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

BEFORE

C.L. CARVER **E.E. GEISER** **J.D. HARTY**

UNITED STATES

v.

Teresa S. MILEY
Molder Chief (E-7), U. S. Navy

NMCCA 9600822 Decided 24 May 2006

Sentence adjudged 13 September 1995. Military Judge: N.H. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base, San Diego, CA.

Capt ROLANDO SANCHEZ, USMC, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to her pleas, of larceny (two specifications) and forgery (five specifications), in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923. The convening authority approved the adjudged sentence of confinement for 105 days, reduction to pay grade E-1, and a bad-conduct discharge. However, pursuant to a pretrial agreement, the convening authority (CA) suspended confinement in excess of 90 days, reduction below pay grade E-5, and the bad-conduct discharge for 12 months from the date of trial.

Approximately nine months into the 12-month suspension period, the appellant's commanding officer imposed nonjudicial punishment (NJP) on the appellant for wrongful use of methamphetamine. The appellant's appeal of that NJP was subsequently denied. Shortly thereafter, based on the appellant's drug offense, a hearing was conducted to determine whether the suspended portion of her court-martial sentence should be vacated. Having considered the matter, the general court-martial convening authority (GCMCA) ordered the suspension

of the reduction in pay grade and the bad-conduct discharge vacated.

This case is before us for the third time. In our first review of this case under Article 66, UCMJ, in an unpublished opinion, we affirmed the findings and sentence as approved below, including the vacation of suspended punishment. *United States v. Miley*, No. 9600822, 1998 CCA LEXIS 102, unpublished op. (N.M.Ct.Crim.App. 26 Feb 1998). The Court of Appeals for the Armed Forces (CAAF) subsequently set aside our decision and returned the record to the Judge Advocate General (JAG) for submission to the convening authority for either a fact-finding hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), or a new vacation proceeding. *United States v. Miley*, 51 M.J. 232 (C.A.A.F. 1999).

The GCMCA opted to order a new vacation proceeding. After a new hearing was held by the special court-martial convening authority (SPCMCA), that officer recommended that the suspended punishment not be vacated. Contrary to that recommendation, the GCMCA ordered vacation of the suspension of the reduction in pay grade and bad-conduct discharge. In our second review of this case under Article 66, UCMJ, in an unpublished opinion, we affirmed the findings and sentence as approved below, including the second vacation of suspended punishment. *United States v. Miley*, No. 9600822, 2002 CCA LEXIS 237, unpublished op. (N.M.Ct.Crim.App. 11 Oct 2002). Our superior court subsequently set aside our decision and returned the record to the Judge Advocate General for submission to the convening authority for a new vacation proceeding. *United States v. Miley*, 59 M.J. 300 (C.A.A.F. 2004).

The record is now before this court for further review. Having considered the record of trial and all allied papers, the three assignments of error concerning the most recent vacation proceeding,[1] 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. *See* Arts. 59(a) and 66(c), UCMJ.

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[1] I. THE CONVENING AUTHORITY INAPPROPRIATELY ORDERED A NEW VACATION HEARING, WITH A NEW HEARING OFFICER, CONTRARY TO THE CAAF'S INSTRUCTION THAT ONLY FINDINGS OF FACT WERE NEEDED TO SUPPORT THE PRIOR HEARING OFFICER'S DECISION AND ALLOW THE GCMCA TO MAKE AN INFORMED DECISION.

II. THE CONVENING AUTHORITY'S ACTION VACATING THE SUSPENDED SENTENCE IS VOID BECAUSE THE VACATION PROCEEDINGS BEGAN AFTER THE PERIOD OF SUSPENSION HAD EXPIRED.

III. THE EVIDENCE PRESENTED AT THE VACATION HEARING WAS INSUFFICIENT TO SUPPORT A FINDING OF MISCONDUCT.

Expiration of Suspension Period

For her second assignment of error,[2] the appellant claims that the period for holding a vacation hearing expired prior to the convening authority taking his action vacating the suspension. The appellant requests this court to void the convening authority's supplemental action and to enforce the provisions of the pre-trial agreement. Appellant's Brief of 30 November 2005 at 9. We disagree.

We initially addressed this issue in our review of the second vacation hearing. Relying on *United States v. Castrillon-Moreno*, 16 M.J. 222 (C.M.A. 1983), we held that a new round of vacation proceedings in the appellant's case, instituted after the expiration of the suspension period, was permissible if: (1) the GCMCA proceeded within a reasonable period; and (2) the new vacation proceedings were based exclusively on the original drug charge. We find that analysis was sound then, and we apply the same analysis now.

