UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman SCOTT A. ROSE
United States Air Force

ACM 34873

12 March 2003

Sentence adjudged 7 September 2001 by GCM convened at Spangdahlem Air Base, Germany. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months and 20 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Lieutenant Colonel Lance B. Sigmon , Captain Nurit Anderson, and Captain Lance Thurgood.

Before

VAN ORSDOL, STONE, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

ORR, V.A., Judge:

The appellant was convicted, in accordance with his pleas, of one specification of attempting to wrongfully import 3,4-methylenedioxymethamphetamine (ecstasy) into the United States, one specification of wrongful use of ecstasy, one specification of possessing ecstasy, one specification of distributing ecstasy, and one specification of wrongful use of marijuana in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880 912a, respectively. A military judge, sitting alone, sentenced him to a bad-conduct discharge, confinement for 18 months, and reduction to E-1. The convening authority approved the adjudged bad-conduct discharge and the reduction to E-1, but reduced the appellant's confinement to 16 months and 20 days. The issues on appeal are: (1)

Whether the staff judge advocate (SJA) failed to inform the convening authority of the military judge's recommendation concerning mandatory forfeitures; (2) Whether the SJA properly explained the differences between waiver and deferral of mandatory forfeitures; and (3) Whether the SJA had an obligation to serve the mandatory forfeiture recommendation on the appellant. We set aside the action of the convening authority and remand the case for a new action.

Background

The appellant's involvement with illegal drugs occurred over a seven-month period while he was stationed at Spangdahlem AB, Germany. His activities ended on 22 May 2001 at the Frankfurt airport when German customs agents stopped him from boarding a flight back to the United States. Acting on a tip from the Spangdahlem AB, Air Force Office of Special Investigations (OSI), the customs agents searched the appellant and found that he had recently handled methamphetamines. The results of the search were communicated to the search authority at Spangdahlem AB, who then gave an OSI special agent authority to search appellant's carry-on luggage. The agent found approximately 48 ecstasy pills hidden in a deodorant container in appellant's luggage. When questioned by a special agent from the Rhein-Main OSI, the appellant confessed that he was planning to import the pills into the United States as well as confessing to the other ecstasy related offenses. He later confessed to using marijuana after a consensual urinalysis tested positive for marijuana metabolites.

In his unsworn statement during sentencing, the appellant expressed his desire to continue supporting his young daughter. The military judge, knowing the appellant would be subjected to mandatory forfeitures of all pay and allowances by operation of Article 58b, UCMJ, 10 U.S.C. § 858b, said, "I recommend to the Convening Authority that he exercise his discretion to waive or defer the mandatory forfeitures that will occur as the result of this sentence for the benefit of the accused's dependent wife and daughter for the maximum period authorized by law."

The SJA served a copy of the recommendation (SJAR) on the appellant and his counsel on 20 November 2001, in accordance with Rule for Court-Martial (R.C.M.) 1106(f). The SJAR made no mention of the judge's clemency recommendation. The following day, on 21 November 2001, the appellant submitted a "Personal Statement in Support of Request for Clemency," as part of his R.C.M. 1105 response to the SJAR. Consistent with his unsworn statement at trial, the appellant asked the convening authority to "consider *waiving* my forfeitures for six months." (emphasis added). Later in the statement, the appellant reiterated his request by saying "[s]upporting my wife and daughter is my main concern right now . . . Additionally *deferment of forfeitures* can only last for six months at the most, but my daughter will be around for a lot longer than that." (emphasis added). Finally, the appellant asked the convening authority to "*waive the forfeitures,* and . . . reduce my confinement . . . ." (emphasis added).

The defense counsel also submitted a clemency request for the convening authority's consideration on 21 November 2001. In his request, the defense counsel stated, "I also respectfully request that you consider the clemency that AB Rose asked for, which is *deferring* mandatory forfeitures for the benefit of his wife and daughter...."[1] (emphasis added.) The defense counsel neither objected to the SJAR nor did he mention the SJA's failure to raise the military judge's clemency recommendation.

