UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LEVI W. ACKLEY
United States Air Force

ACM 36703

16 August 2007

Sentence adjudged 5 August 2005 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Dawn Eflein.

Approved sentence: Bad-conduct discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, Major Steven R. Kaufman, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

The appellant was charged with rape, forcible sodomy, four specifications of larceny, and three specifications of housebreaking, in violation of Articles 120, 121, 125, and 130, UCMJ, 10 U.S.C. §§ 920, 921, 925, 930. He pled not guilty to the rape and forcible sodomy charges and specifications, but guilty to the remainder. In accordance with his pleas, he was found not guilty of rape and forcible sodomy, but guilty to the larceny and housebreaking charges and specifications.

On appeal the appellant asserts three errors: (1) Whether the addendum to the staff judge advocate's recommendation contains "new matter" not provided to defense counsel for comment, necessitating a new convening authority action in this case; (2) Whether appellant's due process right to timely post-trial review has been denied;[1] and, (3) Whether appellant's sentence to a bad-conduct discharge and confinement for 4 years is inappropriately severe.

Staff Judge Advocate Recommendation (SJAR) addendum

The appellant asserts he was entitled to be served with the addendum to the SJAR in order to respond to new matters contained therein, but was not served and thereby missed his chance to provide comments before the convening authority took action in his case. The appellant argues that by the staff judge advocate (SJA) telling the convening authority, "[a]ppellant's argument had already been considered by the court members and they 'had the best opportunity to judge the severity of the crimes committed and the true character of the airman who committed those crimes,'" the SJA had introduced new matters. Appellant also asserts the comment of "what role, if any, the court members' evaluation of the findings and sentence should play in the convening authority's assessment of the clemency request" contained in the SJAR addendum is also new matter. The appellant compares this last comment to *United States v. Catalani*, 46 M.J. 325, 327 (C.A.A.F. 1997), where the SJA sought to bolster his position in the addendum by stating that it matched that of the senior most judge of the Pacific Circuit who actually saw the trial first-hand. We disagree and find no error.

The standard of review for determining whether post-trial processing was properly completed is de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2001)). Whether a matter contained in an addendum to the SJAR constitutes "new matter" that must be served upon an accused is a question of law we also review de novo. *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F 1997).

If we find the addendum did, in fact, contain a new matter, we must decide if the appellant was prejudiced by the SJA's failure to serve the addendum upon the appellant and provide an opportunity for him to comment. *Id.* The appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Id.* (quoting Article 59(a), UCMJ, 10 U.S.C. § 859(a)). The threshold in demonstrating prejudice is low. *Id.*

Besides the comments mentioned above, the appellant quotes the following passage in the SJAR addendum as containing the new matters:

[1] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

> [Appellant] pled guilty to larceny and house breaking, and pled not guilty to sexual assault charges. Court members found [appellant] not guilty of the sexual assault charges. During the findings and sentencing portions of the trial the court members were able to get a clear picture of the kind of person [appellant] really is. Based upon their first hand observations throughout the trial, and through consideration of all the evidence presented in sentencing, the court members, which consisted of both officers and enlisted members, decided that [appellant] deserved 4 years of confinement for his larceny-related crimes. When so many factors come to bear on a court panel's decision on a proper sentence, it is of little value to compare sentences in different cases. The court members who sentenced [appellant] had the best opportunity to judge the severity of the crimes committed and the true character of the airman who committed those crimes.

