UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KEVIN W. MEDLEY
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201200460
SPECIAL COURT-MARTIAL

Sentence Adjudged: 25 June 2012.
Military Judge: CAPT Terry Ganzel, JAGC, USN.
Convening Authority: Commanding Officer, Combat Logistics Regiment 2, 2d Marine Logistics Group, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Capt M.C. Andrew, USMC.
For Appellant: Maj Babu Kaza, USMCR.
For Appellee: CDR Christopher L. VanBrackel, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN; LT Lindsay P. Geiselman, JAGC, USN.

28 February 2013

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence and five specifications of wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge sentenced the appellant to be confined

for 135 days, to be reduced in pay grade to E-1, and to be discharged from the Marine Corps with a bad-conduct discharge. A pretrial agreement had no effect on the sentence and the convening authority (CA) approved the sentence as adjudged.[1]

In a single assignment of error, the appellant argues that the CA failed to consider clemency matters properly submitted by his trial defense counsel (TDC) following trial. He requests that we remand his case for proper post-trial processing. The Government disputes that clemency matters were actually submitted; regardless the Government argues that the appellant has failed to show prejudice. We disagree and order appropriate relief in our decretal paragraph.

Factual Background

The military judge sentenced the appellant on 25 June 2012. That same day, the appellant submitted a "Request for Voluntary Appellate Leave" (VAL)listing a total of five enclosures. Enclosure (5) in the VAL package dated 25 June 2012 is a document entitled "Request for Restoration/Clemency" addressed to the Naval Clemency and Parole Board. In this document, the appellant requests reduction in confinement and restoration to the pay grade of E-3. Near the bottom of the page appears the handwritten note "[s]ee clemency submitted." Both the appellant's and TDC's signature appear at the bottom.

On 14 September 2012, the staff judge advocate (SJA) submitted a recommendation (SJAR) pursuant to RULE FOR COURTS-MARTIAL 1106(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) to the CA. In his recommendation, the SJA notes that "[p]ost-trial matters by the defense will be provided when received." The SJA also notes that no deferment request has been made. *Id*. On 27 September 2012, TDC received a copy of the SJAR. On 15 October 2012, the SJA forwarded the record of trial, the SJAR, an acknowledgement by TDC of SJAR service, and a proposed action to the CA for review. In an included cover letter, the SJA notes that neither the appellant nor TDC submitted any matters for the CA's consideration. See SJA, 2d MLG ltr 5813 Ser: G12-25 of 15 Oct 2012.

On 22 October 2012, the CA took action on the appellant's case. Special Court-Martial Order No. G12-25 of 22 Oct 2012.

[1] To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Under the header "Matters Considered", the CA lists the results of trial, record of trial, and the recommendation of the SJA. There is no mention of any post-trial matters from either the appellant or TDC.

The appellant now claims error in the post-trial processing of his case as, contrary to the SJA's advice, TDC actually submitted clemency matters for the CA's consideration on 25 June 2012, the date of trial. In these matters, TDC requests deferment and suspension of all confinement and suspension of the punitive discharge. *See* Consent Motion to Attach of 7 Jan 2013. The appellant also includes an unsworn declaration from TDC made under the penalty of perjury in which TDC states that he properly submitted the aforementioned clemency matters along with the VAL package on 25 June 2012.

The Government disputes that TDC properly submitted clemency matters following trial. Furthermore, the Government argues that even if such matters were properly submitted, the appellant fails to demonstrate material prejudice.

Discussion

If "defense counsel does not make a timely comment on an omission in the SJA's recommendation, the error is waived unless it is prejudicial under a plain error analysis." *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citations omitted). Thus, the appellant carries the burden of proving 1) error exists; 2) it was plain or obvious; and 3) the error materially prejudiced a substantial right. *Id*. Whether an appellant demonstrates plain error under these circumstances is a matter we review *de novo*. *Id*. Due to the highly discretionary nature of a CA's action, "we will grant relief if an appellant presents 'some colorable showing of possible prejudice.'" *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)). This is a low threshold that an appellant must meet.

We disagree with the Government's characterization of the matters now attached to the record by the appellant. The unsworn declaration by TDC states that clemency matters were submitted on 25 June 2012, the day of trial. To the extent that this might be "unusual practice" as the Government suggests,[2] we note that the record includes a similarly dated "Request for Restoration/Clemency" signed by both TDC and the appellant with

[2] *See* Government Answer of 6 Feb 2013 at 10.

the handwritten comment indicating that clemency matters were submitted. This information adds weight to the TDC's post-trial declaration that he submitted clemency on 25 June 2012.[3]

We conclude that the appellant has met his burden of demonstrating error and that the error was both plain and obvious. Article 60, UCMJ, and R.C.M. 1107(b)(2) require the CA to consider matters submitted by the appellant pursuant to R.C.M. 1105 and 1106(f). There is no indication that the CA considered these matters. Due to the highly discretionary nature of the CA's clemency prerogative, we will not speculate whether the CA would have been inclined to grant any relief. We therefore hold that the appellant has demonstrated "some colorable showing of possible prejudice" and remand is appropriate. *See United States v. Travis*, 66 M.J. 301; 303-04 (C.A.A.F. 2008); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989).

The CA's action dated 22 October 2012 is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority for proper post-trial processing, including preparation and service on the trial defense counsel of a new staff judge advocate's or legal officer's recommendation and an appropriate opportunity for the submission of matters on behalf of the appellant. *See* R.C.M. 1105-1107. The CA shall then return the record of trial to this

[3] The TDC states in his declaration that "[o]n 25 June 2012, I submitted post trial clemency matters to the convening authority via the Review section as is the normal and customary manner to submit clemency." *See* Declaration of R. Vroman of 2 Jan 2013 at 1. While the Government challenges the sufficiency of the appellant's post-trial assertion that clemency matters were timely submitted, the Government has not filed any similar matter disputing the accuracy of TDC's declaration or that the procedures he purportedly followed were incorrect. Thus, we have no conflicting affidavits or post-trial submissions from the parties. When a post-trial affidavit alleges facts that *prima facie* substantiate error and the Government does not contest the relevant facts, we can decide the issue without remanding the record for further fact-finding. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997). Since we have no disputed facts and the averments of the TDC are corroborated to an extent in the record, we decline to order further fact-finding.

court for further review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181 (C.M.A. 1989).

For the Court

R.H. TROIDL
Clerk of Court