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

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.A. WAGNER**

UNITED STATES

v.

Corey B. GRIGGS
Private (E-1), U.S. Marine Corps

NMCCA 200301922 Decided 15 June 2005

Sentence adjudged 12 December 2002. Military Judge: P.J. Ware. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 7th Engineer Support Battalion, 1st Force Service Support Group, MarForPac, Camp Pendleton, CA.

Capt PETER GRIESCH, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence and four specifications of the unlawful use of controlled substances, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The appellant was sentenced to a bad-conduct discharge and confinement for 6 months.

The convening authority (CA) disapproved the finding of guilty to the first specification of unauthorized absence since the appellant had previously been punished for the same offense at nonjudicial punishment. He then applied day-for-day credit of the 14 days' restriction and 14 day's extra duties against the adjudged sentence and approved only so much of the sentence as provided for a bad-conduct discharge and confinement for 165 days. He reduced the adjudged confinement by about 17 to 18 days (assuming that 6 months is equivalent to 182 or 183 days).

Pursuant to a pretrial agreement, the CA then suspended the remaining confinement over 90 days.

We find that the CA erred in applying the *Pierce* credit. He should have applied the 14-day credit against the approved, vice adjudged, sentence in the same manner as credit for pretrial confinement is applied to the approved confinement. *See United States v. Pierce,* 27 M.J. 367 (C.M.A. 1989); *United States v. Globke,* 59 M.J. 878, 882 (N.M.Ct.Crim.App. 2004). But we find that this error did not prejudice the appellant because, in any event, the pretrial confinement credit of 84 days and the brig good time credit of 15 days exceeded the approved confinement of 90 days. Thus, the appellant should not have served any confinement after the sentence was announced regardless of how the *Pierce* credit was applied.

We carefully considered the record of trial, the appellant's assignment of error that the substitute trial defense counsel was ineffective in the post-trial phase, and the Government's response. We conclude that the findings and sentence are correct in law and fact. We find no error that is materially prejudicial to the substantial rights of the appellant. *See* Arts. 59(a) and 66(c), UCMJ.

Ineffective Assistance of Substitute Counsel

In his assignment of error, the appellant contends that his substitute trial defense counsel was ineffective by failing to establish an attorney-client relationship with the appellant after trial and by failing to submit a clemency petition on his behalf. We agree that error occurred, but we decline to grant relief.

The original trial defense counsel deployed after trial. Captain (Capt) A was then appointed as the substitute trial defense counsel (TDC) and receipted for copies of the record of trial and the staff judge advocate's recommendation (SJAR). When Capt A receipted for the SJAR on 30 April 2003, he did not alter the first sentence on the form that stated: "1. I have (not) established an attorney-client relationship with the accused." First Endorsement on Staff Judge Advocate memo 5814 SJA of 29 Apr 2003 at 1. Capt A then initialed the second option under paragraph 3 of the form receipt stating that he would submit comments or corrections within the next 10 days. *Id.* An unsigned note at the bottom of the same receipt indicated that Capt A did not submit any response as of 21 May

2003 and no comments from Capt A were included in the record of trial. The CA thereafter signed his action on 4 June 2003.

In support of his assignment of error, the appellate defense counsel asserted the following facts:

> The undersigned counsel for Appellant has been informed by Appellant that Appellant was unaware that substitute defense counsel was appointed. Appellant has never spoken with Captain A[].
>
> The undersigned counsel for Appellant further represents that he contacted Appellant by dialing the number provided in the long-form Appellate Rights Statement in Appellant's record of trial. The undersigned counsel left a message for Appellant on 18 December 2003. The next morning, Appellant returned the call and advised that he wants to be restored to active duty in the United States Marine Corps.

