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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Alexander S. HALL
Private (E-1), U.S. Marine Corps

NMCCA 200001801 Decided 28 January 2004

Sentence adjudged 17 May 2000. Military Judge: S.B. Jack. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Transportation Support Battalion, 2d FSSG, U.S. Marine Forces, Atlantic, Camp Lejeune, NC.

LT COLIN A. KISOR, JAGC, USN, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel
LT JASON L. LIEN, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

This is our second review of the appellant's special court-martial. Based on this second review of the record and appellate pleadings, we now set aside the convening authority's action and return the record to the field. Due to the careless handling of this case at the hands of various lawyers since the appellant's trial on 17 May 2000, we set forth the case background in some detail so that those lawyers who will handle it in the weeks to come will understand the posture of the case and thus, pay particular attention to detail in tending to their professional duties.

On 17 May 2000, the appellant was convicted, pursuant to his pleas, by a military judge sitting alone, of a two-month unauthorized absence terminated by apprehension. In the presentencing hearing, the Government offered only the appellant's 3.1/2.5 average pro/con marks in aggravation. The

trial defense counsel (TDC) offered nothing in extenuation and mitigation. The military judge sentenced the appellant to confinement for 45 days, forfeiture of $630.00 pay per month for one month, and a bad-conduct discharge.

On 18 August 2000, the military judge authenticated the record. At some point in time, which we cannot discern from our examination of the record, someone erroneously placed 10 different documents between the proof of service of the record upon the TDC and the first page of the transcript of trial proceedings.[1] Among these documents was a Record of Trial by Summary Court-Martial (SCM), DD Form 2329 showing that the appellant was convicted, contrary to his pleas, of "Viol of Art 112a of the UCMJ" by a Second Lieutenant (name illegible) on 19 December 1999. The nature of the violation was not specified. *On that same date*, the convening authority approved the sentence, including 28 days confinement and reduction to private, and ordered it executed. There is no indication in the record that the appellant waived his right to submit matters to the convening authority before action was taken.

The staff judge advocate signed his post-trial recommendation (SJAR) on 22 September 2000. In the SJAR, he listed the prior SCM as the appellant's disciplinary history. However, on 7 February 2000, the same convening authority who had previously approved the SCM findings and sentence signed a "Supplementary Convening Authority Action" withdrawing his earlier action and substituting disapproval of the findings and sentence of the SCM. A judge advocate review of 8 February 2000 noted that the findings and sentence had been disapproved. Thus, the SJAR erroneously advised the special court-martial convening authority (a different officer from the one who had acted on the SCM) that the appellant had a disciplinary history.

Unfortunately, on 2 October 2000, the TDC told the staff judge advocate that he had "no comments, corrections, or rebuttal" to the SJAR. TDC Ltr 5813 Ser G00-555 of 2 Oct 2000. We note that on the date of his sentencing by this special court-martial, the appellant waived his right to submit matters in clemency to the convening authority but indicated that the

[1] We urge all court reporters, trial counsel, military judges, and staff judge advocates to ensure that records of trial under their cognizance are prepared and compiled strictly in accordance with the guidance set forth in MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), App. 14, DD Form 490 (blue front and back covers for records of trial), and Judge Advocate General Instruction 5813.1A (17 Sep 93).

waiver did not relieve the TDC of his obligation to provide comments in response to the SJAR.

On 23 October 2000, the convening authority signed his action approving the sentence and, except for the bad-conduct discharge, ordered the sentence executed. In accordance with the pretrial agreement, he suspended confinement in excess of 30 days. In taking his action, he "specifically considered the results of trial, the record of trial, and the [SJAR]." Special Court-Martial Convening Authority Action and Order NO...G00-555 of 23 Oct 2000 at 1. Thus, we presume that the convening authority believed that the appellant had a prior SCM when he chose to approve the sentence as adjudged and suspend 15 days of confinement.

In early March 2001, the first appellate defense (ADC) counsel was assigned to represent the appellant before this court. According to his affidavit of 3 December 2001, he consulted with the appellant and realized that the SJAR may have been incorrect in its recitation of the prior SCM. The ADC then began an investigation into the SCM. Based on his affidavit, we find that he did not intend to file the case on its merits before this court until he was satisfied that the SJAR was correct. Notwithstanding that intent, on 11 July 2001, the ADC inadvertently signed a pleading submitting this case on its merits. On 24 July 2001, a predecessor panel of this court affirmed the findings and sentence without discussion.

Later, it was discovered that the case had been erroneously submitted on its merits without assignment of error. At that point, a second ADC successfully petitioned our superior court for relief based upon ineffective assistance of TDC and the first ADC. In an order of 11 June 2002, the Court of Appeals for the Armed Forces (CAAF) set aside our decision and remanded the case to this court for consideration of the issues presented to CAAF, particularly the factual issue of the accuracy of the appellant's disciplinary record.

A third ADC has now filed a brief assigning two errors: (1) ineffective assistance by the TDC and the first ADC; and (2) sentence appropriateness. We conclude that the record must be remanded to the field because of post-trial ineffective assistance by the TDC. When a convening authority decides whether to approve the sentence, as adjudged, or to approve a lesser sentence, he may provide clemency to the accused. Such clemency consideration by the convening authority is a valuable right for the appellant. *See United States v. Lowe*, 50 M.J.

654, 656-57 (N.M.Ct.Crim.App. 1999)("We continue to believe that an accused's best chance for post-trial clemency lies in the hands of the convening authority.").

In this case, we conclude there is a substantial risk that the appellant was deprived of that right when the convening authority was led to believe that the appellant had a prior SCM. Based on our experience in the field, most convening authorities would view a two-month unauthorized absence quite differently if they knew that there was a prior SCM vice a record free of prior discipline. By allowing the erroneous SJAR to go to the convening authority without correcting the error, we conclude that the TDC was ineffective in his professional duties, and that the appellant was thereby materially prejudiced. Art. 59(a), UCMJ.

As to the complaint about the first ADC's ineffective assistance, that issue is moot due to our superior court's remand and our corrective action. Likewise, we find no merit in the appellant's contention that the TDC was ineffective at trial.

Conclusion

The convening authority's action is set aside. The record is returned to the Judge Advocate General of the Navy for remand to the convening authority so that a new SJAR and action may be prepared. Upon completion of the new action, the record shall be returned to this court for completion of appellate review. At that time, we will resolve the sentence appropriateness issue.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court