**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class JOEY L. SHOEMAKER**
**United States Air Force**

**ACM S30057**

**9 October 2002**

Sentence adjudged 25 September 2001 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of $200 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Patricia A. McHugh, and Major Natasha V. Wrobel.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Lane A. Thurgood.

Before

BURD, ROBERTS, AND PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

PECINOVSKY, Judge:

The appellant pled guilty to one specification of signing a false official record, one specification of making a false official statement, and larceny in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. His adjudged sentence consisted of a bad-conduct discharge, confinement for 3 months, forfeiture of $200 pay per month for 3 months, and reduction to E-1. Even though the pretrial agreement provided that the convening authority would not approve confinement in excess of 3 months, the convening authority approved only 30 days of the adjudged confinement and the rest of the adjudged sentence. On appeal, the appellant alleges that the staff judge advocate's recommendation (SJAR) and addendum were defective because both documents failed to

inform the convening authority that the judge recommended waiver of automatic forfeitures in conjunction with his sentence announcement. In addition, the appellant alleges that the defense counsel's post-trial representation amounted to ineffective assistance of counsel. He requests new post-trial processing and new convening authority action. Because we are returning the case for another SJAR and action, we need not address the issue of ineffective assistance.

## I. Background

The appellant admitted to taking several items from a fellow airman's dormitory room and pawning the items for money. When initially questioned by the security forces investigators under proper rights advisement pursuant to Article 31, UCMJ, 10 U.S.C. § 831, he falsely denied any knowledge of the missing items. The appellant also accomplished a written statement, after again being advised of his rights under Article 31, UCMJ, on an Air Force Form 1168 repeating the same false information.

## II. Deficiency of the SJAR and Addendum

In his unsworn statement to the judge, the appellant disclosed that his wife had a baby by cesarean section four days prior to the trial. The appellant's wife was having complications from the delivery and could not care for their 4-year-old daughter by herself. In addition, the appellant revealed that his family was having financial difficulties and that he was the sole support for his wife and two children. After announcing sentence, the judge, knowing that the appellant would be subjected to automatic forfeitures of 2/3 pay by operation of Article 58b, UCMJ, 10 U.S.C. § 858b, said:

> I further [urge] that confinement be deferred, at least for a period of time to ascertain the [appellant's] wife's medical condition. And I also recommend that the automatic forfeitures applicable in this case be waived. But specifically, I do not recommend that the forfeitures that I have adjudged be waived. That is a different matter.

After trial, the convening authority deferred the appellant's confinement in accordance with Rule for Courts-Martial (R.C.M.) 1101, pursuant to trial defense counsel's request, dated 25 September 2001. On 2 October 2001, the appellant submitted his clemency package in accordance with R.C.M. 1105, requesting a bad-conduct discharge rather than confinement, forfeitures, and loss of rank. Pursuant to R.C.M. 1106, the SJAR was prepared and served on the appellant on 4 October, which recommended the convening authority approve none of the adjudged confinement. The SJAR *did not* mention the military judge's recommendation that the automatic forfeitures be waived and directed to the appellant's family. The trial defense counsel responded in writing to the SJAR, indicating that she had no objections or additions to the document.

However, on 16 October the appellant was absent without leave (AWOL) from his assigned place of duty. In response to this additional misconduct, the convening authority rescinded the deferral of confinement. An addendum to the SJAR was prepared on 23 October, recommending a bad-conduct discharge, forfeiture of $200.00 pay per month for 3 months, confinement for 1 month, and reduction to E-1, in light of the appellant's recent AWOL. No mention was made as to the trial judge's recommendation regarding automatic forfeitures. Trial defense counsel responded, indicating that she had no objections or additions to the addendum.

The appellant now alleges that the SJAR and the addendum were defective due to the omission of the recommendation made by the military judge regarding waiver of the automatic forfeitures made in conjunction with the announced sentence. We agree that the SJAR was defective and find that there was prejudice to the appellant.

Rule for Courts-Martial (R.C.M.) 1106(d) sets forth the required contents for the recommendation of the staff judge advocate. Contrary to the assertions of appellant's counsel, R.C.M. 1106(d)(3)(B) unequivocally requires that the SJAR include, "A recommendation … by the sentencing authority, made in conjunction with the announced sentence." In addition, R.C.M. 1106(f)(6) says that in the absence of plain error, failure of trial defense counsel to appropriately comment on any matter in the SJAR in a timely manner shall waive that claim of error. In this case, trial defense counsel did respond to the SJAR and the addendum, but instead of raising the issue of clemency recommendations by the military judge, she indicated that she found no errors in either document and had no additional information to add. In addition, there was no mention of such items in the clemency matters submitted pursuant to R.C.M. 1105.

We now must examine the record to determine if there was plain error. "To prevail under a plain-error analysis, appellant had 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 substantial right." *United States v. Kho*, 54 M.J. 63, 65 (2000) (citing *United States v. Finster*, 51 M.J. 185, 187 (1999); *United States v. Powell*, 49 M.J. 460, 463, 465 (1998)). Plain error is reviewed de novo as a question of law. 1 Steven A. Childress & Martha S. Davis, *Federal Standards of Review*, § 2.14 (2d ed. 1992). The convening authority remains "the [appellant's] best hope for sentence relief." *United States v. Bono*, 26 M.J. 240, 243 n.3 (C.M.A. 1988). Therefore the threshold for showing prejudice is low in such cases and if "an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt." *United States v. Chatman*, 46 M.J. 321, 323-24 (1997). "[I]n most instances, failure of the staff judge advocate or legal officer to prepare a recommendation with the contents required by R.C.M. 1106(d) will be prejudicial . . . ." *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988).

In this case there was clear, plain and obvious error. In an effort to accommodate the appellant, the staff judge advocate (SJA) lost sight of the basic requirements of R.C.M. 1106(d)(3)(B). We find that the military judge's recommendation that confinement be deferred and that automatic forfeitures be directed to his dependents to be a recommendation for clemency, and as such, is required to be included in the SJAR. The fact that the original recommended action was more beneficial than the sentencing authority's recommendation does not relieve the requirement or excuse compliance with the rule.

Having found that the SJA erred in failing to inform the convening authority of the military judge's recommendation, we set aside the convening authority's action and remand the case for a new SJAR and action.

Judge ROBERTS did not participate.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator