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

BEFORE

Charles Wm. DORMAN **W.L. RITTER** **K.K. THOMPSON**

UNITED STATES

v.

Walter D. WARN
Private First Class (E-2), U. S. Marine Corps

NMCCA 200500515 Decided 12 January 2006

Sentence adjudged 16 October 2003. Military Judge: M.J. Griffith. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, MCAS, Cherry Point, NC.

CAPT FRANK ROBARDS, JAGC, USNR, Appellate Defense Counsel
LT J.L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried before a general court-martial. Consistent with his pleas, the appellant was convicted of unauthorized absence, violation of a general order, five specifications of larceny, forgery, and making and uttering bad checks. The appellant's crimes violated Articles 86, 92, 121, 123, and 123a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 921, 923, and 923a. The military judge imposed the following sentence: confinement for 30 months, forfeiture of all pay and allowances, a fine of $3,805.30, with a fine enforcement provision of an additional 6 months of confinement if the fine is not paid, reduction to pay grade E-1, and a dishonorable discharge. In taking action, the convening authority approved the sentence but suspended confinement in excess of 24 months for a period of 12 months as required by the pretrial agreement.

After careful review of the record, submitted without assignment of error, we conclude that corrective action is required. Following our corrective action, we conclude that findings and sentence are correct in law and fact and that no

error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Larceny of Multiple Items

Although not raised as error by the appellant, we find that the providence inquiry and stipulation of fact concerning Specifications 3 and 4 of Charge V support only a single specification of larceny. These two specifications allege the larceny of 3 Government notebook computers, a battery for a notebook computer and two computer cases. The providence inquiry and the appellant's stipulation of fact reveal that he stole all these items from the same location and at the same time. Although the military judge recognized this issue and stated that he would consider the two specifications to be multiplicious for sentencing, the Manual for Courts-Martial specifically provides that "[w]hen a larceny of several articles is committed at substantially the same time and place, it is a single larceny . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 46c(1)(h)(ii). Accordingly, the appellant is guilty of only one larceny with respect to his theft of the above-listed items of Government property. *See United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999). We will take corrective action on the findings in our decretal paragraph.

Fine Enforcement Provision

Since the record is silent concerning whether the appellant paid the fine, or if he was subjected to an additional 6 months confinement, we find it appropriate to comment on this issue. The appellant entered into a pretrial agreement that capped his confinement at 24 months. In *United States v. Hodges*, 22 M.J. 260 (C.M.A. 1986), our superior court made clear that where a pretrial agreement places a cap on confinement, that cap can not be exceeded absent a waiver by the accused. *See also United States v. Scalarone*, 52 M.J. 539, 541-42 (N.M.Ct.Crim.App. 1999), *aff'd,* 54 M.J. 114 (C.A.A.F. 2000). In the case before us, we do not find such a waiver in the record. Although the military judge did address the sentencing terms of the pretrial agreement after announcing the sentence, he did not do so with sufficient clarity to give rise to a waiver of the sentencing cap. Thus, we hold that while the convening authority could approve the sentence as adjudged, he could not require the appellant to serve an additional 6 months of confinement if the fine was not paid, unless the period of suspension was vacated, at which time the additional 6 months could have been added to the adjudged confinement.

Conclusion

Specification 3 of Charge V is amended by modifying the listing of items stolen to reflect that the appellant stole "two computer cases," vice one, and by adding a subparagraph "e) one Dell notebook computer CPU/Service Tag number W0QPS."

Specification 4 of Charge V is ordered dismissed. The remaining guilty findings, to include Charge V, Specification 3 as modified herein, are affirmed. Since the military judge considered Specifications 3 and 4 of Charge V to be multiplicious for sentencing, it is not necessary to reassess the sentence. Accordingly, the sentence is affirmed, as approved by the convening authority and as conditioned by our holding above.

Senior Judge RITTER concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge THOMPSON did not participate in the decision of this case.