UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32398

UNITED STATES
Appellee

v.

Tanner B. WIDEMAN
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 29 August 2017

Military Judge: James R. Dorman.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1. Sentence adjudged 12 January 2016 by SpCM convened at Sheppard Air Force Base, Texas.

For Appellant: Captain Patrick A. Clary, USAF.

For Appellee: Major Mary Ellen Payne, USAF; Captain Matthew L. Tusing; Gerald R. Bruce, Esquire.

Before MAYBERRY, JOHNSON, and MINK, *Appellate Military Judges.*

Senior Judge JOHNSON delivered the opinion of the court, in which Senior Judge MAYBERRY and Judge MINK joined.

JOHNSON, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas, of one specification of conspiracy to wrongfully use lysergic acid diethylamide (LSD) and one specification of wrongful use of LSD

on divers occasions, in violation of Articles 81 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 912a. The military judge sentenced Appellant to a bad-conduct discharge, confinement for four months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Appellant raises two issues on appeal: (1) whether an 11-day violation of the 30-day post-trial processing standard for forwarding the record of trial for appellate review warrants modest relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002); and (2) whether an error in the staff judge advocate recommendation (SJAR) warrants sentence relief or a new post-trial process. Finding no material prejudice to Appellant's substantial rights, we affirm.

I. BACKGROUND

In April 2015, Appellant was attending training at Sheppard Air Force Base, Texas. On 18 April, Appellant traveled to Dallas, Texas, to attend a music festival with another student, Airman First Class (A1C) ZK. While in Dallas, A1C ZK gave Appellant three tabs of LSD, which Appellant ingested.

Appellant arranged another trip to Dallas with A1C ZK in early July 2015, during which they planned to obtain and use LSD again. This time, Appellant involved a third student, Staff Sergeant (SSgt) JW, who had a vehicle and agreed to drive them to Dallas and who also expressed interest in trying LSD. The three of them made the trip and used LSD as planned.

Appellant's activities came to the attention of the Air Force Office of Special Investigations (AFOSI) after agents interviewed A1C ZK and examined his cell phone. Appellant was interviewed and made oral and written statements describing the events above. At trial, after the military judge denied several Defense motions, Appellant elected to be tried by the military judge alone and pleaded guilty to both charges and specifications without a pretrial agreement with the convening authority. The military judge sentenced Appellant to a bad-conduct discharge, confinement for four months, and reduction to the grade of E-1.

After trial, the staff judge advocate (SJA) for the convening authority prepared a SJAR which provided, *inter alia*, the following advice:

> *You do not have the authority to disapprove, commute or suspend in whole or in part the confinement and the bad-conduct discharge.* You do have the authority to disapprove, commute or suspend in whole or in part the reduction in rank. The sentence adjudged is appropriate for the offenses for which the accused was convicted. I recommend you approve the sentence as adjudged.

(Emphasis added.)

The SJAR was provided to Appellant and trial defense counsel. Pursuant to Rule for Courts-Martial (R.C.M.) 1105, trial defense counsel submitted a memorandum on Appellant's behalf with 16 attachments for the convening authority's consideration before taking action on the court-martial. Trial defense counsel requested the convening authority not approve the bad-conduct discharge, proposing that this relief was authorized pursuant to R.C.M. 1107(d)(1)(E)(i) because Appellant had cooperated and testified in the prosecution of A1C ZK. In the alternative, trial defense counsel requested the convening authority reduce Appellant's term of confinement from four to two months; however, he did not specifically challenge the SJA's advice that the convening authority lacked the authority to disapprove, commute, or suspend the sentence to confinement.

After receiving the Defense submission, the acting SJA prepared an addendum to the SJAR which advised the convening authority, *inter alia*: "I also reviewed the attached clemency matters submitted by the defense. I recommend that you approve the findings and sentence as adjudged."

On 29 March 2016, the convening authority approved the adjudged sentence. Appellant's record of trial was docketed with this court on 9 May 2016.

II. DISCUSSION

A. SJAR Error

The proper completion of post-trial processing is a question of law, which this court reviews de novo. *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (citing *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004)). If the Defense does not make a timely comment on an error in the SJAR, the error is forfeited "unless it is prejudicial under a plain error analysis." *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing R.C.M. 1106(f); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Under a plain error analysis, Appellant must persuade this court that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *Kho*, 54 M.J. at 65).

