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.

Joshua D. RETH
Private First Class (E-2), U. S. Marine Corps

NMCCA 200501592 Decided 21 December 2006

Sentence adjudged 8 March 2005. Military Judge: D.J. Daugherty. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding General, 3d Force Service Support Group, Okinawa, Japan.

CDR LISA H. MACPHEE, JAGC, USNR, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USNR, Appellate Defense Counsel
LT CRAIG A. POULSON, JAGC, USN, Appellate Government Counsel

STONE, Judge:

The appellant summarily assigns as error for the first time on appeal that the staff judge advocate's recommendation (SJAR) failed to accurately list the pleas of the appellant and the findings of the court-martial; failed to note five related cases; allowed the convening authority to consider appellant's proper sentence as including two additional findings of guilt; and allowed the convening authority to approve a sentence based on inadequate information. He requests that the case be remanded for proper post-trial processing. The Government concedes both assignments of error and also requests that the case be remanded. We disagree.

Defective SJAR and Convening Authority's Action

The SJAR incorrectly states that the appellant was found guilty of two specifications of solicitation under Charge IV, which specifications, were dismissed by the military judge pursuant to the terms of the pretrial

agreement. The order promulgating the convening authority's action (CAA) repeats that error. The appellant claims that, as a result, the convening authority must have believed that the appellant was guilty of two additional drug conspiracy offenses when he decided to approve the adjudged sentence. As relief, the appellant asks this court to set aside the CAA and remand for proper post-trial processing.

Failure to object to errors in the SJAR results in waiver of any claim of error in the absence of plain error. RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant bears the burden of establishing plain error, including a showing of specific prejudice. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

We agree that the failure to accurately list the findings and specifications in both the SJAR and the CAA is obvious error. We find, however, that the appellant has not borne his burden of demonstrating specific prejudice resulting therefrom. Supporting our finding that the appellant has failed to allege specific prejudice, we note several facts that allow us to safely conclude that the convening authority was aware that Specifications 2 and 3 of Charge IV had been dismissed by the military judge. We first observe that the results of trial memorandum from the trial counsel to the convening authority properly reflected the findings of the court-martial. We next observe that the pretrial agreement, which was apparently signed *in personam* by the convening authority, reflected that the convening authority specifically agreed to the dismissal of Specifications 2 and 3 of Charge IV by the military judge. We also observe that the convening explicitly stated that he considered the results of trial and the record of trial, both of which properly reflect the dismissal of the specifications, prior to taking his action. Finally, we note that the trial defense counsel received his copy of the SJAR but made no objection to its contents. We will, however, order in our decretal paragraph that the supplemental court-martial order reflect the findings of the court-martial. *United States v. Crumply,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Failure to Consider "Related Cases" by the CA

The appellant claims that the CA failed to consider five cases related to that of the appellant. Indeed, the record of trial suggests the possibility that up to five other service members may have been prosecuted for crimes relating to those of the appellant. Specifically, the pretrial agreement contains a provision requiring the appellant to testify truthfully "if called as a witness" in what appears to be four pending courts-martial, *United States v. Pennington, Unites States v. Hovenga, United*

States v. Lewis, and *United States v. Kelley*. Additionally, the military judge's inquiry into the providence of the appellant's pleas of guilty identifies an additional Marine with whom the appellant conspired to commit an offense.

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0151a(2)(15 March 2004), which provides: "In courts-martial cases where the separate trial of a companion case *is ordered*, the convening authority shall so indicate in his action on the record in each case." (emphasis added). There is, however, no evidence before the court that any of the five aforementioned Marines were actually ordered to trial by courts-martial. *United States v. Watkins,* 35 M.J. 709, 716 (N.M.C.M.R. 1992). Accordingly, this assignment of error is without merit.

Conclusion

The findings and sentence of the court-martial, as approved by the convening authority, are affirmed. The supplemental court-martial order shall properly reflect the appellant's pleas and findings of the court-martial.

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court