UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DAVID M. WHITEHEAD
United States Air Force

ACM S30786

27 February 2006

Sentence adjudged 2 December 2004 by SPCM convened at Andrews Air Force Base, Maryland. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, a fine of $2,385.00, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

The sole assigned error is whether, during post-trial processing, the staff judge advocate (SJA) provided the convening authority incorrect advice about the maximum authorized punishment in the appellant's case.[1] The appellant asks us to order new post-trial processing. Appellate government counsel concede error, but contend the error did not materially prejudice the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

[1] The advice was part of the recommendation required by Rule for Courts-Martial (R.C.M.) 1106.

The appellant was convicted by a special court-martial, in accordance with his pleas, of wrongfully appropriating property of a value of more than $500, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The SJA advised the convening authority that the maximum imposable sentence was a bad-conduct discharge, confinement for one year, a possible fine, and forfeiture of two-thirds pay per month for one year. According to the *Manual for Courts-Martial, United States*, Part IV, ¶ 46e(2)(b) (2005 ed.),[2] the maximum punishment was a bad-conduct discharge, confinement for six months, and forfeiture of all pay and allowances. Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i) limits forfeitures in the special court-martial forum to two-thirds pay per month, or any forfeiture of pay for more than one year.

The appellant and his trial defense counsel received the SJA's recommendation, but neither commented on the error in their clemency submissions. As a result, the alleged error is waived, unless we find plain error. R.C.M. 1106(f)(6). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998).

When plain error is asserted, the appellant "bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993). In post-trial clemency matters, "there is material prejudice to the substantial rights of an appellant if there is error and the appellant makes some colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (citing *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997). Appellate defense counsel contend the incorrect confinement advice prejudiced their client because the convening authority might have been "less than sympathetic."

We conclude the error in the SJA's recommendation to the convening authority was obvious, but we do not find a colorable showing of possible prejudice. Considering the nature of the offenses, the sentence adjudged, and the fact that the SJA did remind the convening authority that he had "agreed not to approve confinement in excess of 4 months," and that the sentence "is within the limits of the pretrial agreement," we find no material prejudice to the substantial rights of the appellant. Article 59(a), UCMJ. *See also United States v. Parsons*, 61 M.J. 550, 551-52 (A.F. Ct. Crim. App. 2005).

[2] The 2002 edition of the *Manual* was in effect during the processing of the appellant's case. The provision is unchanged in the 2005 edition.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court