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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

David Y. OWENS
Private First Class (E-2), U.S. Marine Corps

NMCCA 200200427 Decided 14 January 2005

Sentence adjudged 26 June 2001. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Transportation Support Battalion, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
CDR W.L. BOULDEN, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his plea, of use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 75 days, forfeiture of $600.00 pay per month for 3 months, and reduction to pay grade E-1. The military judge recommended that the convening authority suspend the bad-conduct discharge. The convening authority approved the sentence as adjudged.

In his first assignment of error, the appellant claims that the convening authority committed plain error prejudicial to the substantial rights of the appellant when he failed to wait 10 days following service of the staff judge advocate's recommendation (SJAR) on the trial defense counsel before taking

his action and where the SJAR erroneously stated that the military judge did not recommend clemency and that the appellant did not submit a clemency request. In his second assignment of error, the appellant asserts that the bad-conduct discharge awarded by the military judge was inappropriately severe.

This case is before this court for the second time, having been remanded by our superior court for a new review by a panel of judges who did not participate in this court's earlier decision. The appellant has declined to submit additional assignments of error or responses other than those originally submitted to this court in the appellant's initial pleading.

After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude 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. Arts. 59(a) and 66(c), UCMJ.

Convening Authority's Action

In his first assignment of error, the appellant claims that the convening authority committed plain error prejudicial to the substantial rights of the appellant when he failed to wait ten days following service of the Staff Judge Advocate's Recommendation (SJAR) on the trial defense counsel before taking his action and where the SJAR erroneously stated that the military judge did not recommend clemency and that the appellant did not submit a clemency request. We disagree and decline to grant relief.

The military judge sentenced the appellant on 26 June 2001, recommending on the record that the bad-conduct discharge be suspended. The record of trial was authenticated on 22 October 2001. The trial defense counsel submitted a clemency request to the convening authority on 14 November 2001 asking that the bad-conduct discharge be disapproved. The SJAR was signed on 6 December 2001 and served on the trial defense counsel on 10 December 2001. The SJAR erroneously stated that the military judge did not recommend clemency and that no clemency matters had been received. The convening authority took action on 19 December 2001, noting in his action that the SJAR was in error in that the military judge had recommended suspending the bad-conduct discharge and that he had considered the 14 November clemency request. The trial defense counsel did not, apparently, comment on the errors contained in the SJAR.

Counsel's failure to comment on errors or omissions in the SJAR forfeits the issue, absent plain error. RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Lugo*, 54 M.J. 558, 560 (N.M.Ct.Crim.App. 2000). "To succeed under a plain error analysis, appellant has the

burden of establishing that there was plain or obvious error that 'materially prejudiced' his 'substantial rights.'" *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(quoting Art. 59(a), UCMJ). Moreover, when raising error in the post-trial review process, in addition to alleging error, the appellant must allege prejudice as a result of the error, and must show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). Additionally, the appellant bears the burden of establishing plain error, including a showing of specific prejudice. *Id.* at 288.

We do not find plain error in this case. Turning first to the failure of the convening authority to wait the required ten days after the SJAR was served to take his action, the appellant must make some showing that there were matters he would have submitted to the convening authority and what those matters were. *United States v. DeGrocco,* 23 M.J. 146, 148 (C.M.A. 1987). The appellant has failed to specify either the existence of or content of any additional matters he would have submitted had the convening authority waited to sign the action.

Turning next to the SJAR's erroneous statement that the military judge made no clemency recommendation, we simply note that the convening authority corrected the error in his action and considered the judge's recommendation in taking his action. The appellant is correct where he states in his brief that this court has previously emphasized the importance of a military judge's clemency recommendation in the convening authority's post-trial consideration of a court-martial. *United States v. McLemore,* 30 M.J. 605, 607 (N.M.C.M.R. 1990). In *McLemore,* however, there was no evidence that the convening authority actually considered the military judge's recommendation. In the case at bar, we know that he did.

Turning finally to the SJAR's erroneous statement that clemency matters had not been submitted, the same analysis applies. Again, the convening authority stated that he considered the clemency request submitted by trial defense counsel in taking his action. The appellant's right to have his voice heard before the convening authority, his best chance at clemency, took action, was not abrogated.

Based on the foregoing, we find that the appellant has not borne his burden of demonstrating that any of the three errors in the post-trial processing of his court-martial prejudiced him in any way.

Sentence Appropriateness

In his second assignment of error, the appellant claims that his sentence to a bad-conduct discharge is inappropriately severe and he requests that we, therefore, disapprove it. We disagree and decline to grant relief.

The appellant correctly states in his brief that this court must decide whether a punishment fits the individual appellant as well as the offenses for which he or she stands convicted. *United States v. Mack,* 9 M.J. 300, 317 (C.M.A. 1980). In doing so, we have the responsibility to ensure that a sentence is no more severe than what the circumstances of the case warrant. *United States v. Aurich,* 31 M.J. 95, 97 (C.M.A. 1990). Put another way, "[s]entence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant argues in support of his allegation of error that he has no prior record of misconduct and that he has displayed outstanding military character before and after the offense occurred. The evidence offered at trial and the matters submitted in clemency establish that he was a valuable asset to the Marine Corps. The appellant also argues that he has strong rehabilitative potential. On the other hand, the use of illegal substances by active duty service members is a very serious threat to good order and discipline, security, and safety. The appellant had been on active duty for almost a year when he used cocaine. He stated during the providence inquiry that he and a civilian friend hid outside a club and that he used a straw to snort 3 or 4 lines of cocaine from a bag full of a white powder that he knew, and recognized, to be cocaine. The appellant also stated that he knew what he was doing at the time. Witnesses testified that the appellant had developed a position of trust among his superiors and a position of leadership among his peers and subordinates. Based on the foregoing, this court is satisfied that justice was done in this case and that this appellant did receive the punishment he deserved.

After reviewing the entire record, we find that the sentence is appropriate for this offender and his offense. Healy, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

Promulgating Order

Although not asserted as an allegation of error, we direct that the supplemental court-martial order include either a verbatim text or adequate summary of the specification. *United States v. Glover*, 57 M.J. 696 (N.M.Ct.Crim.App. 2002); R.C.M. 1114(c)(1).

Conclusion

Accordingly, the findings of guilty and sentence, as approved below, are affirmed.

Chief Judge DORMAN and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court