UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LEONARDO RIVERA, JR.
United States Air Force

ACM 34626

6 January 2003

Sentence adjudged 8 May 2001 by GCM convened at McGuire Air Force Base, New Jersey. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, forfeiture of $690.00 pay per month, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Kyle R. Jacobson, and Captain Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, and Lieutenant Colonel Lance B. Sigmon, and Major Mitchel Neurock.

Before

SCHLEGEL, STONE, and LOVE
Appellate Military Judges

OPINION OF THE COURT

LOVE, Judge:

At a general court-martial, a military judge convicted the appellant, in accordance with his plea, of wrongful use of cocaine. Article 112a UCMJ, 10 U.S.C. § 912a. A panel of officers imposed a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to airman basic. The convening authority recognized that the appellant could not receive forfeiture of all pay and allowances without confinement and thus reduced his forfeitures to $690.00 per month, while accepting the rest of the sentence. The appellant contends that the judge erred in granting trial counsel's objection to certain statements in the appellant's exhibits. We agree that the trial judge erred in his ruling on the sentencing exhibits, but find the error harmless. We also find that the convening

authority correctly reduced the total forfeitures to partial forfeitures because of the lack of confinement, but that his action failed to specify the number of months the forfeitures would apply, as required by Rule for Courts-Martial (R.C.M.) 1003(b)(2). Therefore, we affirm the sentence, but only forfeitures of $690.00 pay per month for one month.

I. FACTS

The appellant was a 20-year-old airman assigned to the civil engineering squadron at McGuire Air Force Base (AFB), New Jersey. On a visit to New York City, he acquired a small amount of cocaine, which he consumed a few days later by himself in his dormitory room. Shortly thereafter, he was randomly selected to provide a urine sample which tested positive for cocaine. After the base officials were notified of the test results, the appellant confessed his drug use to a special agent with the Air Force Office of Special Investigations (AFOSI).

The trial was uneventful until sentencing, when the appellant offered several letters in support of his good character and military service. The trial counsel objected to comments in three of the letters, claiming they referenced specific instances of conduct in support of the appellant's potential for rehabilitation, in violation of R.C.M. 1001(b)(5)(D). One letter pointed out the appellant's willingness to provide expedited drafting services when needed. The second letter indicated the appellant was willing to work weekends and evenings to meet deadlines on high-profile projects. The third letter included a description of the appellant's performance as an escort officer and, presumably, other specific instances of good service.[1]

The trial counsel's objection to the defense exhibits based on R.C.M. 1001(b)(5) was incorrect because that rule specifically refers to matters presented by *the prosecution*. The rule applicable to defense materials is R.C.M. 1001(c)(1)(B), which permits matters in mitigation that include "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." Unfortunately, neither counsel nor the judge recognized the mistake and the specific references to the appellant's good conduct were redacted from all three exhibits.

II. ERROR IN EXCLUDING SENTENCING EVIDENCE

The military judge's decision to exclude evidence is reviewed for an abuse of discretion. To find an abuse of discretion, we must be convinced that the military judge's

[1] The judge forgot to preserve "clean" copies of the modified exhibits; thus, the substance of the redacted statements had to be reconstructed from the transcript. Although the redacted statements in two of the letters are clear, the substance of the redacted material in the third letter could not be fully reconstructed. We presume that the redacted statements in the third letter also referenced specific positive acts in support of the appellant's duty performance.

action was clearly untenable and that it so deprived the appellant of a substantial right that justice was denied. *United States v. Hawkins*, ACM 29975 (A.F.C.M.R. 1994)

The confusion over the different rules for prosecution and defense exhibits led to an erroneous ruling by the judge. However, reading the record as a whole, and focusing on the defense exhibits in particular, this mistake did not create an injustice.

The defense presented eight letters of support from military members and one from an Air Force civilian employee. All were well written and highly complementary of the appellant. The letters presented convincing evidence that the appellant's military service was excellent and his potential for continued service was strong. The letters described the appellant as "professional," "intelligent," "motivated," "courteous," "respectful," a "model airman," "confident," "career-oriented," and possessing "great potential," among other things. These descriptions, coming from supervisors and co-workers in his unit, should have positively impacted the panel.

Additionally, we note that there was no dispute over the appellant's service record or duty performance. The few sentences that were redacted did not change anything in the case for either side. Thus, the mistake in this case, while regrettable, did not substantially harm the appellant nor deny him justice.

ERROR IN THE STATEMENT OF FORFEITURES

Under R.C.M. 1003(b)(2), a sentence that includes partial forfeitures shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last. In this case, the convening authority action states that only so much of the appellant's sentence that includes forfeitures in the amount of $690.00 pay per month was approved. Thus, the convening authority's action fails to specify the duration of the forfeitures. It is the practice on appeal that if the duration of forfeitures is not specified, their duration shall not exceed one month. *United States v. Foster*, 39 M.J. 846 (A.C.M.R. 1994); *United States v. Burkett*, 57 M.J. 618 (C.G. Ct. Crim. App. 2002). Therefore, we affirm the sentence, but only forfeitures of $690.00 pay per month for one month.

The approved findings and the sentence, as modified, 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 (2000). Accordingly, the approved findings and sentence, as modified are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator