

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Captain CHRISTOPHER GRAY
United States Army, Appellant

ARMY 20090259

19th Sustainment Command (Expeditionary)
Donna M. Wright, Military Judge
Lieutenant Colonel Juan A. Pyfrom, Staff Judge Advocate

For Appellant: Frank K. Spinner, Esq. (argued); Lieutenant Colonel Jonathan F. Potter, JA; Major Richard Gorini, JA; Captain Kathleena Scarpato, JA (on brief); Frank K. Spinner, Esq. (on brief).

For Appellee: Captain Kenneth W. Borgnino, JA (argued); Major Amber J. Williams, JA; Major Sara M. Root, JA; Captain Kenneth W. Borgnino, JA (on brief).

5 April 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

Per Curiam:

A panel of officers sitting as a general court-martial convicted appellant, contrary to his pleas, of premeditated murder and conduct unbecoming an officer, in violation of Articles 118 and 133 of the Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 918 and 933. The panel sentenced appellant to a dismissal, confinement for life with the possibility of parole, forfeiture of all pay and allowances, and a reprimand. The convening authority (CA) approved the adjudged sentence. This case is before us for review pursuant to Article 66, UCMJ.

A disturbing number of post-trial deficiencies plague this case. The staff judge advocate recommendation (SJAR) and addendum failed to inform the CA of basic, required trial information in a concise manner, provided misleading and incorrect advice as to the status of appellant's request for deferment and waiver of forfeitures, and failed to address numerous allegations of legal error raised by

appellant in his Rule for Courts-Martial [hereinafter R.C.M.] 1105 submissions. Additionally, the CA's action is replete with errors. We find prejudicial error and set aside the action and return the case for a new review and action.

FACTS

On appeal, appellant provided this court with several documents pertaining to deferment and waiver of forfeitures. These documents were not contained in the record of trial (ROT). The first was a request for deferment of forfeitures submitted by appellant on 6 April 2009. In this request, appellant requested deferment of both adjudged and automatic forfeitures until action. Appellant also provided notice that, in his R.C.M. 1105/1106 submissions, he would be requesting disapproval of the adjudged forfeitures and approval of a waiver of forfeitures for the benefit of appellant's mother and children for a period of six months following action. The second document was a recommendation from the staff judge advocate (SJA), dated 20 April 2009, to the CA on deferment of forfeitures. In the recommendation, the SJA mischaracterizes appellant's request as a request to defer only adjudged forfeitures. The third document is the CA's approval of the "Request for Deferment of Adjudged Forfeitures," also dated 20 April 2009, which states "[t]he sentence of total forfeitures will be deferred effective 9 April 2009 until the sentence is ordered executed."

The ROT contains an SJAR for Commander, Eighth United States Army, dated 21 July 2009, consisting of three brief paragraphs.¹ The first paragraph identifies appellant and his unit and also states the ROT has been forwarded for recommendation prior to action. The second paragraph states: "APPROVED DEFERMENT OR WAIVER REQUEST: Approved." The third states: "RECOMMENDATION: Approve the findings and sentence as adjudged." Three enclosures are listed: 1. Record of Trial; 2. Request for Deferment; 3. ORB. This document is signed by the SJA.

The ROT also contains an addendum and action dated 31 August 2009. The addendum is for Commander, 19th Expeditionary Sustainment Command, signed by the SJA, and lists no enclosures. The cursory addendum informs the CA that the accused has submitted R.C.M. 1105 matters and he must take them into consideration prior to taking action. It also states "After careful consideration of the matters submitted under R.C.M. 1105, it is my opinion that clemency is not warranted. I continue with my recommendation that you approve the sentence and

¹ The proper CA for appellant's case is Commander, 19th Sustainment Command (Expeditionary).

order it executed.” The action, signed by the CA, states “. . . the sentence is approved and will be executed.”

A fourth document provided by appellant on appeal and not contained in the ROT is a document dated 31 August 2009, in which the CA approved “the request for deferment of automatic forfeitures” stating “the sentence of total forfeitures will be deferred for six months, effective 9 April 2009 until 8 October 2009.”

On 8 September 2009, appellant submitted extensive matters pursuant to R.C.M. 1105(a)-(b), Article 60 (b)(1), UCMJ, and, R.C.M. 1106(f)(4). Appellant’s civilian defense counsel’s (CDC) memo asserted that although the prior request for deferment/waiver of the adjudged and automatic forfeitures was approved by the CA, it had not been executed due to the Defense Military Pay Office (DMPO) finding the CA failed to address automatic forfeitures. The R.C.M. 1105 matters included an e-mail communication from late August 2009 in which the Deputy SJA promised to look into the matter and get back to the defense. Additionally, appellant’s defense counsel made numerous assertions of legal error. One of the specified legal errors was that the sparse advice and recommendation contained in the SJAR was deficient. The defense asserted that the SJAR, like the pretrial advice (PTA), was simply a formality and lacked any “satisfactory legal review and analysis.”

