IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **C.L. SCOVEL** **J.D. HARTY**

UNITED STATES

v.

Jakub R . PACZKOWSKI
Private (E-1), U. S. Marine Corps

NMCCA 200401468 Decided 26 April 2006

Sentence adjudged 20 October 2003. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3rd Transportation Support Battalion (-)(REIN), 3rd Force Service Support Group, Marine Forces Pacific, Okinawa, Japan.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LT ELYSIA G. NG, JAGC, USN, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful order, destroying government property, larceny, and assault consummated by a battery, in violation of Articles 92, 108, 121, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 908, 921, and 928. The appellant was sentenced to confinement for eight months, forfeiture of $750.00 pay per month for eight months, and a bad-conduct discharge.

Pursuant to his staff judge advocate's recommendation (SJAR), the convening authority (CA) disapproved the finding of guilty to Charge I, Specification 1, violation of a lawful order. The CA approved the remaining findings, and approved only so much of the sentence as includes confinement for six months, forfeiture of $750.00 pay per month for six months, and

a bad-conduct discharge. Pursuant to the pretrial agreement, the CA suspended all confinement in excess of time served plus seven days for 12 months from the date the appellant was released from confinement.

We have considered the record of trial, the appellant's two assignments of error, the Government's answer, and the appellant's reply. We find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Defective SJAR and CA's Action

For his first assignment of error, the appellant claims the staff judge advocate (SJA) erred in his SJAR by failing to state the legal standard he used in arriving at the recommended sentence reassessment, and by not providing the CA with the legal standard for reassessing a sentence once a guilty finding has been disapproved. The appellant also claims that the CA's action is defective because the CA did not state what legal standard he used in reassessing the appellant's sentence. The Government argues that there is no requirement to state the legal standard used.

The SJAR contains a recommendation that the guilty finding to Charge I, Specification 1, be disapproved due to legal error, and that the CA should approve the sentence adjudged except for confinement, in which case the SJAR recommended approving only six of the eight months adjudged. SJAR of 30 Jun 2004 at 4. The SJAR was served on the trial defense counsel who chose not to submit a response. Receipt for SJAR of 6 Jul 2004.

If the appellant does not make a timely comment on an error in the SJAR, the error is waived absent plain error. *United States v. Capers*, 62 M.J. 268, 269 (C.A.A.F. 2005); RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). To prevail under a plain error analysis, the appellant must show: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). The third prong of the plain error analysis is satisfied if the appellant makes some colorable showing of possible prejudice. *Id*. We are not persuaded that the appellant has made the required showing.

In *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991), our superior court addressed this issue in the context of an SJA recommendation that the most serious conviction be disapproved due to a violation of the statute of limitations, and that the confinement adjudged be reduced from seven to five years. The SJA, however, did not provide any guidance to the CA on how to cure the error's impact on the sentence, or how he arrived at the recommended confinement reduction. Our superior court held:

> Thus, where a staff judge advocate recommends certain curative action on the sentence (*see* RCM 1106), it is imperative that he make clear to the convening authority the distinction between, on the one hand, curing any effect that the error may have had on the sentencing authority and, on the other, determining anew the appropriateness of the adjudged sentence. See RCM 1107(d)(2).

Id. at 100. A new CA's action was ordered, because the Government had not "carried its burden of convincing [that court] that 'a properly prepared recommendation would have [had] no effect on the convening authority's' action to rectify the impact on the sentence from the error on the finding." *Id*. (quoting *United States v. Hill,* 27 M.J. 293, 296 (C.M.A. 1988)).[1] In the case *sub judice,* the SJA failed to comply with *Reed*. We must decide if that error was plain or obvious and, if so, whether the appellant has made a colorable showing of possible prejudice.

When a CA takes corrective action on sentence, his action must be guided by the same rules applicable to appellate authorities. *Id*. at 99. A Court of Criminal Appeals may reassess a sentence instead of ordering a rehearing if the court is convinced that the sentence "would have been at least of a certain magnitude" but for the trial error. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). If a Court of Criminal Appeals "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," it must return the case for sentence rehearing rather than reassess the sentence itself. *Id*. If the CA complied with this standard, even without specific guidance to do so in the SJAR, we see no reason to return this record for a new SJAR and CA action.

