UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM N. ROGERS
United States Air Force

ACM 35256

26 August 2004

Sentence adjudged 20 May 2002 by GCM convened at Hanscom Air Force Base, Massachusetts. Military Judge: Thomas G. Crossan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Brandon A. Burnett, Major Terry L. McElyea, Major Jefferson B. Brown, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major James K. Floyd, and Captain Steven R. Kaufman.

Before

BRESLIN, ORR, and PETROW
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The record of trial reflects that the military judge in announcing that portion of the sentence pertaining to forfeitures stated the following: "to forfeit all payable allowances." The appellant contends that the adjudged forfeiture violates Rule for Courts-Martial (R.C.M.) 1003(b)(2) in that it only included forfeiture of allowances and not of pay. Accordingly, the appellant requests that this Court order an amendment to the General Court-Martial Order to reflect the sentence as it appears in the record, and to then disapprove that portion of the sentence.

In order to verify what sentence the military judge announced at trial, this Court ordered the military judge to review the record of trial and tape recordings of the proceedings, as necessary, and to inform the court whether the record accurately reflects the adjudged sentence. *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). If the military judge determined that the record did not accurately reflect the sentence adjudged, we directed that he complete a certificate of correction, following the procedures in R.C.M. 1104(d). *See United States v. Anderson*, 12 M.J. 195 (C.M.A. 1982); *United States v. McLaughlin*, 39 C.M.R. 61, 62 (C.M.A. 1968); *United States v. Mosley*, 35 M.J. 693, 695 (N.M.C.M.R. 1992).

Government appellate counsel conducted an inquiry and determined that the stenographic reporting for the trial had been contracted out to a private firm and that no tapes existed – only the court reporter's stenographic notes which were consistent with the record of trial.

The military judge completed a certificate of correction after complying with the procedures set forth in R.C.M. 1104(d), giving notice of the proposed correction to the parties. The correction consisted of deleting the word "payable" and inserting the words "pay and" in its place. The appellant objected asserting that the record, supported by the stenographer's notes, should hold sway over the judge's memory of the single moment at which he announced sentence.

Our review of the record persuades us otherwise. First, it appears that the presence of a mechanical noise in the court room made it difficult for the court reporter to hear, resulting in the trial counsel, on several occasions, requesting witnesses to speak up because of the noise.

A pretrial agreement limited the maximum approvable period of confinement to 24 months. In discussing the agreement following sentencing, the military judge asked counsel if they agreed that the convening authority may approve the sentence adjudged. Both government and defense counsel responded affirmatively.

The staff judge advocate's recommendation (SJAR), as well as the addendum to the recommendation, both of which were served upon appellant and his counsel, recommended approval of the adjudged sentence described as including "total forfeiture of all pay and allowances." No objection was raised by the defense to either document. In fact, the defense counsel in her clemency petition describes the adjudged sentence as including "total forfeitures of all pay and allowances."

Appellant defense counsel frames the issue in this case as one of an ambiguous sentence which should be construed in favor of the accused. However, it appears the only ambiguity in this case was in the ear of the beholder. In fact, the true onus in this case was laid much earlier on and squarely in the lap of the trial defense counsel when

she had the opportunity to raise legal objections to the sentence pursuant to R.C.M. 1105(b)(2)(A). Other similar opportunities existed after defense counsel received the SJAR referencing "total forfeitures of all pay and allowances." Pursuant to R.C.M. 1106(f)(4), the trial defense counsel may submit, in writing, corrections or rebuttal to any matter in the SJAR believed to be erroneous, inadequate, or misleading. No such correction or rebuttal surfaced. The obvious explanation, as borne out by the defense counsel's own use of the "all pay and allowances" language in her clemency submission, is that she heard what everyone else in the courtroom heard, that is, with the exception of the court reporter.

The court reporter's insertion of the record of "all payable allowances" is clearly an administrative error. Such error must be tested for prejudice and waiver. *United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992). The appellant was punished by forfeiture of all pay and allowances. That punishment was clearly intended by the military judge and understood by all of the parties to the trial. Accordingly, the appellant suffered nothing more or less than what was intended.

The trial defense counsel's failure to object on the various occasions presented for such action confirms this conclusion. Pursuant to R.C.M. 1106(f)(6), such failure waives any later claim of error unless it rises to the level of plain error. To establish plain error the appellant must establish that (1) there was an error, (2) that it was plain or obvious, and (3) that the error materially prejudiced a substantial right. *United States v. Wilson*, 54 M.J. 57, 59 (C.A.A.F. 2000) (citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). The appellant suffered no prejudice in receiving the punishment clearly intended for him.

Finally, insubstantial errors or omissions in a record of trial "do not raise a presumption of prejudice or affect that record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). All of the available evidence indicates that this error was nothing more than a transcription error by the court reporter.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court