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
g
v.

Charles E. MUNSELL II
Information Systems Technician Seaman Apprentice (E-2), U.S. Navy

NMCCA 200300313 Decided 22 April 2004

Sentence adjudged 14 December 2001. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS OLDENDORF (DD 972).

CAPT JOHN A. FABIAN, JAGC, USNR, Appellate Defense Counsel
LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LT KATHLEEN A. HELMANN, JAGC, USNR, Appellate Government Counsel
Maj GREGG LYSKO, USMCR, Appellate Government Counsel

HARRIS, Judge:

A special court-martial, composed of a military judge sitting alone, convicted the appellant, pursuant to his pleas, of a 145-day unauthorized absence, missing movement of his ship through neglect, and breaking pretrial restriction, in violation of Articles 86, 87, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 934. The military judge sentenced the appellant to reduction to pay grade E-1, 2 months confinement, forfeiture of $600.00 pay per month for 2 months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and ordered the entire sentence executed. Pursuant to the terms of a pretrial agreement, the convening authority was required to suspend confinement in excess of 45 days for a period of 6 months from the date of trial.

We have carefully considered the record of trial, the appellant's three assignments of error,[1] and the Government's

[1] I. APPELLANT HAS BEEN PREJUDICED BY THE DILATORY POST-TRIAL PROCESSING OF THIS CASE.

response. We find: (1) The results of trial is missing from the record; (2) The legal officer's recommendation (LOR) is erroneous; (3) The convening authority took an *ultra vires* action and failed to abide by the terms of the pretrial agreement; and, (4) The court-martial order reports erroneous findings and adjudged sentence. We further find the collective effect of these and other errors to be materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ. We shall order corrective action in our decretal paragraph.

Legal Officer's Recommendation

Although not assigned as error, the legal officer erroneously reported both the military judge's findings and adjudged sentence to the convening authority. LOR of 13 Sep 2002; Record at 55, 79. Further, the special court-martial order repeats most of these errors. Special Court-Martial Order No. 01-2001 (SCMO) of 24 Sep 2002. Specifically, both the LOR and the special court-martial order report the appellant as having been found guilty of desertion vice unauthorized absence under the specification to Charge I, and as having been sentenced, in part, to 60 days confinement vice 2 months confinement. Charge Sheet; Record at 12, 55, 79.

Further, the LOR also erroneously reports the convening authority's obligations pursuant to the pretrial agreement. LOR of 13 Sep 2002 at 2. Specifically, the LOR misstates the convening authority's obligation on the commencement of the suspension period pertaining to confinement in excess of 45 days, and erroneously reports the convening authority's obligation concerning forfeitures or fines. Appellate Exhibit II; Record at 79-80.

RULE FOR COURTS-MARTIAL 1106(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), sets forth the minimum requirements for the LOR. Among other things, the recommendation shall include concise information as to the findings and the sentence adjudged by the court-martial. R.C.M. 1106(d)(3)(A). There is no doubt that the LOR incorrectly reports the findings and the sentence of the appellant's court-martial. However, unless this particular deficiency rises to the level of plain error, the matter is waived, because the trial defense counsel failed to comment on it in a timely manner. R.C.M. 1106(f)(6).

Although "plain error" lacks a fixed definition, it has been described as error that is "both obvious and substantial," that is "particularly egregious," that poses a serious threat to the

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II. ASSUMING APPELLANT HAS NOT DEMONSTRATED PREJUDICE, WHICH HE HAS, THE DILATORY POST-TRIAL PROCESSING OF THIS CASE WARRANTS RELIEF.

III. THE CONVENING AUTHORITY'S FAILURE TO APPROVE ONLY THE UNSUSPENDED PORTION OF THE AGREED-UPON [CONFINEMENT LIMITATION] CONSTITUTES PLAIN ERROR AND REQUIRES THAT THE APPELLANT'S SENTENCE BE REASSESSED.

“fairness, integrity, or public reputation of judicial proceedings," or an error otherwise “requires appellate intervention to prevent a miscarriage of justice, protect the reputation and integrity of the court, or to protect a fundamental right of the accused." *United States v. Lowry*, 33 M.J. 1035, 1037-38 (N.M.C.M.R. 1991)(internal citations omitted).