Additionally, the defense asserted that there was an issue with the SJA being qualified to issue the SJAR when he provided questionable testimony on a “controverted” issue. The defense matters specifically requested that the CA “Please review the motion testimony of the SJA . . . as the defective referral issue was litigated and determine for yourself if the substance of his testimony regarding the pretrial advice was reasonable.” In assessing other specified allegations of legal error, the defense counsel requested the convening authority review additional portions of the record such as: the closing statements of counsel; the testimony of the Criminal Investigation Command agents in contrast to the military judge’s version of events; and “the defense motions and objections, as well as the testimony, evidence and arguments presented in support of them.”

On appeal, appellant asserts prejudice from action being taken prior to consideration of clemency matters submitted by appellant and prejudice from the approved forfeitures not being included in the action. In response, the Government Appellate Division (GAD) submitted an affidavit from the SJA, an addendum dated 18 September 2009, and an action dated 25 September 2009. In the affidavit, the SJA relates that during a 31 August 2009 meeting with the CA to get his decision on “the defense request for deferment of automatic forfeitures,” the CA prematurely signed the prepared action after signing the document pertaining to the deferment. The SJA stated he explained to the CA that he had signed the document prematurely, the premature documents would be shredded and new copies would be provided “along with the required recommendation after I received 1105 matters and

completed my review.” After receiving the post-trial matters from the defense and reviewing them, the SJA drafted “my recommendations and submitted the addendum to my previous SJAR along with the post-trial matters to the convening authority for his consideration and approval.”

Except for the dates, the addendum signed on 18 September 2009 is identical to the addendum signed on 31 August 2009. The addendum informs the CA that R.C.M. 1105 matters have been submitted and all written defense submissions must be considered prior to action. It also states “After careful consideration of the matters submitted under R.C.M. 1105, it is my opinion that clemency is not warranted. I continue with my recommendation that you approve the sentence and order it executed.” The addendum addresses neither the issues concerning the forfeitures nor the defense assertions of legal error. The addendum also fails to list any enclosures.

The action signed by the CA on 25 September 2009 is identical to the one he signed on 31 August 2009, with the exception of the date. It merely states “the sentence is approved and will be executed.”

LAW AND DISCUSSION

“Whether an error, constitutional or otherwise, was harmless, is a question of law that we review de novo.” *United States v. Travis*, 66 M.J. 301, 303 (C.A.A.F. 2008) (quoting *United States v. Hall*, 66 M.J. 53, 54 (C.A.A.F. 2008)). “Because clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is an error and the appellant “makes some colorable showing of possible prejudice.” *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)).

Under the facts of this case, the errors in the SJAR and addendum were prejudicial. First, basic, required information was not provided to the CA. R.C.M. 1106(d)(3) requires, *inter alia*, the SJA to provide the CA “. . . a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied” Neither the SJAR nor addendum referenced the result of trial, nor did the body of the SJAR or addendum address the findings, sentence, or confinement credit. In this sixteen-volume murder case the presentation of the entire ROT would not provide the requisite concise information. Additionally, in light of the careless administration of this case, including the omission of important documents from the ROT, the erroneous inclusion of documents in the ROT, and the prematurely signed

addendum and action, we will not presume the result of trial was included in the ROT nor that the CA was actually presented with the ROT prior to action.²

Second, the R.C.M. 1105 matters clearly and unequivocally raised numerous allegations of legal error – including the deficiency of the SJAR and the disqualification of the SJA. R.C.M. 1106(d)(4) requires the SJA to

. . . state whether, in the staff judge advocate’s opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused.

The SJA failed, even in the minimal manner required, to address the extensive allegations of legal error raised. In light of the nature of the alleged legal errors we find this absolute failure to be prejudicial.

Third, the SJA failed to provide accurate advice concerning the defense requests for deferment, failed to provide any advice concerning waiver of forfeitures, and the advice he did provide was misleading.

Excellent discussions of deferment and waiver of forfeitures pursuant to Articles 57a(a) and 58b(b) are contained in *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002) and *United States v. Morales*, 65 M.J. 665 (Army Ct. Crim. App. 2007) and we commend them to all practitioners. Additionally, R.C.M. 1101(c)(3) requires that the CA’s action on deferment requests pursuant to Article 57(a), UCMJ, be in writing and state the reason if the request is denied. *See also* Army Reg. 27-10, Legal Services: Military Justice [hereinafter AR 27-10], para. 5-32(a) (3 Oct. 2011). R.C.M. 1103(b)(3)(D) requires the deferment request and the action on the request be included in the ROT.