But examination of the trial defense counsel's clemency submission reveals the following which corresponds to the SJA's comments in the SJAR addendum:

> [Appellant] admits his guilt and the harm that his actions have inflicted, not only upon the Air Force but also those he loves. [Appellant] has committed these offenses but he is not the evil person this sentence suggests . . . [appellant] is far more that (sic) what is outlined in the black and white of the charge sheet. There is much mitigating (sic) about him and his current posture in life. He requests clemency with regard to the sentence.
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> . . . .
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> Sir, you have been provided with letters from those who know [appellant], both before and after the offenses were committed and whose lives he has touched. Family and friends rallied around him so that you can know that he is not the person the charge sheet makes him out to be . . . These letters tell you that he is a kind, caring and motivated young man with a future.
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> . . . .
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> [Appellant's] very brave decision to profess his innocence began a very heated and hard fought trial. The defense believes it was the hard fought nature of the trial, as well as the potential spill-over from it, that has resulted in this severe and inappropriate sentence for the remaining offenses.

The trial defense counsel's submission then spent a considerable amount of space comparing the appellant's case with another case that was tried two weeks after the appellant had his day in court. That case involved the appellant's supervisor, Staff

Sergeant (SSgt) Gariteix, another security forces member, who used his duty position to steal government property. SSgt Garateix was a non-commissioned officer who stole, and resold for profit, a much greater amount of material that was worth significantly more than the property the appellant stole. The appellant pointed out that his supervisor's case was a much more egregious case of larceny and house breaking, but there was a pretrial agreement that limited the approved sentence, in part, to two years and a bad-conduct discharge. The appellant's trial defense counsel also pointed out that she tried to negotiate a pretrial agreement but the legal office would not consider an agreement unless he pled guilty to the rape and forcible sodomy charges, so no deal could be struck. In the interests of "fairness and equality" the appellant's trial defense counsel asked the convening authority to approve no more than two years confinement for appellant.

The appellant also submitted his own clemency request. In that submission to the convening authority, he took full responsibility for his actions and made the same point his trial defense counsel did, arguing that his sentence was far more severe than his supervisor's case which was far more aggravated. He also asserted he had become a changed person, becoming more responsible and selfless than he was before the court-martial. He also stressed his wife's severe financial needs. Attached were numerous warm and supporting letters from family and co-workers.

We hold the SJA's comments were not new matters. Each of the comments in the SJAR addendum identified by the appellant was written in response to something brought up in the clemency materials submitted by the appellant and his trial defense counsel. The appellant's character was first brought up in those submissions as was the comparison between the appellant's sentence and the sentence received by his supervisor. The government is entitled to respond to these comments under the invited response doctrine. *See United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005); *United States v. Gilley*, 56 M.J. 113, 120-21 (C.A.A.F 2001). "'New matter' does not ordinarily include any discussion . . . of the correctness of the initial defense comments on the recommendation." Rule for Courts-Martial (R.C.M.) 1106(f)(7), Discussion. "The defense must anticipate that a [SJA] will comment on the defense submissions, and fair, accurate comment on legal and factual positions is permitted (so long as it does not include new appellate decisions)." *United States v. Komorous*, 33 M.J. 907, 910 (A.F.C.M.R. 1991).

Regarding appellant's assertion that this SJA committed the same error committed in *Catalani*, that is just not the case. The issue there was not simply that the SJA commented on the role the fact finder's "evaluation of the findings and sentence should play in the convening authority's assessment of the clemency request." *Catalani*, 46 M.J. at 328. In *Catalani*, the SJA wrote that the sentence was handed down by the "seniormost (sic) military judge in the pacific." *Id.* Our superior court observed that this comment served to bolster the SJA's own recommendation and was potentially misleading because it implied a stature and judicial experience that was not necessarily

accurate. By not serving the addendum on the defense, the appellant missed the opportunity to point these things out before action was taken.

In the instant case, the SJA merely pointed out that the jury heard the facts and sentencing case and decided upon a sentence they thought was appropriate. There was nothing potentially misleading in this as there was in *Catalani*, nor was there an attempt to bolster the SJA's comments utilizing the stature of a senior judge or some other figure of judicial authority.

