UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STANLEY A. TITANSKI
United States Air Force

ACM S31888

29 June 2012

Sentence adjudged 9 November 2010 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Jeffrey A. Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge found the appellant guilty of divers use and divers distribution of cocaine, in violation of Article 112a, UCMJ, 10 USC § 912a. Consequently, a panel of officer members sentenced the appellant to a bad-conduct discharge, 6 months of confinement, reduction to E-1, and a reprimand. A pretrial agreement (PTA) limited the convening authority from approving confinement in excess of nine months. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues that the military judge erred by admitting an erroneous Personal Data Sheet (PDS) at trial and the staff judge advocate erred during

post-trial processing by forwarding the erroneous PDS to the convening authority in his SJA recommendation (SJAR). We find error with no resulting prejudice and therefore affirm.

Background

The appellant pled guilty to wrongful use of cocaine on approximately 12 occasions, and wrongful distribution of cocaine to fellow airmen and civilian friends on approximately 12 occasions. During the charged timeframe, the appellant started using cocaine several times to the point where he felt he had a problem, but then he deployed to Bagram Air Base (AB), Afghanistan. He started using cocaine again shortly after his return. At trial, the Government offered into evidence a PDS that indicated "none" in the section reserved for overseas service and "none listed" in the section reserved for combat service, although it did reflect that the appellant was awarded an Afghanistan Campaign Medal. At trial, the military judge was clearly aware of the deployment Bagram AB and questioned the accuracy of the PDS, before ultimately admitting it without defense objection:

> MJ: Counsel, is the PDS correct regarding overseas service and combat service?
>
> ATC: One moment, Your Honor. [Conferring with defense counsel.]
>
> MJ: Sure.
>
> DC: It appears to be correct. I just consulted with [the appellant] and I believe the military judge was probably asking about the combat service column. Is that --?
>
> MJ: Yes.
>
> DC: I talked to the client and the client can answer any questions the military judge has to certainly make sure we have it right, but we talked about whether or not he had ever received combat pay and whether or not he had ever been in a combat zone to his knowledge and he said, "No. He [sic] didn't receive hazardous pay," and that he was at Bagram [AB].

This same PDS was later forwarded to the convening authority during post-trial processing in an SJAR that made no reference to the issue of the appellant's service at Bagram AB.

Waiver of Issue

The Government does not contest the appellant's claim that the PDS presented to the members was erroneous. Rather, the Government argues that the appellant waived

the issue at trial. We disagree. "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Thus, the question is whether the appellant knew that his deployment qualified as "overseas service" or "combat service," and then, knowing of the error on the PDS, intentionally relinquished his right to have his service accurately reflected on the document.

Rather than a knowing, tactical choice, the dialogue between the military judge and trial defense counsel demonstrates that the appellant held a belief that the Bagram AB deployment was not considered "combat service" or "overseas service." Trial defense counsel specifically stated, "It appears to be correct," as opposed to just indicating that the appellant had no objection to the admission of the document. The decision not to object to what is believed to be a nonissue does not constitute an "intentional relinquishment or abandonment of a known right." *See Johnson*, 304 U.S. at 464. In fact, the appellant's written statement to the members that includes reference to his deployment to Bagram AB, and trial defense counsel's sentencing argument that included reference to the deployment, demonstrate a desire that the members consider his deployed service. Presumably, he would have wanted such mitigation evidence presented in the light most favorable to his defense – credited as actual overseas combat service.

Therefore, we find that he did not knowingly waive this issue and we review the forfeited issue for plain error. *See Harcrow*, 66 M.J. at 158.

Admission of Erroneous PDS

The appellant requests a rehearing on sentence, arguing that the military judge committed plain error at trial by admitting an erroneous PDS, which indicated that the appellant had no combat or overseas duty, despite all parties' knowledge of the apellant's deployment to Bagram AB. When trial defense counsel states "no objection" at trial, thereby forfeiting the issue, the appellant has the burden to show that there was an error, the error was plain or obvious, and it materially prejudiced a substantial right of the appellant. *Id*. The record adequately reflects that all parties were well aware of the deployment overseas to Afghanistan and the fact that the PDS reflected no credit for overseas or combat service; therefore, the error was plain or obvious. However, while the military judge erred by admitting an erroneous PDS, the members were still made aware of the mitigating fact of his deployment. The appellant specifically stated that he had deployed to Bagram AB in his written unsworn statement to the members, which was irrefuted by trial counsel, buttressed by the language on his Afghanistan Campaign Medal certificate that was admitted into evidence, and already reflected on the PDS in question. Furthermore, trial defense counsel argued the mitigating nature of the deployment and the members saw no negation from trial counsel. In light of the uncontroverted evidence and

argument presented at trial that clearly established his deployment to Bagram AB, we find that the appellant did not suffer any prejudice as a result of its omission from this one document.

Erroneous PDS in SJAR

The appellant also requests remand for new post-trial processing because the SJAR included the erroneous PDS from trial. Errors or omissions in an SJAR are waived "unless it is prejudicial under a plain error analysis." *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citations omitted). The convening authority's vast power to grant clemency makes the threshold for prejudice low in these instances; however, "an appellant must make 'some colorable showing of possible prejudice.'" *Id*. at 436-37 (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). In this instance, like the members at trial, the convening authority was aware of the appellant's deployment based on his written statement and Afghanistan Campaign Medal certificate that he submitted in his clemency package. The convening authority signed a document indicating that he had personally considered all the clemency matters submitted by the appellant, which included the PDS that referred to the Afghanistan Campaign Medal, before making his decision to approve the sentence as adjudged. Therefore, the appellant has not met his burden making a colorable showing of possible prejudice in clemency under a theory that the convening authority lacked this mitigating information.

Conclusion

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 E. Dixon

ANGELA E. DIXON, TSgt, USAF
Deputy Clerk of the Court