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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Eric W. SELL
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200200458 Decided 12 May 2005

Sentence adjudged 4 May 2001. Military Judge: T.A. Daly. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, MARTTS-253, MAG-14, 2d MAW, Cherry Point, NC.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LCDR B.A. ERMENTROUT, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LCDR JEAN KILKER, JAGC, USNR, Appellate Government Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

REDCLIFF, Judge:

In an unpublished decision, a predecessor panel of this court reviewed the appellant's special court-martial and affirmed the findings and sentence approved by the convening authority (CA). *United States v. Sell*, No. 200200458, unpublished op. (N.M.Ct.Crim.App. 27 Aug 2003). After granting the appellant's petition for review, our superior court summarily set aside our earlier decision pursuant to *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) and returned the record of trial to this court for further review by a panel of different judges.[1] We have now

[1] "On further consideration of this case, and in light of our decision in *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), it is ordered that the decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General of the Navy for remand to that court for a new review pursuant to Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c)(2000), before a panel comprised of judges who have not previously participated in this case."

complied with our superior court's mandate. After carefully considering the record of trial, the appellant's three assignments of error,[2] 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.

At trial by a military judge sitting as a special court-martial, the appellant was convicted consistent with his pleas of violating a lawful general order by wrongfully providing alcoholic beverages to an underage person, assault consummated by a battery, and drunk and disorderly conduct, in violation of Articles 92, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 928, and 934. The military judge sentenced the appellant to confinement for 180 days, reduction to pay grade E-1, forfeiture of $600.00 pay per month for 6 months, and a bad-conduct discharge. The pretrial agreement called for referral of the charges to a special court-martial and had no effect on the adjudged sentence. The convening authority approved the sentence as adjudged.

Additional Pretrial Confinement Credit

The appellant contends that the military judge erred by failing to grant additional administrative credit for pretrial confinement under RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).[3] We disagree.

The appellant asserts he is entitled to additional pretrial confinement credit because his commanding officer and the initial review officer had no basis to order him into pretrial confinement. Specifically, the appellant contends that his offenses were not so serious as to warrant pretrial confinement, and in the alternative, that lesser forms of pretrial restraint were not considered.

We begin by noting that a commander may authorize pretrial confinement only when there is probable cause or "reasonable grounds" to believe, among other factors, that the confinee "will engage in serious criminal misconduct" and other "less severe forms of restraint are [deemed] inadequate." R.C.M. 305(h)(2)(B).

No. 04-0090/MC. *United States v. Sell,* 60 M.J. 344 (C.A.A.F. 2004)(Summary Disposition).

[2] The appellant raised three assignments of error (AOE) in his original submission to this Court. The first AOE involved the appellant's contention that the military judge should have awarded him additional credit because his offenses were not sufficiently serious to warrant pretrial confinement. The second AOE asserted that the appellant's sentence was inappropriately severe. The third AOE contended that the record of trial is incomplete because 29 pages were not authenticated by the presiding trial military judge. The appellant has not raised any additional AOEs upon remand.

[3] The appellant did receive appropriate administrative credit for pretrial confinement under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984).

"Serious criminal misconduct" includes offenses that "pose a serious threat to [the] . . . safety of the community." *Id.* Within seven days of initial confinement, an initial review officer (IRO) must determine that the requirements for confinement are established by a preponderance of the evidence. R.C.M. 305(i)(2)(A)(iii). Further, upon defense motion for appropriate relief, the military judge must review the IRO's decision to continue pretrial confinement and apply an abuse of discretion test. R.C.M. 305(j)(1)(A).

We find that neither the military judge nor the IRO abused their discretion by permitting continued pretrial confinement. The findings of fact entered by the military judge are fully supported by the record, and we adopt them as our own. Record at 27-29. From these facts, we note that statements from several witnesses describing the violent nature of the appellant's assault on another Marine were presented to, and considered by, the IRO and the military judge. We also note other serious misconduct by the appellant preceded this assault, as well as the appellant's prior nonjudicial punishment for larceny, wrongful appropriation, false official statement, and disrespect towards a commissioned officer.

We concur with the IRO's determination that the appellant "posed a serious threat to the local area." Record at 12. We likewise agree that the appellant manifested a clear inability to control himself. Given the appellant's escalating pattern of misconduct, his chronic abuse of alcohol, and his alcohol treatment failure, we have no difficulty concluding, as did the IRO and the military judge, that the appellant posed a substantial risk of further serious misconduct and that lesser forms of restraint would likely prove inadequate. *See United States v. Rosato*, 29 M.J. 1052, 1053-54 (A.F.C.M.R. 1990), *rev'd on other grounds*, 32 M.J. 93 (C.M.A. 1991)(finding that pretrial confinement was justified for accused with substantial history of disobeying orders). Thus, we find no merit in this assignment of error and decline to provide relief.

Sentence Appropriateness

The appellant contends that his bad-conduct discharge is inappropriately severe. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The appellant stands convicted of several offenses, including a violent assault on another Marine that broke his

victim's jaw in several places. Additionally, the appellant has a prior nonjudicial punishment for numerous other offenses. After reviewing the entire record, we find that the adjudged sentence is appropriate for this offender and his offenses. *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Thus, we decline to grant relief.

Authentication of Record of Trial

In the appellant's final assignment of error, he contends that the record of trial was not properly authenticated under R.C.M. 1104(a)(2)(A). Specifically, the appellant asserts that the first 29 pages of the record were not authenticated by the presiding military judge.[4] Finding no prejudice, we decline the appellant's request to set aside his bad-conduct discharge or, in the alternative, to return the record of trial for proper authentication and a new CA's action.

When a punitive discharge is adjudged by a special court-martial, each military judge presiding must authenticate the record of trial. R.C.M. 1104(a)(2)(A). If a military judge is unable to authenticate the record of trial, the trial counsel present at the end of the proceedings may authenticate it. R.C.M. 1104(a)(2)(B). If substitute authentication is required, an explanation necessitating this option should be attached to the record of trial.[5] *Id.*; *United States v. Galavitz*, 46 M.J. 548, 550 (N.M.Ct.Crim.App. 1997). The trial counsel erred by failing to attach such an explanation.

We begin by noting that the original military judge provided an affidavit stating that he transferred before the record of trial was prepared. Thus, the military judge authorized the trial counsel to authenticate the record in his absence pursuant to R.C.M. 1104(a)(2)(B). This is precisely what the trial counsel did, although he neglected to annotate this action in the record. Additionally, the trial counsel made the record available to the trial defense counsel, who certified that he examined the record of trial proceedings pursuant to R.C.M. 1103(i)(1)(B). The trial defense counsel raised no objection to the record of trial concerning its authentication, and thereby, waived the right to submit further comments, corrections, or other relevant matters for the convening authority's consideration. R.C.M. 1105 and R.C.M. 1106.

Even if we did not apply the doctrine of waiver to bar the appellant's claim here, the appellant falls short of the mark on this issue. After considering the record of trial as a whole, we find no prejudice from this omission and, therefore, decline to

[4] Another military judge presided over the remainder of the trial and properly authenticated the remainder of the record.

[5] Substitute authentication is ordinarily justified by a military judge's prolonged absence, including a permanent change of station. R.C.M. 1104(a)(2)(B), Discussion.

provide the requested relief. *See United States v. Merz*, 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999); and, *United States v. Mahler*, 49 M.J. 558, 568 (N.M.Ct.Crim.App. 1998), *aff'd*, 52 M.J. 375 (C.A.A.F. 1999).

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court