Even assuming for the sake of argument new matters were presented in the SJA addendum, the appellant has failed to meet even the low burden of showing that he would have presented information that would have denied, countered or explained the new matter contained in the SJA addendum. *See Chatman*, 46 M.J. at 323; *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F. 1996). According to the appellant, if he received the SJAR addendum he would have commented on the fact that clemency was within the sole discretion of the convening authority and that the convening authority's duties were different than the duties of the court members; that there was more information in the clemency package than the court members had when deciding on a punishment; and that during the long period since his trial the appellant had already taken steps towards rehabilitation. All of these matters were covered in the appellant's and his trial defense counsel's clemency submissions. These points do not "deny, explain, or counter" anything contained in the SJAR addendum. *Leal*, 44 M.J. at 237. They merely repeat positions already strenuously taken by the appellant.

There is one matter in the SJAR that the appellant did not bring up to the convening authority. In that document, the SJA told the convening authority that the maximum sentence regarding confinement was 22 ½ years, however, the maximum was only 20 years of confinement as the members were instructed. Failure to raise this issue in a timely manner waives it unless it is plain error. R.C.M. 1106(f); *United States v. Paz-Medina*, 56 M.J. 501, 504 (Army Ct. Crim. App. 2001). Although the SJA was clearly mistaken when he misinformed the convening authority about the maximum confinement time, a 2½ years mistake on a 20 year maximum sentence is not an error that rises to the level requiring a corrective action. *See generally United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). We note that appellant's case does not rise to the level of error we have previously sought to correct in others instances of incorrect maximum punishments cited in a SJAR. *See United States v. Blodgett*, ACM 35267 (A.F. Ct. Crim. App. 30 Jul 2004) (unpub. op.).

Timely Post Trial Review

The appellant asserts his post-trial right to a timely appeal was violated because it took 244 days from sentence for the convening authority to take action in his case. The military judge authenticated the record of trial on 30 January 2006, 178 days after the

trial was completed. It was not served on the appellant until 16 February 2006 and on his trial defense counsel until 1 March 2006. The convening authority took action on 6 April 2006, 244 days after trial.

The length of post-trial review in the case is evaluated under the four part test enunciated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See United States v. Dearing*, 63 M.J. 478, 487-88 (C.A.A.F. 2006); *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). Those four factors are: (1) length of the delay; (2) the reasons for the delay; (3) any assertion by appellant of his right to speedy post-trial review; and (4) prejudice to the appellant. The standard for review is de novo. *Moreno*, 63 M.J. at 135.

Applying these standards to the instant case we are mindful of the fact that because of the date this case was tried, the *Moreno* presumption of unreasonableness that applies to an action taken more than 120 days after trial, does not apply in this case. We find no violation of the appellant's right to speedy post-trial review. While it took 244 days before action was taken, almost six months of that time was taken up by the preparation and authentication of the record of trial. By far, this accounted for the largest delay in the post-trial processing of appellant's case.

A review of the court reporter's chronology shows she was busy with other courts and military justice duties, and was not dilatory or removed from her primary duties to perform non-military justice tasks. It appears she was diligent in her efforts to process this record of trial. Indeed, there is no indication that the length of time it took to process this record and for the convening authority to take action was due to any unacceptable reason. While we have certainly seen other cases processed much quicker than this one, we do not find the total amount of time it took for the convening authority to take action to be facially unreasonable given the reason for the delay.

The appellant did not assert his right to speedy post-trial review or complain about the length of time it was taking to complete post-trial processing of case. Other than his claim of lack of institutional vigilance, the appellant cites to no specific prejudice he has suffered. Applying the *Barker* test we do not find that the appellant's right to speedy post-trial review was violated.

