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

BEFORE

W.L. RITTER **K.K. THOMPSON** **E.B. STONE**

UNITED STATES

v.

Daryl L. THOMPSON
Ship's Serviceman Third Class (E-4), U. S. Navy

NMCCA 200300386 Decided 31 July 2006

Sentence adjudged 12 April 2002. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, National Naval Medical Center, Bethesda, MD.

Maj J.ED. CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
LT MARK HERRINGTON, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of conspiring to possess marijuana with the intent to distribute, making a false official statement, possessing marijuana onboard a military installation with intent to distribute, and three specifications of false swearing, in violation of Articles 81, 107, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 912a, and 934. The military judge sentenced the appellant to three years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended all confinement in excess of 24 months.

The appellant contends: (1) the military judge erred in admitting into evidence that marijuana the appellant possessed; (2) the staff judge advocate (SJA) did not respond to the defense's post-trial assertion of legal error; (3) the convening

authority's action (CAA) did not comport with the terms of the pretrial agreement; and (4) the CAA purports to execute the bad-conduct discharge.

After carefully considering the record of trial, the appellant's four assignments of error, 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.

Evidence in Aggravation

The appellant contends the military judge abused her discretion by admitting into evidence the actual 1,127 grams of marijuana that was the basis for the appellant's criminal activities. He argues: (1) the actual amount of controlled substance at issue was irrelevant in light of the appellant's guilty pleas; (2) the evidence was cumulative with the appellant's guilty pleas and the stipulation of fact; and (3) the presence of the marijuana in court was unfairly prejudicial to the appellant. We disagree.

The appellant conspired with a civilian to take possession of a significant amount of marijuana and deliver it to a third individual. In furtherance of this agreement, this civilian met the appellant onboard the National Naval Medical Center (NNMC) in Bethesda, Maryland, and delivered the marijuana to the appellant. The appellant then concealed the marijuana within a wall locker of an NNMC barracks room, where it was eventually discovered by the Naval Criminal Investigative Service. The appellant later made various false statements pertaining to his knowledge of and involvement with this marijuana.

RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), allows the Government to present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the appellant has been found guilty. This includes evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the appellant's offenses. Evidence qualifying for admission under R.C.M. 1001(b)(4) must also pass the test of MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). "The appellant has the burden of going forward with conclusive argument that the judge abused his discretion" in applying the MIL. R. EVID. 403 balancing test. *United States*

v. Mukes, 18 M.J. 358, 359 (C.M.A. 1984). Appellate courts give a military judge's decision less deference when they fail to articulate their balancing analysis on the record, and no deference if they fail to conduct the MIL. R. EVID. 403 balancing test. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000).

Because the military judge did not articulate her balancing analysis on the record, we give less deference to her decision. Nevertheless, we agree with the Government that the visual presence of the contraband provided the sentencing judge with a more clear picture of the scope of the appellant's criminal conduct and, in particular, the consequences that might have resulted had this large volume of marijuana been distributed as planned. Furthermore, the fact that much of the marijuana had already been portioned into numerous smaller units offered an accurate depiction of how wide an impact the appellant's criminal enterprise could have had on both the NNMC and the surrounding community.

We find the evidence was not cumulative because it provided greater context than the sterile 1,127 grams figure mentioned in the specifications and the stipulation of fact. We find no unfair prejudice to the appellant by the admission of the contraband he had already admitted to taking possession of with the intent to distribute. And we reject the appellant's argument that his guilty plea renders the actual evidence of his crimes either irrelevant or cumulative. *See* R.C.M. 910(a)(1), Discussion ("[a] plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation"); *see also United States v. Willis*, 43 M.J. 889, 899 (A.F.Ct. Crim.App. 1996), *aff'd*, 46 M.J. 258 (C.A.A.F. 1997). To hold otherwise would permit an accused to hide from the sentencing authority the full nature of his crimes by pleading guilty, and deprive the Government of its ability under the rules of evidence to present aggravation evidence directly related to the offenses.

Failure to Respond to Defense Assertion of Error

The appellant contends that the SJA's recommendation (SJAR) to the convening authority fails to address the appellant's assertion of error in his counsel's post-trial submission of 8 November 2002. That assertion of error challenged the military judge's admission of the marijuana as evidence in aggravation. We agree that the SJA erred, but find no prejudice to the appellant resulting from the error.

The SJA should have summarized the complaint of legal error, stated his agreement or disagreement with the matters raised by the appellant, and avoided this issue altogether. R.C.M. 1106(d)(4). In failing to do so, he erred. In *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988), our superior court cautioned that "in most instances [the] failure of the staff judge advocate . . . to prepare a recommendation" and to respond to any legal error intimated by the defense "will be prejudicial and will require remand of the record to the convening authority for preparation of a suitable recommendation." The remand ensures that the accused is placed in the same position he would have been in had the staff judge advocate fulfilled his duties. *Id*. But the failure to comment on an allegation of error does not always result in a remand. For example, where there is no error at trial, there can be no prejudice flowing from the SJA's failure to address the defect asserted. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996).

Since we have found that the military judge did not err with respect to the admission of the marijuana as aggravating evidence, we find no prejudice to the appellant from the failure of the SJA to address this allegation of error for the benefit of the convening authority. We also note that the appellant does not allege prejudice from the SJA's error. We thus conclude that the appellant has made no colorable showing of possible prejudice from the SJA's failure to specifically note the allegation of legal error and provide a statement of agreement or disagreement with the those allegations. *See United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998).

Errors in the Convening Authority's Action

In his last two assignments of error, the appellant correctly notes: (1) the CAA does not note the deferral and waiver of the Article 58b, UCMJ, automatic forfeitures required by the terms of the pretrial agreement; and (2) the convening authority's action appears to order the appellant's bad-conduct discharge executed. We find no basis for granting relief in either assignment of error.

While it is true that the convening authority failed in his action to suspend and waive the automatic forfeitures imposed on the appellant by operation of law, we do not find error in this case for three reasons. First, the pretrial agreement contains a provision that expressly provides both for the appellant's

request and the convening authority's approval of the request for deferral and waiver of automatic forfeitures. Thus, the deferral and waiver had already been accomplished by operation of the pretrial agreement, independent of the CAA. And since the appellant was not in confinement at the time of the CAA, there were no automatic forfeitures left to defer or waive. Second, the appellant does not allege that his pay was adversely affected by the absence of any mention of automatic forfeitures in the CAA. Third, the Government has produced evidence that the appellant's pay was unaffected by Article 58b, UCMJ, while he was confined. For these reasons, we conclude that the appellant received the benefit of his bargain with the convening authority and that the appellant suffered no prejudice from this alleged deficiency in the CAA.

As for the CAA's purporting to execute the bad-conduct discharge, we find that error harmless, as it is a legal nullity. *See United States v. Houston*, 48 M.J. 861, 863 (N.M.Ct.Crim.App. 1998); *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994). Thus, no remedial action is required.

Conclusion

We therefore affirm the findings and the sentence, as approved by the convening authority.

Judge THOMPSON and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court