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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Edwin L. ALVAREZ
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200301744 Decided 21 June 2005

Sentence adjudged 8 January 2003. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Medical Battalion, 1st FSSG, FMFPac, Camp Pendleton, CA.

LT JENNIE L. GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a special court-martial, accepted the appellant's pleas of guilty to a 1-week unauthorized absence, failure to go to his appointed place of duty, two specifications of wrongful use of methamphetamine, and two specifications of breaking restriction, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. In summarizing his findings, the military judge stated that: "[I]n accordance with your pleas, this court-martial finds you: Of the Charge and specifications thereunder: Guilty; Of the Additional Charge and specifications thereunder: Guilty." Record at 65. The military judge sentenced the appellant to confinement for 90 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed. Pursuant to the terms of a pretrial agreement, the CA suspended confinement in excess of 75 days for 12 months.

We have carefully considered the record of trial and the appellant's three assignments of error (AOEs) asserting: (1) that

both the staff judge advocate's recommendation (SJAR) and the CA's action and court-martial promulgating order (CMO) erroneously report that the appellant was convicted of two additional specifications of breaking restriction that were dismissed at trial; (2) that because substitute trial defense counsel (TDC) failed to enter into an attorney-client relationship with the appellant, the appellant was denied effective representation during the post-trial phase of his case; and (3) that the military judge erred by entering ambiguous findings. We have also considered the Government's answer. We agree with the parties that both the SJAR and the CMO erroneously report that the appellant was convicted of two additional specifications of breaking restriction that were dismissed at trial. We also agree with the appellant that the military judge entered ambiguous findings. We, nonetheless, conclude that the findings and the 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.

Court-Martial Order

As to the appellant's first AOE, we conclude that both the SJAR and the CMO erroneously report that the appellant was convicted of two additional specifications of breaking restriction that were dismissed at trial. We find that review of the irregularities in the SJAR was forfeited by the appellant's failure to object. *See* RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Further, the CA considered the "entire" record of trial before he acted on the appellant's case. CA's Action of 4 Jun 2003 at 2. As such, we find no prejudice to the appellant as a result of this scrivener's error, but he is entitled to accurate official records concerning his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will direct in our decretal paragraph that this error be corrected in the supplemental court-martial order.

Post-Trial Representation by Substitute Trial Defense Counsel

In his second AOE, the appellant asserts that because substitute TDC did not submit any clemency matters despite indicating that he would, substitute TDC may have failed to enter into an attorney-client relationship with the appellant, thereby denying the appellant effective representation during the post-trial phase of his case. We do not agree.

The substitute TDC "shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response." R.C.M. 1106(f)(2). The substitute TDC also has an ethical responsibility to establish an attorney-client relationship. *United States v. Howard,* 47 M.J. 104, 106 (C.A.A.F. 1997).

We note that the Courts of Criminal Appeals Rules of Practice and Procedure require that "[i]f a party desires to attach a statement of a person to the record for consideration by the Court on any matter, such statement shall be made either in an affidavit or as an unsworn declaration under penalty of perjury. . . ." CCA RULE 23(b). The averments of counsel are not evidence. The appellant has not filed an affidavit or unsworn declaration under penalty of perjury asserting that he was not contacted by substitute TDC, that substitute TDC's failure to file clemency matters was contrary to the appellant's wishes, or that he was prejudiced by substitute TDC's actions. Thus, we are compelled to consider appellate defense counsel's (ADC) assertions as speculation, rather than fact. *United States v. Starling*, 58 M.J. 620, 623 (N.M.Ct.Crim.App. 2003).

In light of the ADC's speculation, we must decide this case only upon the facts in the record of trial. The appellant, nonetheless, need only make a colorable showing of possible prejudice in order to gain relief. *United States v. Miller,* 45 M.J. 149, 151 (C.A.A.F. 1996). If we presume that an attorney-client relationship was not established between the appellant and his substitute TDC, we do not know what information the appellant would have asked substitute TDC to present to the CA on his behalf. Further, the record of trial contains the appellant's request to go on appellate leave, which was addressed by the SJA in his SJAR. SJAR of 28 Apr 2003 at 3. We, therefore, presume that the appellant was immediately placed on appellate leave after his release from confinement, as the pretrial agreement required the CA to suspend confinement in excess of 75 days, which he did. Under the circumstances of this case, we find that the appellant has failed to meet the low threshold of showing possible prejudice. We, therefore, decline to grant relief.

Ambiguous Findings

In his third AOE, the appellant asserts that the military judge erred when he delivered ambiguous findings. The appellant avers that we should order a rehearing. We agree that the military judge entered ambiguous findings, but we decline to grant relief.

When a military court of criminal appeals finds that a military judge has announced inartfully worded or ambiguous findings after accepting an accused service member's guilty pleas, it may still be permissible for the appellate court to affirm such findings. *United States v. Dilday*, 47 C.M.R. 172, 173 (A.C.M.R. 1973). When it is clear to an appellate court, after examining the language of the specifications, the appellant's pleas, the providence inquiry, any stipulation of fact, and any pretrial agreement, that the intent of the military judge was to find the appellant guilty of the charges in question, despite ambiguous or inartfully worded findings, then the appellate court can affirm the findings that the military judge entered or clearly intended to enter on the record.

Therefore, if the intent of the military judge can be determined, not only can such a finding be affirmed on appeal, but also the appellant will be afforded full protection against double jeopardy. *United States v. Perkins*, 56 M.J. 825 (Army Ct.Crim.App. 2001).

Addressing the military judge's failure to enter unambiguous findings with regard to the charges in the appellant's case, we find that the military judge's failure to separately find the appellant guilty of each and every charge to be of little consequence to us in that we can adequately determine by examining the record in its entirety, that the military judge clearly intended to find the appellant guilty of the questioned charges as pled by the appellant, as supported by the providence inquiry and the stipulation of fact, and as consistent with the pretrial agreement. In the appellant's case, it is clear that the intent of the military judge was to find the appellant guilty of all of the charges. This is consistent with the appellant's pleas, and the appellant reinforces this finding by the absence of any objections at trial, or comment or objection to the SJAR. Therefore, although we find errors in the action by the military judge in failing to announce unambiguous findings of guilty as to each of the charges individually, we find this error to be harmless. Therefore, we decline to grant relief.

Conclusion

Accordingly, we affirm the findings of guilty that the military judge intended to enter, namely to Charge I and Specifications 1 and 2 thereunder, to Charge II and its Specification, to Additional Charge I and its Specification, and to Additional Charge II and Specifications 1 and 2 thereunder, and the sentence, as approved by the convening authority. The supplemental CMO will accurately reflect under Additional Charge II that the appellant has been convicted of only two specifications of breaking restriction.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court