

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Technical Sergeant ROBERT L. SEITTER
United States Air Force**

ACM 34973

23 March 2004

Sentence adjudged 6 November 2001 by GCM convened at Kadena Air Base, Japan. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, the appellant was convicted of two specifications of writing multiple worthless checks, totaling \$8,000.00, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. A court composed of officer members sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to airman. The convening authority approved the sentence as adjudged, and the case is now before this Court for mandatory review under Article 66(c), UCMJ, 10 U.S.C. § 866(c). We have reviewed the record of trial and the two assignments of error asserted by the appellant and conclude that they do not warrant relief.

The record indicates that at the conclusion of the defense counsel's sentencing argument, the bailiff retrieved a note from the military judge and handed it to the trial counsel. Without pause, the trial counsel delivered a brief rebuttal argument, followed by

the military judge's instructions. The appellant did not object to the note and there is no discussion of it on the record. Both the trial counsel and the military judge have submitted post-trial declarations. Neither recalls the note being passed nor its contents. The appellant alleges this was an impermissible ex parte communication between the trial counsel and the military judge and that he is entitled to "considerable sentence relief" as a result.

We have doubts that this note was truly an ex parte communication, since the event occurred in open court and in the presence of the appellant and defense counsel. Assuming arguendo that it was, however, this trivial event simply fails to pass through the harmless error screen. Article 59(a), UCMJ, 10 U.S.C. § 859(a). *See generally, Ellis v. United States*, 313 F.3d 636 (1st Cir. 2002) (Error of ex parte instruction did not warrant relief), *cert. denied*, 124 S. Ct. 99 (2003).

Shortly after trial, the appellant requested that the convening authority "defer the reduction in his rank and the forfeiture of all pay and allowances for a period of six months pursuant to Article 57(a)(2), UCMJ." Additionally, he requested in the same letter that the convening authority "waive the automatic forfeitures pursuant to Article 58(b), UCMJ." In a letter dated 27 November 2001, the convening authority denied the deferment requests but granted the waiver of forfeiture of pay and allowances. The convening authority's letter provided, in part:

Pursuant to Article 58b, UCMJ, the required forfeiture of total pay and allowances is waived effective from the date of this letter for a period of six months, release from confinement or expiration of the term of service, whichever is soonest. The waived required forfeiture is to be paid to your wife, Mrs. [DS], for her benefit.

The convening authority repeated this grant of the appellant's waiver request in his 2 February 2002 action. The appellant now complains that he is entitled to relief because the action is not compliant with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002).

We agree that the waiver does not comport with *Emminizer*, which was decided after the action was taken in this case. However, we disagree that relief is warranted. Although it is unusual to see a pre-action waiver of automatic forfeitures (as opposed to deferment), under Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 9.7.3 (26 Nov 2003), "a convening authority may waive any part or all of the automatic forfeitures under Article 58b, when the accused is actually serving a sentence to confinement, for up to six months at any time prior to action or when action is taken." Thus, the convening authority's pre-action waiver was permissible.

We believe the intention of the convening authority is clear from his pre-action letter granting the appellant's request for a waiver and his action pursuant to Article 60, UCMJ, 10 U.S.C. § 860. Although technically incorrect under *Emminizer*, because the action did not disapprove, modify, or suspend adjudged forfeitures, it clearly reflects the convening authority's intention to waive the automatic forfeiture of pay and allowances under Article 58b, UCMJ, 10 U.S.C. § 858b, for the benefit of the appellant's wife. Furthermore, the record provides no basis to believe that his wife was not paid. We hold that the action was effective; therefore, there is no cause to remand the case for a new action or to disapprove adjudged forfeitures. *United States v. Medina*, 59 M.J. 571 (A.F. Ct. Crim. App. 2003). *See also United States v. Loft*, 10 M.J. 266 (C.M.A. 1991). Finally, we note that, subject to review by our superior courts, our appellate review of this record of trial will become "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States" under Article 76, UCMJ, 10 U.S.C. § 876. We presume this issue preclusion statute would apply to any future--and highly speculative--collection efforts of any officer of the United States who disagrees with our determination of the convening authority's intention to exercise his authority under Article 58b, UCMJ, for the benefit of the appellant's wife.

We conclude 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER
Chief Court Administrator