The SJA delivered the package containing appellant's waiver request to the convening authority on 4 December 2001. The SJA's waiver package consisted of a staff summary sheet with four attachments. The attachments included: (1) A proposed waiver letter for the convening authority to sign; (2) A waiver request from the defense counsel; (3) An Air Force form 1359, Report of Result of Trial; and (4) An e-mail summarizing appellant's E-1 pay and allowances. Paragraph 2b of the staff summary sheet advised the convening authority as follows:

> In this case, the appellant's defense counsel now requests you waive the mandatory forfeitures for the duration of confinement, so they may be paid directly to AB Rose's spouse for the support of his dependent child. AB Rose has been providing 500DM or roughly $240.00 in support in the form of mandatory allotments through his bank. By waiving $240.00 of the mandatory forfeitures for six months, you can provide a means of continued support for his dependents while AB Rose is in confinement. The money will be set up in an involuntary allotment for the benefit of his dependents.

The SJA then recommended the convening authority grant the appellant "relief from forfeitures of pay and allowances, for the benefit of his dependents, in the amount of $240.00 by signing the action at Tab 1." The staff summary sheet did not mention the judge's clemency recommendation.

The only reference to the military judge's clemency recommendation appeared in attachment 2 to the staff summary sheet. Attachment 2 was a letter from the defense counsel entitled, "Waiver of Forfeitures—*United States v. Amn Scott A. Rose.*" In this waiver request, the defense counsel told the convening authority:

> Due to the mandatory forfeitures imposed by Article 58 of the Uniform Code of Military Justice, as well as the adjudged forfeitures, AB Rose will have no income. That means he will be unable to provide monetary support for his dependents. Although the military judge adjudged forfeitures, you, as the convening authority, are permitted to direct that the forfeited pay be

[1] In his request for clemency on the appellant's behalf, the defense counsel told the convening authority his client had been sentenced to a "bad-conduct discharge, total forfeiture of pay, reduction to the rank of E-1 and 18 months confinement." This was incorrect. The military judge did not sentence the appellant to any forfeitures.

> paid to AB Rose's dependents for a limited period (up to six months). In fact, at the conclusion of the court-martial, the military judge, Col Linda S. Murnane**,** said that she was recommending on the record that you waive these forfeitures. On behalf of AB Rose, I respectfully request that you waive the mandatory forfeitures and direct that his pay and allowances be given to his daughter Vanessa Rose and his wife Gabriele Rose for the next six months.

The SJA did not serve the staff summary sheet with attachments on the defense counsel for comment before presenting it to the convening authority.

Two days later, on 6 December 2001, the SJA served the SJAR, the appellant's clemency matters, and the addendum on the convening authority. In the addendum the SJA summarized the appellant's waiver request by saying, ["l]astly, AB Rose also requests you consider waiving the mandatory forfeiture of his pay and allowances pursuant to Article 58(b), UCMJ."[2] The convening authority granted the appellant's request for a waiver of forfeitures that same day. The approval waived $240.00 per month of appellant's mandatory forfeitures for a period of six months or release from confinement, whichever was sooner. The approval, which was effective the date of action, directed that the monthly amount be paid to the appellant's spouse for her benefit and the benefit of her daughter.

Military Judge's Clemency Recommendation

We review the issue of an SJA's compliance with R.C.M. 1106 de novo. *United States v. Kho*, 54 M.J. 63 (2000). Any recommendation for clemency by the sentencing authority made in conjunction with the announced sentence must be included in the SJAR. R.C.M. 1106(d)(3)(B). A recommendation by the military judge must be brought to the attention of the convening authority to assist him in considering the action to take on sentence, and the SJA is required to advise the convening authority of such recommendations. *United States v. Lee*, 50 M.J. 296 (1999). The SJA could have informed the convening authority of the judge's clemency recommendation in the SJAR, the staff summary sheet, and in the addendum to his SJAR. He failed to do so each time.

It will generally be plain error for the SJA to fail to call the convening authority's attention to a clemency recommendation made at the time of sentencing by the military judge. *United States v. Clear*, 34 M.J. 129, 132 (C.M.A. 1992). "To prevail under a plain-error analysis, appellant ha[s] the burden of persuading this Court that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a

[2] The addendum, which was not served on the defense counsel, did not inform the convening authority of the military judge's clemency recommendation.

substantial right." *Kho*, 54 M.J. at 65 (citing *United States v. Finster*, 51 M.J. 185, 187 (1999); *United States v. Powell*, 49 M.J. 460, 463, 465 (1998)).

Finding the SJA's failure to inform the convening authority of the judge's clemency recommendation to be plain error, we must determine if that failure materially prejudiced a substantial right of the appellant.

Waiver Request Advice

According to *United States v. Emminizer*, 56 M.J. 441 (2002), the convening authority's powers are limited to either deferring a mandatory forfeiture until action, or providing transitional compensation to the accused's dependents for a limited period of time.[3] *Id.* at 443. If the accused does not request deferment, mandatory forfeitures take effect 14 days after the sentence is adjudged, or the date the convening authority approves the sentence, whichever is earlier.

It is clear from the record that the appellant sought some type of relief from the convening authority concerning the mandatory forfeitures that accompanied his sentence. In his waiver request, the defense counsel informed the convening authority that the appellant would not have any income to support his family due to the adjudged forfeitures and the mandatory forfeitures.[4] In his clemency request, the appellant initially asked the convening authority to consider "waiving his forfeitures." Later in that same letter the appellant told the convening authority he "could defer the forfeitures up to six months."

There is no specific language in Article 58b or 57(a), UCMJ, which authorizes a convening authority to "defer forfeitures up to six months." Rather, upon the accused's application, a convening authority can defer mandatory forfeitures until he or she takes action. Upon taking action, a convening authority can still waive the mandatory forfeitures up to six months for the benefit of the appellant's family. While the defense counsel in this case only asked the convening authority for a waiver on the appellant's behalf, the appellant appeared to ask for a waiver *and* a deferment. We cannot discern from the record whether the appellant was making two requests or if he was using the terms "waive" and "defer" interchangeably. Unfortunately, neither the timing of appellant's submissions nor the language of his waiver request helps us to discern his true intentions. If the appellant had submitted his request for a deferment within 14 days after the sentence was adjudged, the SJA could have followed the interrelated provisions of Articles 58b and 57(a), UCMJ. If, however, the appellant had only asked for a waiver,

[3] We interpret our superior court's use of the phrase "transitional compensation" to be synonymous with the term waiver in Article 58b, UCMJ.

[4] Trial defense counsel's advice to the convening authority was incorrect. The adjudged sentence was a bad-conduct discharge, confinement for 18 months, and reduction to E-1. Therefore, there were no adjudged forfeitures for the convening authority to act upon.

without mentioning a deferment at all, the SJA could have limited his advice to Article 58b, UCMJ.

At first glance, the appellant's requests seem to be in conflict. Yet, they are necessarily mutually exclusive. We have not found anything in the Uniform Code of Military Justice or case law, which precludes a convening authority from granting a request for deferment retroactively if he so chooses. *See United States v. Clark*, 55 M.J. 555 (Army Ct. Crim. App. 2001), *aff'd*, 56 M.J. 203 (2001); *United States v. Paz-Medina*, 56 M.J. 501, n. 10. (Army Ct. Crim. App. 2001), *pet. denied*, 57 M.J. 323 (2002). Moreover, a request for a waiver under Article 58b, UCMJ, is a clemency request, which calls into play the processing requirements of Article 60, UCMJ, 10 U.S.C. § 860. *United States v. Spears*, 48 M.J. 768, 772 (A.F. Ct. Crim. App. 1998); *overruled in part on other grounds, United States v. Owen*, 50 M.J. 629 (A.F. Ct. Crim. App. 1998) (en banc).

We hold the SJA's failure to inform the convening authority of the military judge's clemency recommendation, combined with the limited advice he provided on the waiver request, to be plain error that materially prejudiced the appellant's rights. We will not speculate on what consideration the appellant's family may have received if the convening authority had understood all of his options under Article 58b, UCMJ. Finding the SJA's actions to be prejudicial error, we need not address the appellant's remaining assignment of error.

The convening authority's action is set aside. The record of trial will be returned to the convening authority for new post-trial processing.

Judge STONE did not participate.

OFFICIAL

DEIRDRA A. KOKORA, Major, USAF
Chief Commissioner