Here, the appellant had a prior nonjudicial punishment, summary court-martial, and several official counseling sessions. These documented instances of misconduct involved repeated disobedient, drunken and violent behavior. The disapproved guilty finding of violating a battalion order by not staying with a liberty buddy was the least serious misconduct before the court. The convictions of destroying government property, larceny, and assault consummated by a battery, involved far more serious criminal conduct. These are serious offenses by a person with a serious criminal history. All of this information was contained in the SJAR and considered by the CA.

We find that the CA's action reassessing the appellant's sentence was in accord with the rules applicable to this court, and the action taken was appropriate under the circumstances. Any error that may exist from non-compliance with *Reed* is not plain or obvious. Even if it is plain or obvious, the appellant

[1] Without referring to a plain error analysis, our superior court appears to have found a colorable showing of possible prejudice that was left unrebutted by the Government.

has not made a "colorable showing of possible prejudice." A properly prepared recommendation would have had no effect on the CA's action to rectify the impact of the error on the sentence. This issue is without merit.

Incomplete Record of Trial

Although the appellant frames his second assignment of error as one of incomplete record of trial, his analysis is two-pronged. First, he asserts that the CA's action is defective because the CA relied on the SJAR's direction that he must consider a companion case, without stating the disposition of that case. Thus, the CA considered matters outside the record of trial without giving the appellant an opportunity to comment. Second, the appellant argues that without information in the record concerning the companion case, we do not know what it was that the CA considered, how it impacted the CA's action on findings and sentence, or whether there were disparate sentences in closely related cases.[2] Thus, preventing our ability to conduct our statutory review.

1. Waiver

The trial defense counsel was served with a copy of the SJAR that contained the advice now complained of, and he did not respond to that SJAR. We find that the appellant waived any issue concerning advice contained in that SJAR or the CA following that advice, absent plain error. Applying the test for plain error, we do not find error. Even if there is error, that error is not plain or obvious and the appellant has not made a colorable showing of possible prejudice. We will discuss the two issues raised briefly.

2. Consideration of outside matter

We note that the appellant agreed to cooperate fully in the trial of the "companion case" by testifying. Appellate Exhibit II at 3, ¶ 15. That convinces us that the appellant and his detailed defense counsel were staying informed of the status of that case, and serves as some evidence that they did not comment on the SJAR because they were aware of the disposition in the "companion case." That disposition, discussed in the next section, is not part of the appellant's record of trial. However, the appellant only has to be notified of adverse matters considered from outside the record. *See* R.C.M. 1107(b)(3)(A)(iii). The disposition in the "companion case" was not adverse to the appellant, and, therefore, there was no requirement that

[2] *United States v. Dellandrea*, No. 200500116 unpublished op. (N.M.Ct.Crim.App. 29 Jul 2005)(involving guilty pleas to two specifications of orders violations under Article 92, UCMJ, resulted in a sentence to confinement for 91 days and a bad-conduct discharge).

he be notified and given an opportunity to rebut that information. This issue is without merit.

3. Incomplete record of trial

A record of trial can only be incomplete if it is missing something required to be present. There is no requirement that companion case information be spelled out in a CA action or elsewhere in a record of trial. Therefore, we do not find anything about the appellant's record of trial that inhibits this court's ability to perform its statutory review. Arts. 59 and 66, UCMJ. We have before us all matters required by R.C.M. 1103, and information that convinces us that the appellant's case and the "companion case" are not companion cases, nor are they closely-related cases for a disparate sentence analysis.[3] This issue is without merit.

Conclusion

The findings and sentence are affirmed as approved by the convening authority. We note that in disapproving the guilty finding to Charge I, Specification 1, the CA did not dismiss that Charge and specification as required by R.C.M. 1107(f)(3). We take that action ourselves. Charge I and Specification 1 thereunder are dismissed. The supplemental court-martial order will reflect this court's action.

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court

[3] The SJA and CA are not using "companion case" in a strict legal sense. *See United States v. Swan*, 43 M.J. 788, 791 (N.M.Ct.Crim.App. 1995)(holding companion cases are those in which two or more individuals are charged with criminal conduct showing some commonality of conduct indicating similarities of culpability).