Following trial, appellant requested that his adjudged and automatic forfeitures be deferred. Based on the SJA’s mischaracterization of appellant’s request, the CA approved deferment of only adjudged forfeitures until “execution of

² The SJA’s affidavit states he “submitted the addendum to my previous SJAR along with the post-trial matters to the convening authority for his consideration and approval.” This statement, combined with a ROT replete with administrative errors, gives us no confidence that the SJA brought the SJAR enclosures to the CA for review.

the sentence.” When confronted with DMPO’s refusal to pay forfeitures because the CA had not deferred the automatic forfeitures, the SJA returned to the CA in an apparent effort to address the problem. The document signed by the convening authority on 31 August 2009 states essentially that the request for deferment of automatic forfeitures is approved: “the sentence of total forfeitures will be deferred for six months, effective 9 April 2009 until 8 October 2009.” The purported end dates of the deferment for adjudged and automatic forfeitures are not the same.

Nothing in the record of trial provides evidence that the CA was given any advice on how to properly consider and execute a decision on deferment and waiver of forfeitures pursuant to Articles 57a(a) and 58b(b). The entirety of the guidance given to the CA by the SJA was contained in paragraph 2 of the 21 July 2009 SJAR which ambiguously states: “APPROVED DEFERMENT OR WAIVER REQUEST: Approved.” Such guidance from his SJA could have reasonably caused the convening authority to believe he granted all requested relief with regards to deferment and waiver of forfeitures. Regardless of the actual intent of the CA, the action dated 25 September 2009 approving the adjudged sentence to total forfeitures and ordering it executed, ended the prior deferments.

We decline to accept GAD’s invitation to consider this 31 August action as a waiver. The 31 August 2009 deferment document was signed before appellant had even requested waiver of forfeitures through his R.C.M. 1105 submission. In his affidavit, the SJA repeatedly refers to the 31 August meeting as one for the “purpose of getting his decision on the defense request for deferment of automatic forfeitures.” The deferment document appears to be directed at supplying what the DPMO identified as missing, a deferment of the automatic forfeitures to give effect to the prior deferment of adjudged forfeitures. Deferment in the context of Article 57, UCMJ, and waiver in the context of Article 58, UCMJ, are distinctly different concepts.

. . . *deferred* forfeitures inure to the direct benefit of an appellant; they remain part of his military compensation and are directly deposited into his designated bank account. On the other hand, *waived* forfeitures inure to the direct benefit of an appellant’s dependents; they are paid directly to an appellant’s spouse or the custodian of his minor children. . . .

United States v. Morales, 65 M.J. 665, 667 (Army Ct. Crim. App. 2007). Consequently, all parties in the court-martial process must understand deferment and waiver concepts and how to apply them in different factual settings. *Id.* at 666, (citing *United States v. Brown*, 54 M.J. 289, 292 (C.A.A.F. 2000)).

Given the convening authority’s inherent power to waive forfeitures under Article 58b, UCMJ, we are unable to say with any certainty that additional relief would not have been granted. Clemency is a “highly discretionary” command function of a convening authority. *Travis*, 66 M.J. at 303 (quoting *United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005)).

In the context of this case, the SJAR, and the subsequent addendum, did nothing to “assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative.” R.C.M. 1106(d)(1) and Article 60(c)(1), UCMJ. Additionally, the appellant has been prejudiced by the ineffective efforts of the government to take action on his fairly straightforward requests for deferment and waiver of forfeitures – he still has been paid nothing, the paperwork does not establish clearly what he is to be paid, and waiver appears not to have been properly considered.

Additionally, we note the following deficiencies in the CA’s action. The action purports to execute the adjudged dismissal when a sentence to dismissal cannot be ordered executed until after completion of appellate review. Article 71(b), (c), UCMJ. The action fails to mention any approved deferment or waiver of forfeitures as required by R.C.M. 1101(c)(4). The action does not account for confinement credit to be awarded the appellant. The action does not include the reprimand that the CA approved and ordered executed. R.C.M. 1107(f)(4)(G) (the action is required to contain any reprimand which the CA has ordered executed).

CONCLUSION

The convening authority’s initial action, dated 25 September 2009, is set aside. The record of trial is returned to The Judge Advocate General for a new SJAR and action by the same or a different convening authority in accordance with Article 60(c)-(e), UCMJ.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court