *Background*

During presentencing, trial counsel submitted a PDS dated 31 May 2012 to the military judge. The PDS miscalculated the appellant's length of service as "11 years 2 months." The military judge stated that the correct length of service should be "11 years 4 months." Both sides agreed and the PDS, as corrected, was admitted as a prosecution exhibit. The PDS also included under "Overseas Service (OCONUS)" the appellant's assignment to Kadena Air Base, Japan, and included under "Awards and Decorations" the appellant's longevity service award with one device.

On 25 June 2012, the SJA submitted the SJAR to the convening authority. Attached to the SJAR was an incorrect version of the PDS, dated 31 May 2012. This PDS omitted the appellant's overseas tour to Kadena Air Base and his longevity service award with one device. It also incorrectly listed his length of service as "11 years 2 months."

On 13 July 2012, trial defense counsel submitted the appellant's clemency package to the convening authority. The clemency package did not raise the errors in the PDS. On 13 July 2012, the SJA provided the SJAR Addendum to the convening authority. Attached to the Addendum was a copy of the appellant's clemency request, the appellant's sentencing package, the appellant's enlisted performance reports, various character letters, excerpts from the appellant's trial, and the SJAR with attachments. The Addendum advised the convening authority that he must consider matters submitted by the appellant prior to taking action. On 16 July 2012, the convening authority endorsed the Addendum stating that he had considered the "attachments" before taking action on the appellant's case.

### *Post-Trial Processing*

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to comment in a timely manner on matters in the SJAR, or on matters attached to the SJAR, waives any later claim of error in the absence of plain error. Rule for Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). An appellant must make some "colorable showing of possible prejudice in terms of how the [perceived error] potentially affected [his] opportunity for clemency." *Id.* at 437 (quoting *Kho*, 54 M.J. at 65).

In this case, the SJAR included an erroneous PDS that mischaracterized the length of the appellant's service; incorrectly summarized the appellant's service record by omitting his overseas tour to Kadena Air Base; and omitted his longevity service award with one device. This was error. To be entitled to relief, however, the appellant must show prejudice. Here, the appellant's clemency request and submissions sufficiently informed the convening authority of the appellant's service history, to include length of service, overseas assignment to Kadena Air Base, and longevity service award with one device.<sup>1</sup> The Addendum to the SJAR correctly informed the convening authority that he was required to consider the appellant's clemency submission pursuant to R.C.M. 1107(b)(3)(A)(iii). We are convinced that the convening authority was aware of the appellant's length of service, assignment to Kadena Air Base, and longevity service award with one device because the endorsement to the SJAR indicates he did, in fact, consider all of the matters submitted by the appellant. Notwithstanding the SJA's error, we find the appellant failed to make a colorable showing that he suffered prejudice from the error.

#### *Sentence Severity*

The appellant also argues that his sentence, which included a bad-conduct discharge, is inappropriately severe.<sup>2</sup> We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved.” Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, 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); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

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<sup>1</sup> The appellant's clemency submission specifically references his length of service, overseas tour to Kadena Air Base, Japan, and his longevity service award. See Pet. Clemency, Attach. 1, Def. Exs. E, I, N, O, P, Q, R, T, V, W, X, Y, Z, and AH. Likewise, his enlisted performance reports from 16 January 2001 to 1 May 2007 refer to his Kadena assignment. *Id.* at Attach. 2. The appellant also mentioned it in his written unsworn statement. *Id.* at Attach. 1, Ex. AU. In his written unsworn statement, the appellant mentioned that he enlisted in the Air Force on 16 January 2001, from which the convening authority could extrapolate the length of the appellant's service. Finally, the appellant's longevity service award with the one device is listed. *Id.* at Attach. 1, Def. Ex. K.

<sup>2</sup> The appellant raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial. In this case, the appellant, a senior non-commissioned officer, used methamphetamine on two occasions. His actions were a clear departure from the expected standards of conduct in the military. We find that the approved sentence, which included a bad-conduct discharge, was clearly within the discretion of the convening authority, was appropriate in this case, and was not inappropriately severe.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.



FOR THE COURT

STEVEN LUCAS  
Clerk of the Court