There is no definitive rule as to what errors in an LOR constitute plain error. We are mindful of our own decision that "misadvice as to both findings and pleas" can constitute plain error. *Id.* (citing *United States v. McLemore*, 30 M.J. 605 (N.M.C.M.R. 1990)). Factors to consider in determining whether a misstatement of findings amounts to plain error include: (1) whether the error is an omission or an affirmative misstatement; (2) whether the matter is material and substantial; and (3) whether there is a reasonable likelihood that the convening authority was misled by the error. *Id*. at 1038. Moreover, in *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998), our superior court made clear that an appellant who questions the validity of a convening authority’s action after passing on his opportunity to comment on an error in the LOR must: (1) allege the error at the court of criminal appeals; (2) allege prejudice as a result of the error; and (3) show what he would do to resolve the error if given such an opportunity.

While the appellant failed to allege the aforementioned specific errors, we see these errors as neither substantial nor particularly egregious. The convening authority’s action clearly states that he considered the record of trial before carrying out his duties with respect to the findings and the sentence. SCMO of 24 Sep 2002 at 2. Consequently, we have no reason to doubt that the convening authority was well aware of the true findings of the appellant’s court-martial. Nonetheless, for other reasons we shall order corrective action.

We take note of the legal officer’s failure to comment on any post-trial processing delay, as mentioned by the trial defense counsel in post-trial matters to the convening authority. Clemency Petition of 16 Sep 2002 at 2. The appellant addressed post-trial processing delay in his First and Second assignments of error. We moot these assignments of error by our action below. In other words, by setting aside the convening authority’s action and ordering a new legal officer’s recommendation, we will provide the convening authority an opportunity to consider possible relief for post-trial delay in this case.

The legal officer also did not comment on the trial defense counsel’s assertion that the trial counsel, in effect, interfered with the convening authority’s purported inclination to disapprove the bad-conduct discharge. *Id*. However, the convening authority clearly stated in his action that he considered the appellant’s clemency petition before he acted on the appellant’s record of trial. SCMO at 2. Without more from

the appellant, our below action also moots the trial defense counsel's assertion.

Convening Authority's Action

Although not assigned as error, we note that when the convening authority took his action, he purportedly ordered the adjudged and approved bad-conduct discharge executed. SCMO of 24 Sep 2002 at 2. A convening authority is without power to order a bad-conduct discharge executed prior to completion of appellate review. That portion of the convening authority's action is a nullity. *United States v. McGee*, 30 M.J. 1086, 1088 (N.M.C.M.R. 1989); *see also United States v. Olinger*, 45 M.J. 644, 647 (N.M.Ct.Crim.App. 1997). Further, the appellant has not demonstrated that he was prejudiced in any way by the convening authority's *ultra vires* action. Therefore, finding no prejudice from the error, we decline to grant relief on this ground standing alone. Art. 59(a), UCMJ.

In the appellant's third assignment of error, he asserts that the convening authority, in effect, failed to suspend confinement in excess of 45 days for 6 months from the date of trial, as he was obligated to do under the terms of the pretrial agreement. We agree that the convening authority erred. While the appellant has alleged, but not proved, that he was actually required to serve confinement in excess of that called for in the pretrial agreement, the record is, nonetheless, devoid of the results of trial that might clarify whether the brig was informed of the pretrial agreement. In spite of the fact that remedial action would normally not be required, *United States v. Caver*, 41 M.J. 556, 565 (N.M.Ct.Crim.App. 1994), in the appellant's case, in light of all of the aforementioned errors, we shall order remedial action.

Conclusion

Accordingly, the convening authority's action is hereby set aside. We return the record of trial to the Judge Advocate General of the Navy for remand to an appropriate convening authority for a new legal officer's recommendation, R.C.M. 1106(a), service on trial defense counsel, R.C.M. 1106(f) and 1107(h), who shall be given the opportunity to respond in accordance with R.C.M. 1106(f)(4), and new convening authority's action. *See* R.C.M. 1107(g).[2] Following those actions, the

[2] The convening authority shall also attach a copy of the results of trial to his new action.

record will return to this court for further review pursuant to Article 66(c), UCMJ.

Senior Judge PRICE and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court