To meet the third prong of the plain error test in the context of a post-trial recommendation, Appellant must make "some colorable showing of possible prejudice." *Id.* at 436–37 (quoting *Kho*, 54 M.J. at 65). "The low threshold for material prejudice with respect to an erroneous post-trial recommendation reflects the convening authority's vast power in granting clemency and is designed to avoid undue speculation as to how certain information might impact the convening authority's exercise of such broad discretion." *Id.* at 437. While

the threshold is low, there must be some colorable showing of possible prejudice. *Id.*

Except as otherwise provided by law, a convening authority may approve, disapprove, commute, or suspend the sentence of a court-martial in whole or in part. 10 U.S.C. § 860(c)(2)(B). However, Article 60(c)(4)(A), UCMJ, provides: "Except as provided in subparagraph (B)[1] or (C),[2] the convening authority . . . may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." 10 U.S.C. § 860(c)(4)(A). Similarly, R.C.M. 1107(d)(1)(B) states: "Except as provided in subparagraph (d)(1)(C)[3] of this rule, the convening authority may not disapprove, commute, or suspend, in whole or in part, that portion of an adjudged sentence that includes . . . confinement for more than six months; or . . . dismissal, dishonorable discharge, or bad-conduct discharge."

Appellant asserts his request to have his term of confinement reduced from four to two months was not fairly considered because the SJAR erroneously advised the convening authority that he lacked the power to grant such relief. As a result, Appellant requests this court set aside some portion of his sentence or, in the alternative, remand the case for a new post-trial process. The Government, without conceding, acknowledges this court has previously found such advice to be error,[4] but contends Appellant suffered no prejudice and is therefore entitled to no relief.

Because Appellant did not object to the SJAR's advice with respect to Appellant's term of confinement, we test for plain error. We find the advice was erroneous, and moreover the error was plain or obvious. The military judge sentenced Appellant to only four months of confinement, and therefore neither Article 60(c)(4)(A) nor R.C.M. 1107(d)(1)(B) limited the convening authority's ability to reduce the term of confinement. The remaining question is whether

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[1] Article 60(c)(4)(B) applies in cases where the trial counsel has made a recommendation for clemency in recognition for the accused's assistance in the investigation or prosecution of other offenders. 10 U.S.C. § 860(c)(4)(B).

[2] Article 60(c)(4)(C) applies in cases where the convening authority has entered a pretrial agreement with the accused. 10 U.S.C. § 860(c)(4)(C).

[3] R.C.M. 1107(d)(1)(C) applies where the trial counsel makes a clemency recommendation in recognition for the accused's assistance in the investigation or prosecution of other offenders, or where a pretrial agreement exists.

[4] *See, e.g., United States v. Parikh*, No. ACM S32381, 2017 CCA LEXIS 456, at *4 (A.F. Ct. Crim. App. 7 Jul. 2017) (unpub. op.); *United States v. Jones*, No. ACM 39140, 2017 CCA LEXIS 310, at *6 n.1 (A.F. Ct. Crim. App. 28 Apr. 2017) (unpub. op.).

Appellant has made a colorable showing of possible prejudice. *See Scalo*, 60 M.J. at 436–37.

The SJA's erroneous advice clearly undermined Appellant's request for a reduction in his term of confinement by denying the convening authority was authorized to grant such relief. However, the Government has provided sworn affidavits from the SJA and the convening authority. The SJA asserts, in pertinent part:

> It has come to my attention that the Addendum to the Staff Judge Advocate's Recommendation contained an error. The Addendum advised the convening authority that he did not have the authority to disapprove, commute, or suspend, in whole or in part, the confinement portion of the sentence, when, in fact, the convening authority did have the authority under Article 60(c)(4)(A) to grant clemency as to confinement.
>
> Even with this knowledge, my office's recommendation to the convening authority in the addendum would not have changed. I would have still recommended that the convening authority approve the sentence as adjudged. . . .

The convening authority's affidavit is substantially similar. After acknowledging the error in "the Addendum," he avers: "Even with the knowledge that I had the authority to grant clemency with respect to the adjudged confinement, my decision would not have changed."

