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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Calvin E. SMITH
Master Gunnery Sergeant (E-9), U.S. Marine Corps

NMCCA 200100458 Decided 30 December 2004

Sentence adjudged 24 March 1999. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Air Bases, Eastern Area, MCAS, Cherry Point, NC.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of indecent acts (9 Specifications) and indecent exposure, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The appellant was sentenced to a bad-conduct discharge, confinement for six months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant contends that his plea to indecent exposure is improvident; that the trial counsel engaged in improper argument on sentencing; and that the convening authority failed to consider defense clemency submissions.

We have carefully considered the record of trial, the appellant’s assignments of error, and the Government’s response. We hold that post-trial error requires the preparation of a new staff judge advocate's recommendation (SJAR) and convening authority's action (CA's Action).

Defense Clemency Submissions

The appellant claims that he was prejudiced by the convening authority's failure to consider his clemency submissions. We agree.

The convening authority's action states that he:

> ... specifically considered all the matters submitted pursuant to R.C.M. 1105, MCM (1998 Edition), by the accused on 26 May 1999. I have also considered all other correspondence previously submitted by the accused.

General Court-Martial Convening Authority's Action and Order No. 7-00, 17 Jan 2001. The civilian defense counsel waived the right to submit clemency matters upon receipt of the record of trial and post-trial recommendation; however, he expressly indicated that he had "previously submitted clemency matters on 29 March 1999 and 23 May 1999." Waiver of Right to Submit Matters in Accordance with R.C.M. 1105 and R.C.M. 1106, 24 Aug 2000. The only document attached to the record of trial corresponding to the aforementioned dates is a "Request for Deferment," dated 26 May 1999. This document is signed by the appellant personally, with no mention of his civilian defense counsel.[1] There are no post-trial submissions from the civilian defense counsel referenced in the action, or attached to the record of trial. *See* R.C.M. 1103(b)(2)(D)(3).

It is well-established that a convening authority must consider matters submitted by an accused under R.C.M. 1105 and 1106. *See United States v. Stephens*, 56 M.J. 391, 392 (C.A.A.F. 2002). Our superior court has stated that "speculation concerning the consideration of such matters simply cannot be tolerated in this important area of command prerogative." *See United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989)(citing *United States v. Siders*, 15 M.J. 272, 273 (C.M.A. 1983)). On the basis of the record and post-trial documents before us, "we cannot guess as to whether clemency matters prepared by the defense counsel were attached to the record or otherwise considered by the convening authority." *Id*. (quoting *United States v. Hallums*, 26 M.J. 838, 841 (A.C.M.R. 1988)).

The Government does not argue that the defense submissions did not exist, or that they were not submitted to the convening authority. *See* Government Brief of 21 Oct 2003 at 7-8. Rather, the Government argues that the appellant is merely speculating that the convening authority never considered these documents. We cannot agree with the Government's contention. The

[1] We note that there are a copies of several of the appellant's fitness reports from Defense Exhibit B inserted in the post-trial documents, with no corresponding cover sheet or explanation. We will not speculate as to whether these documents were part of a clemency submission.

appellant's burden is merely to raise some "colorable showing of possible prejudice." *See United States v. Wheelus*, 49 M.J. 283, 288-89 (1998). This he has done. The appellant was a Master Gunnery Sergeant with more than 25 years of service at the time of trial. Submission of clemency matters in such a case is axiomatic, notwithstanding the relatively light sentence adjudged. Those matters are neither referenced in the CA's Action, which is not required, nor attached to the record of trial, which is required. Simply put, we cannot conclude that the convening authority properly received and considered the clemency submissions of the civilian defense counsel. Thus, we hold that a new SJAR and CA's Action are warranted.[2]

Finding prejudicial error that requires corrective action, we defer decision as to the appellant's remaining assignments of error.

Conclusion

Accordingly, this record of trial is returned to the convening authority for preparation of a new SJAR and CA's Action, after the appellant has had an appropriate opportunity to review and comment upon the SJAR and submit matters pursuant to R.C.M. 1105 and 1106.

Senior Judge CARVER and Judge Wagner concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] Although not raised by the appellant, we note that several of the appellant's awards stated on the record were not listed in the SJAR. This error should also be corrected on remand. *See United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993).