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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Michael L. VILLAMIZAR
Captain (O-3), U.S. Marine Corps

NMCCA 200500439 Decided 5 December 2005

Sentence adjudged 13 July 2004. Military Judge: S.B. Jack. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Training and Education Command, Marine Corps Combat Development Command, Quantico, VA.

CAPT STEPHEN WHITE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel

WAGNER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, two specifications of failure to go to his appointed place of duty, willful disobedience of the order of a superior commissioned officer, dereliction of duty, and two specifications of wrongful use of cocaine, in violation of Articles 86, 90, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, 892, and 912a. The appellant was sentenced to a dismissal, confinement for 18 months, and forfeiture of all pay and allowances. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of time served.

The appellant asserts in his sole assignment of error that the military judge erred in accepting the appellant's plea of guilty to the wrongful use of cocaine. The appellant argues in support of this allegation of error that the specification was referred for trial in contravention of Secretary of the Navy

Instruction (SECNAVINST) 5300.28C, *Military Substance Abuse Prevention and Control,* of 24 March 1999, which prohibits disciplinary action based on a valid self-referral for drug abuse.

After considering the record of trial, the appellant's assignment of error, 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. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant's drug abuse was initially brought to the attention of a friend and fellow Marine Corps officer, Captain (Capt) R, by the appellant's wife. Capt R confronted the appellant, who admitted to using cocaine. Capt R told the appellant to turn himself in to their command or Capt R would be forced to report the appellant's actions. Subsequently, with Capt R accompanying him, the appellant reported his own drug abuse to his command. The appellant was asked to consent to a urinalysis, which came back positive for cocaine.

During the sentencing phase of the court-martial, the military judge raised concern over the issue of self-referral for drug abuse under SECNAVINST 5300.28C. In pertinent part, the instruction states that:

> personnel who self-refer for drug abuse to qualified self-referral representatives shall be screened for drug dependency at a medical facility and an official determination shall be made. Personnel screened as drug dependent who are confirmed as valid self-referrals shall be exempt from any disciplinary action, processed for administrative separation, and offered treatment.
> . . .

Defense Exhibit J, enclosure (2) at page 4.

The military judge asked the civilian defense counsel if he considered the appellant's actions leading up to the first urinalysis to be a self-referral. The civilian defense counsel responded that he had informed the appellant that he had the right to challenge the specification on this basis, and that the appellant believed that his actions were not a bona-fide self-referral under the instruction because he was forced to report himself by Capt R. The military judge then elicited the same information from the military trial defense counsel. The military judge thereafter explained the issue to the appellant. The appellant indicated he understood the issue and answered in the affirmative when asked by the military judge if he had reported himself to the command because it would appear better to

the command if he did it rather than having Capt R report the drug abuse.

The military judge informed the appellant that the issue was an evidentiary one, and that the court had not considered any of the evidence in question. The military judge followed up by informing the appellant that he could waive the issue. The appellant was then given time to consult with his counsel, after which he stated, "Sir, I've decided to waive the issue of defense of self-referral, sir." Record at 107. Following this affirmative waiver, the civilian defense counsel reiterated his belief that the actions of the appellant leading up to the first urinalysis were not a valid self-referral under the instruction.

Waiver

The appellant now argues that SECNAVINST 5300.28C barred disciplinary action in this case and urges the court to set aside the finding of guilty to this specification. The Government points out that the appellant provided an affirmative waiver of the issue on the record and urges this court to affirm the finding. We agree with the Government. The military judge explained the issue clearly to the appellant, who indicated that he understood. The appellant was given ample opportunity to consult with his military and civilian trial defense counsel, and he then executed a clear and valid waiver of this issue.

This is a case involving affirmative waiver at trial, which is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). So long as the affirmative waiver was an "intelligent waiver," one done with the appellant's understanding of the issue, that issue is forfeited on appeal. *Id.* Whether such a waiver was intelligent will depend on the facts and circumstances in the record of trial, including "the background, experience, and conduct" of the appellant.[1] *Id.*

The principles of waiver and forfeiture are intended to ensure that issues of fact and law are litigated and resolved in the trial courts, before "any possibility of curing the problem has vanished." *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993). The application of the waiver rule is necessary "to encourage all trial participants to seek a fair and accurate

[1] We distinguish the issue of affirmative waiver from the issue of waiver implied through silence or inaction at trial. Both types of waiver can result in forfeiture of the issue on appeal. (*See, Freytag v. Commissioner,* 501 U.S. 868, 898 (1991)(Scalia, J., concurring in part and concurring in the judgment)(footnote 3). In the case of implied waiver, however, an appellant does not forfeit the issue on appeal if the error is plain and obvious and materially affects a substantial right. *United States v. Schlamer*, 52 M.J. 80, 85 (C.A.A.F. 1999)(citing *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998)). The appellate court will correct a plain error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*., 520 U.S. 461, 467 (1997)(quoting *United States v. Olano*, 507 U.S. 725, 732-34, (1993), in turn quoting *United States* v.*Young,* 470 U.S. 1, 15 (1985), in turn quoting *United States* v. *Atkinson,* 297 U.S. 157, 160 (1936)). Under the circumstances of the case at bar involving an affirmative waiver of the issue at trial, however, we need not apply a plain error analysis in reaching our decision.

trial the first time around." *United States v. Frady*, 456 U.S. 152, 163 (1982). As Justice Scalia stated in his concurring opinion in *Freytag*, 501 U.S. at 894:

> The very word "review" presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of "sandbagging": suggesting or permitting, for strategic reasons, that the trial court pursue a certain course, and later -- if the outcome is unfavorable -- claiming that the course followed was reversible error.

In the case before us, the issue was clearly framed by the military judge and counsel and the appellant clearly understood the issue. The appellant's pleas of guilty were part and parcel of a favorable pretrial agreement. Both the civilian and military trial defense counsel considered the issue and concluded that the Secretary of the Navy Instruction had no impact on the appellant's prosecution because his actions were not a valid self-referral. Under the circumstances, there can be no question that the appellant intelligently and affirmatively waived the issue of self-referral and thereby forfeited the issue on appeal.

Conclusion

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

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court