In his reply to the Government's answer, Appellant aptly notes both affidavits are incorrect in that they assert the addendum, rather than the original SJAR, contained the erroneous advice. Indeed, the addendum—which had a different author than the SJAR—did not even purport to adopt the advice of the SJAR, but merely recommended the convening authority approve the findings and sentence. Appellant contends these errors suggest the SJA and convening authority did not review the SJAR or addendum before submitting their affidavits. We do not go so far in our conclusions. Nevertheless, confidence in the military justice system is not enhanced when this court is presented with sworn affidavits signed by a field grade judge advocate and a general officer that a cursory review of the documents in question reveals to be inaccurate.

However, we are not persuaded that what is essentially a clerical error fatally undermines the SJA and convening authority's assertions that the recommendation and action would not have changed had they known the convening authority was authorized to modify the term of confinement. Accordingly, we find no colorable showing of possible prejudice, and therefore the SJAR error warrants no relief.

B. Post-Trial Delay

Appellant's record of trial was docketed with this court 41 days after convening authority action. The Government has provided a declaration from the Chief of Military Justice of the general court-martial convening authority (GCMCA) responsible for processing courts-martial convened by the special court-martial convening authority who convened Appellant's court. Essentially, the declaration indicates the processing of Appellant's case was slowed by the volume of other records of trial being processed at the GCMCA, and that a review of Appellant's record of trial revealed "several required documents" were missing which had to be obtained from the convening authority's legal office.

In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), the United States Court of Appeals for the Armed Forces (CAAF) established a presumption of unreasonable post-trial delay where a record of trial is not docketed with the service court within 30 days of the convening authority's action. Where such a facially unreasonable delay occurs, there are two phases to our analysis of whether an appellant is entitled to relief. First, we determine whether the delay amounts to a denial of Appellant's due process right to speedy post-trial review and appeal. *Id*. at 135. Next, even if we find no due process violation, we also consider whether this court should exercise its power under Article 66(c), UCMJ, to grant relief for excessive post-trial delay. *Tardif*, 57 M.J. at 224.

In this case, 41 days elapsed between the convening authority's action and docketing with this court, exceeding the *Moreno* standard by 11 days. *See Moreno*, 63 M.J. at 142. Appellant requests that we exercise our Article 66(c) authority to grant meaningful relief pursuant to *Tardif*, but does not assert a due process violation. Nevertheless, because a facially unreasonable delay exists, we are required to conduct a due process analysis. *Moreno*, 63 M.J. at 136.

The CAAF has identified four factors to consider in determining whether post-trial delay amounts to a violation of due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review; and (4) prejudice to the appellant. *Id*. at 135. "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id*. (citing *Barker v. Wingo*, 407 U.S. 514, 533 (1972)). However, where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006). Appellant does not allege any prejudice from the facially unreasonable delay, and we find none. Balancing the other factors, we do not find the delay

so egregious as to impugn the fairness or integrity of the military justice system. Accordingly, we find no due process violation.

Turning to *Tardif*, after considering the factors enumerated 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),[5] we conclude no extraordinary exercise of our Article 66(c) authority to modify the sentence is warranted. We note only 77 days elapsed between the conclusion of Appellant's trial and action by the convening authority, as compared to the 120-day standard for a facially unreasonable delay established in *Moreno*. 63 M.J. at 142. On the whole, the processing of Appellant's case has not been subjected to excessive post-trial delay. In addition, we perceive no substantial harm to Appellant, prejudice to the interests of justice or discipline, or erosion of this court's ability to conduct our review or grant appropriate relief that would move us to modify an otherwise appropriate sentence.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court

[5] These factors include: (1) how long the delay exceeded the standards set forth in *Moreno*; (2) what reasons, if any, the Government set forth for the delay, and whether there is any evidence of bad faith or gross indifference to the overall post-trial processing of this case; (3) whether there is some evidence of harm (either to the appellant or institutionally) caused by the delay; (4) whether the delay has lessened the disciplinary effect of the sentence, and whether relief is consistent with the dual goals of justice and good order and discipline; (5) whether there is any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation; and (6) given the passage of time, whether this court can provide meaningful relief in this particular situation. *Gay*, 74 M.J. at 744 .