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

BEFORE

CHARLES Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Christopher A. WILSON
Sonar Technician (Surface) Seaman Apprentice (E-2), U.S. Navy

NMCCA 200001417 Decided 10 February 2004

Sentence adjudged 8 June 2000. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Fleet Anti-Submarine Warfare Training Center, San Diego, CA.

LCDR WILLIAM O. COE, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT CLARICE B. JULKA, JAGC, USN, Appellate Government Counsel
CDR ROBERT P. TAISHOFF, JAGC, USN, Appellate Government Counsel

VILLEMEZ, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, consistent with his pleas, of wrongful use of marijuana and breaking restriction, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The military judge sentenced the appellant to confinement for 4 months, forfeiture of $600.00 pay per month for 4 months, reduction to pay grade E-1, and a bad-conduct discharge (BCD). In approving the sentence, the convening authority (CA)--in accordance with a pretrial agreement--suspended all confinement in excess of 90 days for 12 months from the date of trial.

This is the second time this case has been before us. In our original decision of 27 March 2003, we set aside the original CA's action and ordered a new action and a new legal officer's review (LOR), returning the record of trial to the Judge Advocate General for remand to an appropriate convening authority for a new post-trial review process. We followed that course of action

because the plethora of errors in those two important post-trial documents negated any presumption of regularity we might normally apply in post-trial circumstances. In remanding the case, we highlighted--in plain language--the specific problems existing in the original CA's action and LOR. We now have the new documents, revised, but, unfortunately, not necessarily much improved. While some of the concerns we held with the original CA's action and LOR have been corrected, there are still troublesome problems with the new efforts.

We have carefully examined the revised post-trial documents, the record of trial, the appellant's two original summary assignments of error,[1] and the Government's response. Following that review, while still quite disappointed with the quality of the revised post-trial documents, we 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.

Supplemental CA's Action

While the revised, supplementary LOR contains several errors and misstatements, it is the supplemental court-martial order and the new CA's action, dated 1 October 2003, with which we must be concerned.

The "corrected" action reads, in part:

> In the case of Sonar Technician (SURFACE) Seaman Recruit Christopher A. Wilson, U.S. Navy, Fleet Anti-Submarine Warfare Training Center, San Diego, California, the sentence is approved and, except for the part of the sentence extending to a bad conduct discharge, will be executed, but the execution of that part of the sentence will be remitted without further action [sic].

While this language certainly lacks clarity, and one might speculate that perhaps the CA was attempting to "remit" the appellant's BCD,[2] we are convinced that it is merely another in a long-line of careless clerical errors unmarred by any apparent attempt at the most elementary proof-reading efforts. This typographical error is obviously the result of the omission of that portion of the action that should have dealt with the CA's obligation under the pretrial agreement to suspend all confinement in excess of 90 days for a period of 12 months from

[1] The appellant did not submit any additional assignments of error upon review of the supplemental CA's action and new LOR. Appellate Defense Counsel's ltr of 17 Oct 2003.

[2] Or "bad discharge," as it is described in the Record and copied in the original LOR. Record at 83; LOR of 31 Jul 2000 at 2.

the date the sentence was announced. This position is shored-up by examining the original CA's action, where such language was included. While we conclude that this error does not impact directly on our ultimate disposition of the case, it is but another of numerous disappointing, distracting defects that continue to permeate this case, even after a re-try with "instructions" provided.

Revised LOR and CA's Action

In our previous opinion in this case, we highlighted the critical nature and importance of the post-trial processing of a court-martial. Despite that clearly-stated emphasis, when given a second chance to correct what can only be characterized as gross errors and oversights, similar, if not the exact same mistakes were made again.[3] If, in fact, true, most disturbing of these second-time-around errors would be the failure by the CA to note in his supplemental action that he considered *both* clemency packages that the revised LOR indicates were submitted by the trial defense counsel on the appellant's behalf. The supplemental LOR indicates that there were two submissions, with one being dated 28 August 2000 and the other 31 August 2000. At one point in the revised LOR, these documents are incorrectly identified as having been the work of the military judge, while in another section of this LOR, they are "correctly" listed as having been submitted by the trial defense counsel. *See* Supplementary Recommendation of 2 Jun 2003 at 2, 4.

