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.

Walerie A. TONEV
Private (E-1), U.S. Marine Corps

NMCCA 200200935 Decided 19 April 2004

Sentence adjudged 6 December 2001. Military Judge: W.P. Snow. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Transportation Support Battalion, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of three specifications of failing to go to his appointed place of duty, two specifications of unauthorized absence, both terminated by apprehension, disobeying a lawful general order by driving a motor vehicle on board a military installation while his state driver’s license was suspended, and disobeying a lawful order by driving a motor vehicle while on restriction, in violation of Articles 86 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 892. The appellant was sentenced to confinement for 45 days, forfeiture of $643.20 pay per month for 1 month, and a bad-conduct discharge. The convening authority approved the adjudged sentence.

After carefully considering the record of trial, the appellant's assignment of error alleging an unreasonable multiplication (UMC) of charges, and the Government's response, we specified the following issue:

WHETHER THE APPELLANT'S COURT-MARTIAL HAD JURISDICTION TO TRY THE APPELLANT WHERE THE CONVENING ORDER IN THE RECORD OF TRIAL SPECIFICALLY LIMITS ITS APPLICATION TO THE CASE OF UNITED STATES V. CORPORAL LAMONT D. PEAL, USMC?

After again considering the record of trial, the appellant's original brief and supplemental brief on the specified issue, and the Government's responses, we find that the court-martial did have jurisdiction to try the appellant. Accordingly, we conclude that the findings and the sentence, except as addressed below, 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.

Court-Martial Jurisdiction

In order for a court-martial to have jurisdiction, the court-martial must be convened and constituted in accordance with law. *McClaughry v. Deming*, 186 U.S. 49, 63 (1902). A court-martial possesses only "special and limited" jurisdiction. *United States v. Mayfield*, 43 M.J. 766, 768 (N.M.Ct.Crim.App. 1995), *rev'd on other grounds*, 45 M.J. 176 (C.A.A.F. 1996). A court-martial is lawfully created when a convening authority creates and promulgates a court-martial convening order. *See* RULE FOR COURTS-MARTIAL 504(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

At trial, the trial counsel affirmatively establishes the court-martial's jurisdiction when he or she announces without challenge by the trial defense counsel, both the convening of the court-martial and the referral to trial of the charges by the convening authority. *United States v. Masusock*, 1 C.M.R. 32 (C.M.A. 1951). The proper referral of the charges by the convening authority requires that the convening authority be a person who is authorized to convene a court-martial and who is not disqualified from performing the duties of a convening authority, receipt of preferred charges by the convening authority for disposition, and a court-martial convened by that convening authority or a predecessor convening authority. *United States v. King*, 28 M.J. 397, 399 (C.M.A. 1989); *see* R.C.M. 601(b), Discussion.

It is clear that the court-martial record of trial must "affirmatively and unequivocally" demonstrate that the court-martial was legally constituted, and that it had jurisdiction to try the accused. *Mayfield*, 43 M.J. at 768. In conducting our review of the record, we apply no presumptions in these matters, jurisdiction will not be established by inference argumentatively, and "[where] the statutory requirements for the court-martial's jurisdiction are not properly satisfied, there is no tribunal authorized to enter judgment." *Id*. at 768-69. The Court of Appeals for the Armed Forces has also held that military courts of criminal appeals must examine the record for "independent

jurisdictional error." *United States v. Ryan*, 5 M.J. 97, 100 (C.M.A. 1978).

The Government must establish jurisdiction over an accused by a preponderance of the evidence, *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002), *cert. denied*, 537 U.S. 1112 (2003), and, where the convening order contains a fundamental defect the convening order is negated and no court-martial exists. *See Ryan*, 5 M.J. at 101. A simple administrative error in connection with convening a court-martial, however, is not a fundamental error and will be examined for prejudice to the appellant. *See United States v. Gebhart*, 34 M.J. 189 (C.M.A. 1992).

Whether the appellant's court-martial had jurisdiction and was properly convened is "a question of law to be reviewed *de novo*" by this court. *See United States v. Townes*, 50 M.J. 762, 764 (N.M.Ct.Crim.App. 1999), *rev'd on other grounds*, 52 M.J. 275 (C.A.A.F. 2000), *cert. denied*, 531 U.S. 821 (2000); *see also United States V. Underwood*, 47 M.J. 805, 812 (A.F.Ct.Crim.App. 1997), *aff'd*, 50 M.J. 271 (C.A.A.F. 1999). Failure of the trial defense counsel to challenge the regularity of the convening order at trial constitutes waiver. *See United States v. Moschella*, 43 C.M.R. 383, 386 (C.M.A. 1971).

On 19 November 2001, the convening authority "[r]eferred for trial to the special court-martial convened by court-martial convening order 3-01 dated 2 October 2001," Charge Sheet at ¶ 14, the charges brought against the appellant. Court-martial convening order 3-01, now attached, is actually dated 30 August 2001. The amendment to court-martial convening order 3c-01 is dated 2 October 2001. We note that on the date of trial the trial counsel made a pen change to the referral block of the charge sheet, striking 3-01 and adding 3c-01, instead of striking 2 October 2001 and adding 30 August 2001. We find the initial referral date discrepancy to be a harmless scrivener's error and the trial counsel's correction to the referral block of the charge sheet on the date of trial to be nothing more than a further continuation of a harmless error in the appellant's case. The appellant did not object to the entered court-martial convening order 3c-01 dated 2 October 2001. Nor does the appellant argue how he was prejudiced by the inclusion of court-martial convening order 3c-01 at his court-martial where he entered pleas of guilty pursuant to a pretrial agreement before a military judge, sitting alone. Further, nothing in the record indicates that the inclusion of court-martial convening order 3c-01, which modified court-martial convening order 3-01 dated 30 August 2001, resulted in any prejudice to the appellant. Failure to object under these circumstances constitutes waiver

by appellant. Any administrative error in this case was not a fatal jurisdictional defect. Accordingly, we decline to grant relief.

Conclusion

The military judge awarded a sentence that included forfeiture of pay not in a whole dollar amount, i.e., $643.20 for 1 month. We correct this error below. Further, we find the appellant's assignment of error asserting UMC to be without merit, and decline to grant relief. Finally, we direct that a supplemental promulgating order be issued that provides either a verbatim text or adequate summary of the specifications. R.C.M. 1114(c)(1); *see also United States v. Glover*, 57 M.J. 696 (N.M.Ct.Crim.App. 2002). Accordingly, we affirm the findings and only so much of the sentence as provides for confinement for 45 days, forfeiture of $643.00 pay per month for 1 month, and a bad-conduct discharge.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court