Sentence Appropriateness

We only affirm those sentences that we find are correct in law and fact. Article 66, UCMJ, 10 U.S.C. § 866(c). In doing so we must consider the entire record, the character of the offender, and the nature and seriousness of the offense. In this area we exercise our judicial function to ensure justice was done. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). The Article 66, UCMJ, sentence appropriateness provision is a "sweeping Congressional mandate to ensure 'a fair and just punishment for every

accused.'" *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

In reviewing sentence appropriate cases, especially in related or similar cases, our superior court has said:

> At a Court of Criminal Appeals, an appellant bears the burden of demonstrating that any cited cases are "closely related" to his or her case and that the sentences are "highly disparate." If the appellant meets that burden, or if the court raised the issue on its own motion, then the Government must show that there is rational basis for the disparity.
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> Our review of a decision from a Court of Criminal Appeals in such a case is limited to three questions of law: (1) whether the cases are "closely related" (e.g., co-actors involved in a common crime, service members involved in a common or parallel scheme, or some other direct nexus between the service members whose sentences are sought to be compared); (2) whether the case resulted in "highly disparate" sentences; and (3) if the requested relief is not granted in a closely related case involving a highly disparate sentence, whether there is a rational basis for the differences between or among cases.

United States v. Lacey, 50 M.J. 286, 288 (C.A.A.F. 1999).

Although the above three inquiries are questions of law used by our superior court, we find them most helpful in conducting our own Article 66, UCMJ review. In so doing, and in exercising our own independent duty considering all of the factors properly reviewable under Article 66, UCMJ, we find the sentence in the instant case is not inappropriately severe.

Indeed, as mentioned previously, another closely related case with which to compare this one was *United States v. Garateix*. Garateix, an NCO and appellant's supervisor was tried two weeks after the appellant for very similar but arguably more aggravated crimes. There is no evidence they were co-actors. As a military working dog handler, Garateix had access to, and used police radios to monitor Security Forces' movements in order to avoid detection while breaking into several buildings on base and stealing a large quantity of property. In all, he stole over $30,000.00 worth of property, reselling much of it for his personal profit. While Garateix did much of his stealing in an off-duty status, he did hatch his plan and reconnoitered some eventual break-in sites while on-duty. When questioned by the Air Force Office of Special Investigations about selling property on the internet, he made a false official statement.

The appellant, an Airman First Class, illegally entered buildings and stole approximately $2,000.00 worth of property. This was done while on patrol carrying out his security forces duties. The property he took included computer games belonging to cadets stored in the basement of a student dorm, a television set, alcohol, and food.

Garateix pled guilty and, pursuant to a pretrial agreement, the convening authority approved a sentence that included two years of confinement and a bad-conduct discharge. The approved sentence also included a $10,000.00 fine and total forfeitures.[2]

The appellant also pled guilty to his offenses. He was sentenced by a jury to a bad-conduct discharge, confinement for 4 years, reduction to E-1, and total forfeitures of pay and allowances. The convening authority approved his sentence, but after clemency submissions waived forfeitures of pay and allowances for six months, so that a portion could be paid to the appellant's wife.

At first blush, the contrast in the lengths of confinement between the two cases is striking. However, these cases are not identical and there are substantial differences that provide a rational basis for the sentence disparity. The appellant had no pre-trial agreement, but received some clemency. Garateix had a pre-trial agreement in which he agreed to plead guilty; he waived his right to trial by court members; agreed to a reasonable stipulation of fact; agreed to cooperate in the investigations of, and to testify against, eight other Airmen who apparently were involved in similar crimes. In return, the convening authority agreed to approve a sentence that was limited in two respects; a two year cap on confinement and a discharge no more severe than a bad-conduct discharge. Garateix also received a substantial fine where the appellant did not. These differences in the two cases provide a sufficient basis to justify any perceived sentence disparity. *United States v. Sothen*, 54 M.J. 294 (C.A.A.F. 2001); *United States v. Dorman*, 57 M.J. 539 (A.F. Ct. Crim. App. 2002).

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

[2] Although this portion of Gareteix's sentences was not cited in either appellate brief, we have the authority to take notice of the sentence in other cases. *United States v. Wacha*, 55 M.J. 266 (A.F. Ct. Crim. App. 2001). In any event, in order to decide this case properly, we must know the complete sentence; partial information could lead to an injustice.

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court