UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GARY W. SEARS
United States Air Force

ACM S30144

24 March 2004

Sentence adjudged 9 May 2002 by SPCM convened at Whiteman Air Force Base, Missouri. Military Judge: Daryl E. Trawick.

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his plea, of one specification of assault and battery upon a child under the age of 16, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The special court-martial, consisting of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 60 days, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant has submitted two assignments of error: (1) that the military judge erred by failing to properly instruct the members on sentencing matters; and (2) that the addendum to the staff judge advocate's recommendation (SJAR) contained new matter and should have been served on the appellant. Finding error as to the first issue, we take corrective action.

I. Background

The appellant was assigned to the Security Forces Squadron at Whiteman Air Force Base, Missouri. On the date alleged, the appellant's wife was providing day care services to the victim, 17-month-old CC. The appellant was playing a game with his own son and with CC. When CC began to cry, the appellant suddenly struck her on the side of her head with his hand. Prosecution evidence included photographs of CC showing noticeable bruising to her face and ear.

The appellant's sentencing case included a written unsworn statement containing a request for an administrative, rather than a punitive, discharge. It stated, in part:

> AFI 36-3208, Administrative Separation of Airmen, provides for administrative discharge after a court-martial if the squadron commander wants to pursue discharge. My attorney tells me that if my squadron commander wants, he could discharge me within a few weeks of this trial. I already have a federal criminal conviction on my record that will follow me for the rest of my life. I am begging you to please, please not impose a Bad Conduct Discharge in addition to the conviction.

In response, the prosecution asked the military judge to instruct the members on the legal ramifications of imposing an administrative discharge following a court-martial conviction. Specifically, the prosecution requested the military judge to provide the instruction set forth in *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000). The instruction in *Friedmann* stated, in part:

> You, of course, should not rely on any of this in determining an appropriate punishment for this accused for the offenses of which he stands convicted. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service. If you don't conclude the accused should be punitively separated from the service, [then] it is none of your business or concern as to whether anyone else might choose to initiate separation action, or how the accused's service might be characterized by an administrative discharge authority.

Friedmann, 53 M.J. at 802. When instructing the members, however, the military judge left out that portion of the *Friedmann* instruction quoted immediately above. Whether this was inadvertent or intentional is not clear from the record, and neither trial nor defense counsel objected to the failure of the military judge to include the paragraph.

During deliberations, the members asked the military judge, "Can we recommend discharge other than [a] bad conduct discharge?" Following an Article 39(a), UCMJ, 10

U.S.C. § 839(a) session, the military judge advised them that a bad-conduct discharge was the only type of discharge they could adjudge, but that they could recommend clemency. He instructed them on procedures for recommending clemency and, upon request of the defense counsel, that a recommendation for clemency would be non-binding. The members asked additional questions that indicated they were seriously evaluating the appellant's request for no punitive discharge. Soon after, the members returned to announce the sentence, which included:

> [a] bad conduct discharge, with a recommendation for clemency for a general discharge under honorable conditions based on your documented honorable service. Our justification was that this appears to be an isolated incident with several mitigating factors, such as, the recent diagnosis of Bipolar disorder and the tragic death of your father. In addition, you have already been given a federal conviction for this offense. And this was agreed upon by more than two-thirds of the members.

II. Sentencing Instructions

This Court reviews the completeness of required instructions de novo. *United States v. Miller*, 58 M.J. 266 (C.A.A.F. 2003). Required instructions on sentencing include "[a] statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." Rule for Courts-Martial (R.C.M.) 1005(e)(4). This legal concept is found in the *Military Judges' Benchbook*, which states: "You must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or higher authority." Department of the Army Pamphlet (D.A. Pam) 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (1 Apr 2001). Without any explanation or complaint by the defense counsel, the military judge failed to provide this instruction to the court members. Moreover, as stated above, he did not provide the members that portion of the *Friedmann* instruction that emphasized that the possibility of subsequent administrative discharge was none of their concern. At one point in time, the military judge did attempt to give that portion of the *Benchbook* instruction that advises members they are not to adjudge a sentence "whose *fairness* depends upon actions that others may take." *See* D.A. Pam 27-9, ¶ 2-6-11 (emphasis added). However, he inexplicably substituted the word "status" for "fairness," thereby introducing an ambiguity that the instructions as a whole did not adequately clarify. Even if we conclude the instruction sufficiently advised the members that their clemency recommendation was non-binding, the instructions as a whole were confusing and ambiguous on the two main concepts found in R.C.M. 1005(e): (1) that the members are "solely responsible" for selecting an appropriate sentence; and (2) that they may not rely on the possibility of mitigating action by higher authorities.

Even though the defense counsel did not object to the instructions as given, the waiver provision of R.C.M. 1005(f) does not apply to the presidentially-mandated sentencing instructions found in R.C.M. 1005(e). *Miller*, 58 M.J. at 270. Thus, we find error and hold that the substance of R.C.M. 1005(e) was not adequately covered in the instructions.

