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.

Ramon RODRIGUEZ, Jr.
Hospital Corpsman Third Class (E-4), U.S. Navy

NMCCA 200400744 Decided 26 July 2005

Sentence adjudged 23 August 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Health Care New England, Newport, RI.

LT LUIS LEME, JAGC, USN, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a special court-martial composed of officer and enlisted members. Contrary to his pleas, the appellant was convicted of an attempt to introduce heroin on board a military installation and the distribution of heroin, in violation of Articles 80 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 912a. As a result of his conviction, the members sentenced the appellant to a reduction to the lowest enlisted pay grade and a bad-conduct discharge. The convening authority approved the sentence.

The appellant has raised a single assignment of error before this court. He argues that the absence of the findings worksheet from the record of trial renders the record incomplete and prevents this court from being able to properly review his conviction. As relief, he prays that this court "remand the case to the convening authority for a new hearing." Appellant's Brief of 29 Oct 2004 at 5. While we agree with the appellant that the absence of the original findings worksheet from the record of trial constitutes error, we find the error to be harmless.

We have carefully examined the record of trial, the appellant’s assignment of error and brief, as well as the

Government's answer. Following that review, we conclude that the findings and sentence are correct in law and fact and that no errors were committed that materially prejudiced the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Complete Record of Trial

Following the appellant's court-martial, the original Appellate Exhibit XLIV, the "Findings Worksheet" completed by the president of the court-martial, was lost. On the second page of that reconstructed exhibit, the military judge provided the following annotation, "AE XLIV was destroyed. This is an accurate representation of what was given to the members. The original with writing by the president of the court is consistent with what was stated in court." The ultimate issue presented in this case is whether the record of trial is complete.

Article 54(c)(1)(B), UCMJ, requires that a complete record of trial be prepared in all special courts-martial in which a bad-conduct discharge was adjudged. Furthermore, Article 19, UCMJ, prohibits the imposition of a bad-conduct discharge where there is no "complete record of the proceedings and testimony." Because the appellant's special court-martial adjudged a bad-conduct discharge, a "complete" record would include a verbatim record of trial and all the exhibits that were used during the trial. RULES FOR COURTS-MARTIAL 1103(b)(2)(B), (b)(2)(D)(v), and (c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Therefore, the fact that the original findings worksheet is not contained in the record of trial calls into question the completeness of the record. *United States v. McCullah*, 11 M.J. 234, 236-37 (C.M.A. 1981); *United States v.* Embry, 60 M.J. 976, 979 (Army Ct.Crim.App. 2005).

> When analyzing an omission from the record of trial, a reviewing court must determine whether it is "substantial." The question of what constitutes a "substantial omission" is analyzed on a "case-by-case basis." Insubstantial omissions do not prevent a record from being characterized complete. However, a substantial omission from the record of trial raises a presumption of prejudice which the [G]overnment must rebut.

Embry, 60 M.J. at 979 (internal citations omitted)

The basis for the appellant's assignment of error raises a legitimate question for our consideration. Does the absence of the original copy of Appellate Exhibit XLIV substantially interfere with our ability to conduct a review of this case under Article 66(c), UCMJ? Our concerns are two fold, first whether the record accurately reports the findings of the members, and second, whether the military judge erred when he denied the appellant's motion for a mistrial related to the modifications the president of the court-martial made to the original findings worksheet.

Upon the members' return from deliberations the following exchange between the military judge and the president of the court-martial ensued.

MJ: Sir, have the members reached a verdict?
PRES: We have, sir.

MJ: And is it reflected on the findings worksheet?
PRES: Yes, it is sir.

MJ: All right. Please fold it over and, Bailiff, if you could hand it to me without looking at it.

. . . .

MJ: Okay, sir. It is – again, I'm handing it back to you, Bailiff, without looking at it.

. . . .

MJ: Members, on that, you have--you've written the vote total, as far as the numbers. We should not know that. So, what I'm going to ask you to do is, if you could strike through that, where you said it's – or cross it out in such a way that it cannot be read, what the vote was.
PRES: Aye, sir.

MJ: Okay. Can you do that now? Or do you need to take a break.
PRES: No, sir [amending the findings worksheet].

MJ: The reason being is that it's not—it's possible you could have one vote for not guilty, two votes for not guilty, three votes for guilty, four votes for guilty. There are various options and we're not supposed to know how many people voted for what. And, once you've done that, give it back to the bailiff. Are you done?
PRES: Aye, sir.

. . . .

MJ: Thank you. . . . Bailiff hand this back. And, sir—hand this back to the president without looking at it. . . On Page 2----
PRES: Aye, sir.

MJ: If you look at it, there seems to be—I know there are some things. There seems to be some conflict. In other words, not everything has-not everything seems to be crossed out where it be--supposed to be crossed out.
PRES: All right, sir.

MJ: Do you see where I mean? Without saying it on the record.
PRES: I'm coming down 1,2,3,4,5.

MJ: Let me--let me—without being specific, let me put it this way: When you go to various options.
PRES: Yes, sir.

