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

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

KC J. DITMORE
Machinist's Mate Third Class (E-4), U. S. Navy

NMCCA 200401563 Decided 15 June 2006

Sentence adjudged 23 October 2003. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS EMORY S. LAND (AS 39).

LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

STONE, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of violating a general order by wrongfully possessing and consuming alcohol aboard a naval vessel, wrongful possession of hashish, wrongful use of hashish, two specifications of assault, and drunk and disorderly conduct in violation of Articles 92, 112a, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, 928, and 934. The military judge sentenced the appellant to confinement for 165 days, forfeiture of $750.00 pay per month for 6 months, reduction to pay grade E-1, and a bad-conduct discharge. Prior to taking his action, the convening authority awarded 15 days additional confinement credit. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant’s sole assignment of error that the record of trial is not verbatim, and the Government’s response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Requirement of a Complete and Verbatim Transcript

The appellant alleges that the record of trial in his court-martial is neither a complete nor a verbatim transcript and therefore, pursuant to RULE FOR COURTS-MARTIAL 1103(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), the convening authority was without authority to approve a sentence that included a bad-conduct discharge. We disagree.

The court was called to order, the appellant was arraigned, and a motion regarding the award of proper confinement credit was heard. Two witnesses were called and gave testimony for the prosecution. Both were subject to cross-examination by the trial defense counsel. Both the trial and defense counsel presented argument on the motion and the military judge awarded one day of additional confinement credit. The appellant then entered pleas in accordance with a pretrial agreement. However, due to equipment failure, a portion of the arraignment, the entire pretrial motion for confinement credit, and the entry of the appellant's pleas, were not recorded by the court reporter. Trial defense counsel refused to participate in the recreation attempt. Record at 133. The attempted recreation resulted in pages 17-20 of the record of trial. Pages 17-20 contain the responses of both witnesses to questions posed by the trial counsel during the motion for pretrial relief and the pleas of the appellant. With regard to the motion for appropriate relief, the pages do not contain the questions posed by trial counsel, nor do they contain any of the cross-examination by the trial defense counsel on that motion. With regard to the entry of the appellant's pleas, the pages reflect the apparently verbatim pleas of the appellant. They do not, however, reflect the military judge's request for the entry of the appellant's pleas, nor do they specifically indicate that the trial defense counsel entered the pleas on behalf of the appellant.

The law requires that a record of trial be "complete" and contain a "substantially verbatim" transcript of the proceedings. Art. 54(c)(1), UCMJ; R.C.M. 1103(b)(2). Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *Id.* at 111. (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981), *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979), and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. *Henry*, 53 M.J. at 111. The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). Prejudice arising from a substantial omission from the record of trial may be cured by dismissal of any charge and specification affected by the

omission. *United States v. Santoro,* 46 M.J. 344, 346 (C.A.A.F. 1997).

We conclude that the omissions in this case are not substantial and do not affect any of the charges and specifications. We reach this conclusion for several reasons. First, we note that the appellant pled guilty in accordance with a pretrial agreement, that the trial transcript reflects the verbatim pleas of the appellant, and that the appellant does not in anyway contest the entry of his pleas at trial on appeal. In light of these facts, the failure of the transcript to record the military judge's request for the pleas of the appellant is of no significance.

Second, we conclude that the lack of a verbatim transcript of the pretrial motion for confinement credit is also insubstantial. It is insubstantial because we find that a pretrial motion for confinement credit is a matter ancillary to the issue of guilt or innocence. *See id.* at 347 (finding no possible prejudice where the error has no relevance to remaining charges). Even if this were not the case, the omission is insubstantial because all of the evidence upon which the military judge relied in making his decision on the motion is reflected in other parts of the record of trial, specifically, Appellate Exhibit I, which is the appellant's written motion for confinement credit. The only exception was the cross-examination of the Government witnesses conducted by the trial defense counsel. Keeping in mind that the trial defense counsel refused to contribute to the recreation of the missing record, the fact that the appellant does not in any way contest the outcome of the pretrial motion on appeal, and finally the fact that the convening authority's grant of clemency on 24 November 2003 fully effected the relief requested by the appellant at trial, we view the omission of the results of his cross-examination as insubstantial.[1] Finally, in this regard, even if we were to find that the omissions from the record were substantial, the convening authority's grant of clemency has rebutted, in fact it has *eliminated*, any claim of prejudice by fully granting the relief requested at trial.

[1] At trial, the appellant requested a total of 80 days of pretrial confinement credit. AE I. The military judge only awarded 65 days of credit, the CA awarded 15 additional days. The CA's action brought the total credit to 80 days. *See* Government Motion to Attach of 28 Jan 2005.

Conclusion

Accordingly, the findings and sentence, as approved by the convening authority are affirmed.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court