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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY CHENOWETH
GUNNER'S MATE SECOND CLASS (E-5), U.S. NAVY

NMCCA 201200238
GENERAL COURT-MARTIAL

Sentence Adjudged: 28 February 2012.
Military Judge: CAPT David A. Berger, JAGC, USN.
Convening Authority: Commander, U.S. Naval Forces, Japan, Yokosuka, Japan.
Staff Judge Advocate's Recommendation: CDR B. Keith, JAGC, USN.
For Appellant: CAPT Diane L. Karr, JAGC, USN.
For Appellee: LT Ann A. Dingle, JAGC, USN.

29 January 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 general court-martial, convicted the appellant, in accordance with his pleas, of two specifications of possessing child pornography and one specification of receiving child pornography, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for seven years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

Because the convening authority's (CA) action of 21 May 2012 was ambiguous, the record was returned to the Judge Advocate General for remand to the original CA with instructions to withdraw the original action and substitute a corrected action.[1] On 28 November 2012, the record was returned to us for completion of appellate review. Included therein was General Court-Martial Order No. 6-12 dated 16 November 2012 on Commander, U.S. Naval Forces Japan letterhead and signed by "T.C. Faller, Acting," which withdrew the CA's action of 21 May 2012. Pursuant to the pretrial agreement, the action disapproved the dishonorable discharge, approved a bad-conduct discharge and the remaining sentence, and suspended all confinement in excess of 34 months.

The "corrected" action was not signed by the same person who signed the ambiguous action of 21 May 2012, and contrary to the terms of our Order did not include either: (1) "*some evidence that the successor [CA] communicated with the original [CA] and that the corrected action reflects the original [CA's] intent*," *United States v. Lower*, 10 M.J. 263, 265 (C.M.A. 1981) (emphasis added), or (2) evidence that the new action was taken after receipt of a new SJAR which had been served on the defense. *See United States v. Mendoza*, 67 M.J. 53, 54 (C.A.A.F. 2008); *United States v. Gosser,* 64 M.J. 93, 96-97 (C.A.A.F. 2006) (per curiam).

As a result, we ordered the Government to show cause as to why the court should not set aside the 16 November 2012 action and return the record for new post-trial processing consistent with our 3 October 2012 Order.

The Government responded to our Show Cause Order by moving to attach an affidavit by Lieutenant (LT) John A. Lovastik,[2] JAGC, U.S. Navy, dated 6 December 2012 as evidence that the original CA communicated his original intent to his apparent temporary successor. Based on the contents of the affidavit and to ensure we had all the documents prepared in this case, we ordered the Government to produce the 16 November 2012 clemency request submitted by the appellant, and "any new SJAR or SJAR

[1] The original action was taken by "J.D. Cloyd" as Commander, U.S. Naval Forces Japan. The appellant's sole assignment of error in his initial brief was that the CA's action was incomplete where the CA sought to suspend all confinement in excess of 34 months pursuant to terms of a pretrial agreement where he had not approved the confinement portion of the sentence.

[2] While LT Lovastik's billet title is not identified in his affidavit, the appellant identifies him as "the staff judge advocate." Appellant's Response to Government's Motion to Attach of 27 Dec 2012 at 2.

addenda prepared after 3 October 2012, and any acknowledgement of service by trial defense counsel for such addenda." The Government produced the 16 November 2012 clemency request and informed the court that no new SJAR or addenda were prepared after 3 October 2012.

The appellant opposed the motion to attach LT Lovastik's affidavit arguing that the affidavit does not provide evidence of communication between Rear Admiral (RADM) Cloyd, the original CA, and Captain (CAPT) Faller, the successor CA, but is instead "a transmission of hearsay via [LT Lovastik], the staff judge advocate." Appellant's Response of 27 Dec 2012. We disagree.

Although LT Lovastik's affidavit is not a model of clarity, we are satisfied that the affidavit provides "some evidence" that the original CA's intent was to approve the adjudged confinement, and that this intent was communicated to CAPT Faller, then "acting" Commander, U.S. Naval Forces Japan. Thus, the corrected action reflects the original CA's intent.[3] We reach this conclusion mindful that the Court of Appeals for the Armed Forces has "decline[d] to lay down a hard rule as to the evidentiary form this need take." *Lower*, 10 M.J. at 265.

Accordingly, the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

[3] While the original CA afforded the appellant another 10-day period to submit clemency matters, there was no need to initiate a new post-trial process where CAPT Faller was not taking an entirely new action, but was merely "acting" in the original CA's stead during his temporary absence.