MJ: When you go to one option, everything else must be crossed out. All right. Do you see what I mean?
PRES: Yes.

MJ: Is that a mistake?
PRES: Perhaps confusion on the worksheet. I had written down--

MJ: I think--I think what you want--I think I know what you want to say.
PRES: Aye, sir. I'm going to make an entry.

MJ: Okay. And, I apologize for the confusion. And believe me it's not your fault.
PRES: [Amending findings worksheet.]

MJ: Let me put it this way. Where you're given the option of in--between things, one thing or the other.
PRES: Right.

MJ: If it's one of those, then everything else must be crossed out.
PRES: I believe this will----

MJ: All right. If you could fold it over one more time.
PRES: I think this will clarify, sir.

MJ: I think it will too. I think I know where we're at.

BAILIFF: [Handing sentence (sic) worksheet to MJ.]

MJ: . . . I have to hand it back to you again.
PRES: I'm just testing you, sir.

. . . .

MJ: Let me put it this way: You were fine--it was fine the way it was before. What I'm looking at-what I was looking at is right above that. That's something--you had something--right above that, you had something circled.
PRES: Aye, sir.

MJ: Now do you see? do [sic] you see what I'm talking about?
PRES: Aye, sir. [Amending findings worksheet.]

MJ: I shouldn't have been--I shouldn't have been so obtuse. I'm going to need you to, if you could, write back in, I think what you crossed out. Because you need to have a specification and a charge.
Pres: Aye, sir.

MJ: If that's indeed, what you--what you want. I'm fairly certain that's what you want. I think I just confused you.
PRES: Maybe--it may be helpful if I show you a note that I had on another piece of paper. Is that allowed?

MJ: Let me ask: Would you prefer me to give you a plain copy of the findings worksheet and go back for five minutes and come back? or [sic] do you want to use this?
PRES: I'd just assume [sic] stay with this, sir.

MJ: Okay. That's fine. If you can understand what I'm----
PRES: If this is not good, sir, I think we'll take a clean sheet.

MJ: I think this will do it, sir.
BAILIFF: [Handing sentence [sic] worksheet to MJ.]

. . . .

MJ: Perfect. You did cross out what I sort of meant in the first place. Just a minor. . . All right. Hand that back to the president.

. . . .

MJ: Commander, when you read that, do not read the highlighted portion. That's just to--or--you know. Don't read like "convicted of all, "not guilty of all," or "mixed findings." That's just to each individual one of you. I think you understand that, sir.
PRES: Yes, sir.

Record at 894-98. Thereafter, the president of the court announced the findings. The record reflects that he read the following:

Of Charge I and its sole Specification: Guilty
Additional Charge I, Specification 2: Not Guilty.

> Of the Specification of Additional Charge II: Guilty, substituting the words, "attempt to" and striking the words "on divers occasions."
> Of Additional Charge II: Not guilty, but guilty of a violation of Article 80, UCMJ.
> Of Additional Charge III and its sole Specification: Not Guilty.
> Of Additional Charge IV and its sole Specification: Striking the word "on divers occasions" from line 4, Guilty.

Id. at 898-99.

Immediately after the findings were announced, the members departed the courtroom and the military judge told counsel that they could look at the findings worksheet during the next break. Before looking at the worksheet, the civilian defense counsel moved for a mistrial based upon the difficulty the president had filling out the findings worksheet. The military judge stated that the president had read exactly what was on the worksheet, explaining that the problem had been with the findings to Additional Charge II. Originally, the members had left in the word "guilty," but it was obvious that they had not intended to find the appellant guilty of the charged offense but rather of the attempt. *Id*. at 900. In denying the motion for a mistrial the military judge again invited counsel to examine the findings worksheet during the next break. Shortly thereafter, the court-martial adjourned for the evening. Upon reconvening the next morning, the appellant did not raise the issue again.

When the members returned to the courtroom the next morning the military judge, however, addressed the findings worksheet with the president of the court-martial. The military judge asked the president, "Can you state that what you announced in open court was, without a doubt, what the members voted on and what you had decided was the findings?" *Id*. at 908-09. The president responded, "I can, sir." *Id.* at 99.

While the omission of the original findings worksheet is error, the portions of the record set out above overcome any presumption of prejudice. First, the military judge stated that the president of the court read into the record what was contained on that worksheet. Second, the president of the court affirmatively stated that he accurately announced the findings. Third, the verbatim transcript of what the president read when announcing the findings is evidence, in and of itself, of what was contained on the findings worksheet. Fourth, the appellant did not raise this issue after having the opportunity to review the findings worksheet during an overnight recess of the court. Finally, we have considered the annotation of the military judge contained on the bottom of the second page of Appellate Exhibit XLIV. Accordingly, based upon the record, we hold that the omission of the original findings worksheet is not a substantial omission from the record. Thus the appellant's record of trial is complete.

Conclusion

Based upon our review of the record of trial, we affirm the findings and the sentence as approved by the convening authority.

Senior Judge PRICE concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge HARRIS did not participate in this decision.