Appellant's Brief and Assignment of Error of 25 Aug 2004 at 3. In the Error and Argument section of the same brief, the appellate defense counsel argued:

> Appellant's post-trial representation was deficient. Substitute defense counsel failed to communicate and establish an attorney-client relationship. . . .
>
> Appellant respectfully submits that substitute defense counsel could have located him with little effort. His permanent home address and telephone number were matters of record. . . .
>
> . . . .
>
> The circumstances of this case more than establish a colorable showing of possible prejudice. With the assistance of counsel, Appellant could have submitted a clemency package. In it, Appellant could have reminded the Convening Authority that he was so eager to join the Marine Corps he did so at age seventeen with special permission from his mother. He could have noted that his offense were committed when he was barely 18. (Record at 54, 57); *See also*, Defense Exhibit A. He could have informed the Convening Authority of his desire to remain in the

> Marine Corps. Matters from outside the record such as brig reports or supervisors' statements could have been offered.

Id. at 4, 6.

The substitute trial defense counsel "shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response." RULE FOR COURTS-MARTIAL 1106(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). 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 "If 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). Since the averments of counsel are not evidence, we invited the appellate counsel to obtain and present appropriate evidence in support of his assignment of error. We issued an order as follows:

> Upon consideration of the appellant's Brief and Assignment of Error, filed on 25 August 2004, we note that appellate defense counsel avers that he has been in telephonic contact with the appellant and that substitute trial defense counsel was ineffective because he did not contact the appellant to establish an attorney-client relationship. As a second indicator of ineffectiveness, appellate defense counsel points out that substitute trial defense counsel did not file any clemency matters with the convening authority on the appellant's behalf.
>
> The appellant has not filed an affidavit or unsworn declaration under penalty of perjury asserting that he was not contacted by substitute trial defense counsel, that counsel's inaction was contrary to the appellant's wishes, and that he was prejudiced by substitute trial defense counsel's actions.
>
> Accordingly, it is, by the Court, this 5th day of January 2005,

ORDERED:

> That the appellant may file an affidavit or unsworn declaration under penalty of perjury relating to the circumstances of his allegations of ineffective assistance of counsel with the Court on or before 19 January 2005.

After we granted 5 enlargements of time to reply to our order, the appellate defense counsel filed the following response:

> Appellant respectfully cannot comply with this Court's order.

Appellant's Response to Court Order of 26 May 2005. Our court order did not direct the appellant to provide an affidavit or statement, but rather afforded him the opportunity to do so. Thus, we are compelled to consider appellate defense counsel's assertions as speculation, rather than fact.

In light of the appellate defense counsel's response to our order, we must decide this case only upon the facts in the record of trial. The pertinent facts are: (1) after trial Capt A was assigned as substitute TDC, (2) Capt A receipted for the SJAR on 30 April 2003 indicating that he had not established an attorney-client relationship with the appellant but that he would respond to the SJAR within 10 days, and (3) Capt A did not respond to the SJAR by the time of the CA's action on 4 June 2003. We do not know whether Capt A ever established an attorney-client relationship with the appellant during the 5 weeks after he receipted for the SJAR. We conclude, however, that once the SJA was put on notice that the substitute TDC had no attorney-client relationship with the appellant, he erred by forwarding his SJAR to the CA for action without ascertaining if the substitute TDC ever fulfilled his legal and ethical obligations to the appellant. *See United States v. Siler,* 60 M.J. 772, 775 (N.M.Ct.Crim.App. 2004).

We must now test the error for prejudice. The appellant need only make a colorable showing of prejudice in order to gain relief. *United States v. Miller,* 45 M.J. 149, 151 (C.A.A.F. 1996). We do not know what information the appellant would have asked Capt A to present to the CA on his behalf if he had established an attorney-client relationship with him. The appellate defense counsel has speculated that Capt A could have highlighted information that was already in the record of trial. The appellate defense counsel also speculated that Capt A could

have presented brig or supervisor evaluations, but, as noted above, the appellant should not have been confined after trial. Further, the record of trial contains the appellant's request to go on appellate leave, which was actually signed a few days before the sentence was announced. We presume that the appellant's request for appellate leave was approved shortly after trial since the submission of the request was a condition of the pretrial agreement. Under the circumstances of this case, we find that the appellant has failed to meet the low threshold of showing possible prejudice and we decline to grant relief.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Chief Judge DORMAN and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court