After a careful reading of the Record and allied papers--an action we highly recommend to all participants in the post-trial process--we conclude that actually there was only *one* clemency request--not two--submitted in this case. On 29 August 2000, the appellant's trial defense counsel submitted a letter to the convening authority in which he indicated that he did not receive the LOR of 31 July 2000, and that, if he had received it, he "had planned" to respond to it by requesting that the CA disapprove the BCD awarded the appellant. Detailed Defense Counsel's ltr of 28 Aug 2000. He goes on in the letter to also request that the adjudged forfeitures of $600.00 pay per month for 4 months be disapproved. *Id*.

As noted above, in the supplemental LOR of 2 June 2003, the CA's legal officer refers to *two* clemency requests by the trial defense counsel--one dated 28 August 2000 and the second dated 31 August 2000. While we discussed the former immediately above, the latter document, we believe, was not a clemency

[3] Incorrect dates for court-martial-related events, references to charges and specifications that were not applicable to the appellant's case, and a series of asterisks where dates should have been inserted all reflect unacceptably sloppy work, without any apparent effort to apply the most rudimentary proof-reading effort. *See United States v. Wilson*, No. 200001417, unpublished op. at 2-3 (N.M.Ct.Crim.App. 27 Mar 2003).

request at all, but rather a letter dated 31 August 2000, from the CA to the Naval Clemency and Parole Board, with the subject line of: "Clemency Request ICO Special Court-Martial For STGSR Christopher A. Wilson, USN, ..." (Emphasis and the appellant's social security number omitted.) We conclude that the legal officer, in preparing the revised LOR, misread the document--or did not actually read it all past the subject line--and erroneously concluded that it was a second clemency request submitted by the trial defense counsel.[4]

While we could remand this case back to the CA for a third swing at getting it right, in the interest of judicial economy, we will not do so. Of primary concern in this case is the inordinate amount of time that has elapsed since the appellant's court-martial without the completion of the review process, when that delay is due in such large part, plain and simply, to administrative carelessness. If the right of an individual to enjoy a timely and meaningful review of his or her court-martial is to be more than a catchy slogan for a Law Day poster, at some point, the Government must be held accountable for repeated failures to effect a timely and meaningful review process in a given case.

In evaluating an appropriate resolution of this case, we are mindful of this court's authority under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay, even in the absence of actual prejudice suffered by the appellant--particularly when the delay has been caused by such carelessness as has been evident in this case to date. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Based on the circumstances of this case, however, we decline to grant any such relief. We are confident that the appellant received a fair and complete review of his clemency request, both contemporaneously with its original submission and again during the second, most recent post-trial review. While the trial defense counsel did not receive a copy of the original LOR of 31 July 2000, he did submit a clemency request on behalf of the appellant on 28 August 2000, in response to having received a copy of the CA's original action of 16 August 2000. In his letter to the Naval Clemency and Parole Board of 31 August 2000, the CA indicates that he did receive and consider that submission. In his supplemental action of 1 October 2003, the CA specifically notes that the clemency request of 28 August

[4] We note from our review of the Record and allied papers that after being properly served with the supplemental post-trial documents, the appellant's substitute trial defense counsel apparently did not submit any additional documents or clemency requests for consideration by the CA.

2000 was, once again, considered. Additionally, we note that when given a second opportunity to submit supplemental materials upon receiving the supplemental LOR of 2 June 2003, the substitute defense counsel declined to do so. Finally, the appellant did not submit any new assignments of error after reviewing the revised LOR and CA's action.

Thus, while far from pleased with the post-trial processing of this case, we affirm the findings of guilt and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court