Assuming, *arguendo*, that the period of suspension ran prior to the GCMCA ordering the suspension vacated, we hold that the vacation of the appellant's suspended punishment was not invalid because of the expiration of that suspension period. First, we find that the convening authority acted reasonably in processing this case on remand.

The following chronology is supported by the record:

4 May 2004	JAG forwarded the record to the GCMCA.
8 Jul 2004	GCMCA directed the SPCMCA to conduct a vacation hearing.
15 Jul 2004	SPCMCA requested counsel be appointed to the appellant.
20 Jul 2004	Counsel was assigned to represent the appellant.
26 Jul 2004	Trial defense counsel requested a continuance of the 29 July 2004 hearing.
19 Aug 2004	Vacation hearing was held.
27 Sep 2004	Vacation hearing report was issued and forwarded to the GCMCA.

[2] We have considered the appellant's first assignment of error and find it to be without merit. Our superior court's remand specifically provided for a new vacation hearing. *Miley*, 59 M.J. at 305.

4 Oct 2004	Vacation hearing report was returned to the SPCMCA for additional findings of fact.
24 Nov 2004	Vacation hearing report was forwarded to the GCMCA.
3 Dec 2004	GCMCA took his action on the SPCMCA's recommendations.
6 Dec 2004	GCMCA forwarded the record to the Navy-Marine Corps Appellate Review Activity.
3 Feb 2005	Record was docketed with the Navy-Marine Corps Court of Criminal Appeals.

Secondly, the record clearly indicates that the basis for the new round of vacation proceedings was the same as the original proceedings: the wrongful use of methamphetamine as evidenced by the June 1996 urinalysis. Accordingly, we conclude that the vacation of the suspended punishment was not invalid based on the amount of time that elapsed from the inception date of the 12-month suspension. This issue is without merit.

Insufficient Evidence to Support Vacation

For her third assignment of error, the appellant claims that the evidence presented at her third vacation hearing was insufficient to support (1) a finding that a knowing and wrongful use of methamphetamine occurred, or (2) to order the suspension vacated. Specifically, she asserts that the only evidence of wrongful use of methamphetamine was the lab package indicating a positive urinalysis for the metabolite of methamphetamine, without any evidence that the metabolite has any relationship to the controlled substance. Additionally, the appellant asserts that her evidence successfully demonstrated that any methamphetamine ingestion was innocent. Appellant's Brief of 30 Nov 2005 at 13. We disagree.

The Government presented the Navy Drug Screening Lab (NDSL) report from the 1996 urinalysis. Recorder Exhibit 1. That exhibit shows that the appellant provided a urine sample on 3 June 1996 that was hand-delivered to the NDSL on 4 June 1996 in undamaged condition. The appellant's urine sample twice screened positive for methamphetamine, and confirmed positive for methamphetamine at a quantity of 1433 nanograms per milliliter of urine. The lab cut-off level for reporting a positive methamphetamine result is 500 nanograms per milliliter of urine.

The appellant does not assert that she did not ingest methamphetamine. She testified that she innocently ingested what

she thought were Tylenol gel capsules, but that those capsules had been laced with methamphetamine by her daughter's boyfriend, Ray Bickel. Mr. Bickel testified that he had purchased empty gel capsules, filled them with methamphetamine, and placed the capsules in a Tylenol bottle. His purported reason for this action was to hide the illegal nature of the contents in case of a search, and as preparation to sell the methamphetamine. He believed that the Tylenol bottle fell out of his pants while at the appellant's home in May 1996. When he later found the bottle in the appellant's home, it was missing two capsules. The appellant also presented evidence of her activity in the community and certification as a daycare provider.

The standard of proof at a suspension vacation hearing is by a preponderance of the evidence. *Hobdy v. United States*, 46 M.J. 653, 655 (N.M.Ct.Crim.App. 1997)(citing *United States v. Englert*, 42 M.J. 827, 831 (N.M.Ct.Crim.App. 1995)). The hearing officer heard the testimony, observed the witnesses' demeanor, and reviewed all exhibits before announcing detailed findings of fact. These findings of fact clearly show the hearing officer applied the proper standard of proof in evaluating the contested facts and determining whether those facts warranted vacating the suspension.

Based on the record before us, we believe the hearing officer's findings of fact were clearly supported by the evidence presented. We further find that the evidence was more than adequate to support the hearing officer's recommendation and the GCMCA's decision to vacate the suspension of the petitioner's reduction to pay grade E-1 and punitive discharge adjudged at trial. This assignment of error is without merit.

Conclusion

The findings and sentence are affirmed as approved by the convening authority. Further, the convening authority's action vacating the appellant's suspended reduction to pay grade E-1 and bad-conduct discharge is affirmed.

Senior Judge CARVER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court