Finally, we must determine if this failure to instruct was prejudicial. Given the facts and circumstances in the case sub judice, we find the case raises the real possibility that the members adjudged a sentence that they believed excessive based upon the hope that the convening authority would substitute an administrative discharge for the bad-conduct discharge. Therefore, we conclude that the incompleteness of the instructions seriously impaired the appellant's effort to avoid the bad-conduct discharge. Under the facts of this case, we hold that the inadequacy of the instructions constitutes an error that operated to the material prejudice of the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Having found error, we must now determine appropriate corrective action. Our superior court has provided the criterion to determine when we can reassess the sentence rather than remand for a rehearing: "[I]f the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of the error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). *See also United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985).

Considering the appellant's specific request that we take corrective action by disapproving the bad-conduct discharge, and given the particular facts and circumstances of this case, we conclude this error is best remedied at this level. We are satisfied that disapproval of the bad-conduct discharge more than adequately moots any claim of prejudice and negates any need to return the case for a rehearing on sentence. Absent the instructional error, we are satisfied that the adjudged sentence would have at least included confinement for 60 days and reduction to E-1. We will take corrective action in our decretal paragraph.

III. New Matter in the Addendum

During the presentencing phase of the trial, the prosecution offered a portion of the appellant's mental health record. It was admitted over the objection of the defense counsel, but the following statement was redacted from the exhibit: "[Appellant] has admitted to physically abusing his wife and child." The panel never saw this redacted information, but an unredacted copy of this document was made an appellate exhibit.

In his post-trial clemency submissions, the appellant submitted clemency recommendations. The president of the court-martial submitted a letter in which he

stated the assault of which the appellant was convicted "is [the appellant's] first documented incident." The overall gist of the appellant's post-trial submissions is that the slapping incident was out of character. Consequently, in the addendum to the SJAR, the SJA wrote:

> [Y]ou should consider the rationale behind the clemency recommendations of both the court as a whole . . . and the single member who recommended retention . . . Both recommendations were based, at least in part, on the members' impression that there was no other evidence that SrA Sears had done anything like this before. However, Appellate Exhibit III, an extract from SrA Sears' mental health record which was offered during trial but not admitted as a prosecution exhibit, contains information showing that SrA Sears has been physically abusive to his own wife and child. Since Appellate Exhibit III is part of the record of trial, you are allowed to consider the information therein as you decide the final action you will take on the sentence.

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law, to be reviewed de novo. *United States v. Key*, 57 M.J. 246 (C.A.A.F. 2002). The Discussion to R.C.M. 1106(f)(7) defines new matter as including:

> discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. "New matter" does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation.

Discussion in the addendum of comments raised by the appellant in post-trial submissions is not a new matter. *See United States v. Komorous*, 33 M.J. 907 (A.F.C.M.R. 1991); *United States v. Wixon*, 23 M.J. 570 (A.C.M.R. 1986), *aff'd*, 25 M.J. 370 (C.M.A. 1987). *But see, e. g., United States v. Anderson*, 53 M.J. 374 (C.A.A.F. 2000); *United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997); *United States v. Catalani*, 46 M.J. 325 (C.A.A.F. 1997).

Because this information was contained in an appellate exhibit, it was part of the record of trial. R.C.M. 1103(b)(2)(D). Insofar as the appellant himself introduced this idea into the clemency process, it was foreseeable that the staff judge advocate would include in his addendum reference to that portion of the record that contradicts this assertion. Therefore, we find it was not new matter as contemplated by R.C.M. 1106.

Even if the addendum contained new matter, however, the appellant must make "some colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324. That is, he

must state "what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Id.* at 323. Before this court, counsel for the appellant states that had the appellant been served with the addendum, he "could have presented deeper information regarding Appellant's diagnosis with Bipolar II disorder to explain or counter the implication that there had been previous physical abuse. Second, the defense could have presented the circumstances of the alleged physical abuse to put it in its true context."

Even given the admittedly low threshold for a showing of possible prejudice, we conclude that the statements set forth in the appellant's brief fail in their intended purpose. The appellant's brief provides no insight as to what "deeper" information there may be about the appellant's mental health condition. Moreover, other than the obvious conclusion that such a disorder may have impacted his self-control in the past, it is not readily apparent as to how a deeper understanding of his medical condition would explain or counter his apparent admission to medical providers that he had abused his wife and son. Furthermore, the appellant has provided no hint as to the circumstances of the alleged abuse of his wife and child and its "true context" (e.g., that it only involved one or two occasions where he engaged in exceptionally minor physical abuse). As it is, however, the appellant's brief is too ambiguous and bereft of factual assertions to permit us to conclude that he has met his threshold colorable showing of possible prejudice. We hold, therefore, that even if erroneous, the failure to serve the addendum was harmless. Article 59(a), UCMJ.

IV. Conclusion

The approved findings, as adjudged, and the sentence, as reassessed, are correct in law and fact, and no additional error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, we affirm the findings and only so much of the adjudged sentence as provides for confinement for 60 days and reduction to E-1.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator