UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JAMES M. SAUTER JR
United States Air Force

ACM 38772

1 September 2016

Sentence adjudged 15 October 2014 by GCM convened at Joint Base San Antonio – Lackland, Texas. Military Judge: Wendy L. Sherman (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Michael A. Schrama.

Appellate Counsel for the United States: Major Jeremy D. Gehman and Gerald R. Bruce, Esquire.

Before

DUBRISKE, HARDING, and C. BROWN
Appellate Military Judges

OPINION OF THE COURT

DUBRISKE, Senior Judge:

In accordance with his pleas, Appellant was convicted by a military judge sitting alone of various drug offenses in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Appellant pled not guilty to additional drug specifications, which were eventually dismissed by the military judge pursuant to a Rule for Courts-Martial (R.C.M.) 917 motion at the conclusion of the Government's case-in-chief.

Appellant was sentenced to a bad-conduct discharge, 20 months of confinement, total forfeitures of all pay and allowances, and reduction to E-1. The convening authority reduced Appellant's confinement to 16 months in accordance with Appellant's clemency request, but otherwise approved the sentence as adjudged.

On appeal, Appellant argues he is entitled to new post-trial processing because the Government attached the personal data sheet (PDS) of a different accused to the staff judge advocate's recommendation (SJAR) that was provided to the convening authority prior to action. He also argues for a reduction in his sentence due to the Government's violation of his right to timely post-trial processing.

Finding no error that materially prejudices a substantial right of Appellant, we now affirm the findings and sentence in this case.

Submission of Wrong Personal Data Sheet

Appellant's first assignment of error alleges the PDS of another Airman, Airman First Class (A1C) JP, was attached to the SJAR and provided to the convening authority prior to action. Appellant argues this error mandates a second round of post-trial processing.

The Government initially conceded the incorrect PDS was provided to the convening authority and that this error was plain or obvious. However, the Government argued no relief was warranted as Appellant had not shown he suffered any prejudice from this error. Shortly after filing its answer, the Government submitted a motion to attach an affidavit from a member of the convening authority's legal office regarding the post-trial processing of Appellant's case. We granted the motion on 2 March 2016 and considered the affidavit in our resolution of this case. The affiant, based on his personal investigation and discussions with personnel directly involved in the processing of Appellant's case, surmises Appellant's correct PDS, and not the one from A1C JP as found in the records of trial provided to this court and both appellate divisions, was actually provided to the convening authority and considered by him before taking action in Appellant's case.

As the affiant had no personal knowledge of the processing of Appellant's case, and, therefore, could not certify the convening authority was in fact provided with the correct PDS, we decline to presume the correct PDS was provided to the convening authority as suggested by the Government in this case. *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989).

Proper completion of post-trial processing is a question of law which this court reviews de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *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. 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).

Although the submission of the wrong PDS to the convening authority is obvious error, we do not find Appellant has established he suffered prejudice from the error given the facts of this particular case. In so holding, we would first note, as highlighted by the Government in its brief, the erroneous PDS is similar to Appellant's PDS admitted at trial in many important aspects. The similarities included rank, overseas service, combat service, marital status, number of dependents, and, most importantly, awards and decorations. Appellant also benefited from the error in that the convening authority was not made aware of Appellant's previous nonjudicial punishment action as the incorrect PDS attached to the SJAR documented no previous disciplinary actions. Evidence of Appellant's previous nonjudicial punishment action was not admitted at trial, so the Government's error prevented the convening authority's consideration of Appellant's full disciplinary record.

Most critical to our determination, however, is the fact Appellant was granted the relief he requested during clemency—reduction in his term of confinement by four months. As such, while we could return the case to the convening authority in the hopes of deterring future errors, especially by this legal office, the clear lack of prejudice causes us not to execute this course of action in this particular case.

Post-Trial Processing Delay

Appellant also argues the 126-day period between the conclusion of trial and the convening authority's action warrants this court granting him relief in the form of 6 days of confinement credit. Under *United States v. Moreno*, courts apply a presumption of unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial." 63 M.J. 129, 142 (C.A.A.F. 2006). Appellant does not assert any prejudice, and we independently find Appellant suffered no prejudice from the delay that would authorize *Moreno* relief. Appellant instead argues the court should nonetheless grant relief under *United States v. Tardif*, 57 M.J. 219, 223–24 (C.A.A.F. 2002).

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this court is empowered "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." *Id.* at 224 (quoting *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006), our superior court held that a service court may grant relief even when the delay was not "most extraordinary." The

court held, "The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration or relief." *Id*.

This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), aff'd, 75 M.J. 264 (C.A.A.F. 2016). Those factors include how long the delay exceeded appellate review standards, the reasons noted by the Government for the delay, whether the Government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or the institution, the goals of justice and good order and discipline, and, finally, whether the court can provide any meaningful relief given the passage of time. *Id*. No single factor is dispositive, and we may consider other factors as appropriate. *Id*.

On the whole, we find the presumptively unreasonable delay does not merit sentencing relief in this case. In so holding, we find the majority of factors employed when considering *Tardif* relief weigh in favor of the Government in this particular case. Furthermore, having considered the totality of the circumstances and the entire record, we find the post-trial delay in this case is not so egregious as to adversely affect the public's perception of fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362.

Corrected Promulgating Order

Although not alleged as an assignment of error, Appellant noted the initial court-martial order incorrectly states Specifications 5, 6, and 7 of the Charge were "withdrawn and dismissed by the military judge." We agree with Appellant that the order should have reflected he was found not guilty of these offenses pursuant to R.C.M. 917. We direct the publication of a new court-martial order to remedy this oversight.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ. Accordingly, the findings and the sentence are **AFFIRMED**.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist