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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Andrew J. PETTIT
Aviation Ordnanceman Airman Apprentice (E-2), U.S. Navy

NMCCA 200401740 Decided 31 August 2005

Sentence adjudged 14 January 2003. Military Judge: D.M. Filetti. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Electronic Attack Squadron 129, NAS Whidbey Island, Oak Harbor, WA.

CAPT PETER GRIESCH, USMC, Appellate Defense Counsel
LT MONTE MILLER, JAGC, USNR, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to distribute psilocybin mushrooms, as well as use, importation into the United States, introduction onto a military installation, and possession of psilocybin mushrooms, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 120 days, forfeiture of $767.00 pay per month for "120 days," and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of 75 days.

The appellant asserts one assignment of error, alleging that the record of trial is not verbatim and is an incomplete record due to a substantial omission. He asks this court to set aside the findings and sentence. We agree.

Record of Trial

Articles 19 and 54(c)(1), UCMJ, require that a “complete record of the proceedings and testimony" be prepared for every special court-martial where the adjudged sentence includes a bad-conduct discharge. A "complete record" does not necessarily mean that the entire record is "verbatim." *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman,* 11 C.M.R. 179, 181 (C.M.A. 1953). Such a record need not be a “word for word” account of the entire trial. *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982). Neither does the Constitution require a verbatim record of a criminal trial. *McCullah*, 11 M.J. at 236. Where an omission from the record of trial is substantial, however, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979).

The appellant's 93-page record of trial is missing pages 8 through 24 and 76 through 87. The charge sheet, the appellant's election of forum, pleas and part of the providence inquiry into the conspiracy specification under Charge I are missing. Also missing is a substantial part of the appellant's mother's testimony during sentencing and all of the sentencing arguments by counsel. The military judge, during his inquiry into the terms of the pretrial agreement, did elicit from the appellant his forum choice, which was military judge alone. Record at 49. Also, paragraph 13 of the pretrial agreement signed by the appellant states the appellant's full understanding of his forum rights, including his right to be tried by members, with or without enlisted representation. Appellate Exhibit I.

The missing testimony, arguments of counsel, and proceedings present a more vexing problem. The Government provides no reconstruction for the missing portions of the record. This court will not speculate as to the contents of the missing pages. Under the circumstances of this case, the omission cannot be termed insubstantial, raising a presumption of prejudice. The Government attempts to rebut that presumption through argument in their brief. There is no affidavit or other evidence from the military judge or trial counsel as to what may have been contained in the missing portions. The Government argues in brief that there were no significant evolutions contained within the missing pages, but that is not apparent on the face of the record. In light of the extensive amount of missing testimony, argument, and proceedings, this court remains unconvinced that there was no prejudice to the appellant as a result of the omissions. *See, United States v. Stoffer*, 53 M.J.

26 (C.A.A.F. 2000); *United States v. Santoro,* 46 M.J. 344 (C.A.A.F. 1997).

The findings and sentence are set aside. A rehearing is authorized.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court