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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **M.J. SUSZAN**

UNITED STATES

v.

Wellington K. JARAMILLO
Private (E-1), U.S. Marine Corps

NMCCA 200300522 Decided 8 November 2004

Sentence adjudged 23 May 2002. Military Judge: P.J. Betz, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

CAPT MARK PEDERSEN, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel

SUSZAN, Judge:

On 23 May 2002, a military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of three specifications of unauthorized absence and wrongful use of methamphetamine, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge sentenced the appellant to 60 days confinement, forfeiture of $700.00 pay per month for two months, and a bad-conduct discharge. On 18 December 2002, the convening authority (CA) approved the sentence as adjudged, and in accordance with the pretrial agreement suspended all confinement in excess of 45 days.

We have carefully considered the record of trial, the appellant's assignment of error, and the Government's response. We find merit in the appellant's claim that RULE FOR COURTS-MARTIAL 1106(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), was not followed. We conclude, however, 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 directed that his copy of the record of trial and staff judge advocate's recommendation (SJAR) be delivered to his trial defense counsel, Captain (Capt) J, USMC. Appellate Exhibit III. On 25 October 2002, Senior Defense Counsel (Major (Maj) B, USMC), Legal Service Support Team Delta, Camp Pendleton, California, assigned himself as substitute defense counsel for the appellant explaining that Capt J had left active duty. Senior Defense Counsel ltr of 25 Oct 2002. On 07 November 2002, Maj B, acknowledged receipt of a copy of the appellant's record of trial as defense counsel. In December 2002, the staff judge advocate (SJA) caused a copy of his recommendation to be served on Maj B. On 11 December 2002, Maj B acknowledged receipt and also placed the CA, through his SJA, on notice that he had not established an attorney-client relationship with the accused, as required by R.C.M. 1106(f)(2). Maj B did this by circling the word "not" on the form provided by the SJA, clearly indicating he did *not* have an attorney-client relationship with the appellant. Maj B also checked the block indicating he did not have comments or corrections to submit. Receipt for SJAR of 11 Dec 2002. There is nothing in the record to show the SJA made any further inquiry on the matter. Post-trial processing of the case proceeded and the CA took action on 18 December 2002.

The case was submitted for review with one assignment of error:

> TRIAL DEFENSE COUNSEL ERRED BY FAILING TO ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP WITH APPELLANT PRIOR TO INDICATING TO THE STAFF JUDGE ADVOCATE THAT HE HAD NO COMMENTS OR CORRECTIONS TO SUBMIT.

Discussion

Before a record of trial by special court-martial that includes a sentence to a bad-conduct discharge can be acted on, the CA's SJA must cause a copy of his recommendation to be served on counsel for the accused and afford the accused an opportunity to respond. *United States v. Goode,* 1 M.J. 3 (C.M.A. 1975); R.C.M 1106(f)(1). If detailed defense counsel is not reasonably available to represent the accused, substitute military counsel shall be detailed and shall enter into an attorney-client relationship with the accused before examining the recommendation and preparing any response. R.C.M. 1106(f)(2).

Our superior court faced a similar issue in *United States v. Cornelious,* 41 M.J. 397 (C.A.A.F. 1995). There, as in the appellant's case, the issue involved adequate representation by defense counsel for purposes of submission of post-trial matters. The facts in *Cornelious* involved an allegation of ineffective

assistance of counsel and a possible conflict of interest in defense counsel's post-trial representation of the appellant. The focus of the court in granting relief was whether the CA fulfilled his duty to ensure that counsel, for purposes of submitting post-trial matters, properly represented the appellant. The CA's responsibility on the matter was placed in issue once his SJA had been put on notice of the possible conflict of interest. Although the case involved a conflict of interest issue, it also serves to highlight the Government's responsibility to ensure counsel adequately represents the appellant during the post-trial stage once on notice that a potential problem with that representation exists. In *Cornelious,* the CA was held to this legal obligation even where the court presumed defense counsel knew or should have known of his client's statements of dissatisfaction and was in a position to address the matter. *Id.* at 398.

Having a similar legal obligation here, the CA clearly failed in that responsibility. The SJA was told, in no uncertain terms, that the substitute defense counsel had not, in a legal or ethical sense, become the appellant's counsel, and had not satisfied his obligation to establish an attorney-client relationship with the appellant, as required by R.C.M. 1106(f)(2) in the time between his assignment as substitute defense counsel (25 October 2002) and receipt of the SJAR (11 December 2002). Once put on notice of this, the SJA should have known that service of the SJAR was not in compliance with R.C.M. 1106(f)(1) and should have determined whether substitute counsel had taken adequate efforts to contact the appellant. Failure to ensure compliance with R.C.M. 1106(f)(1) and (2), in this case, constituted error.

We now consider whether this error was materially prejudicial to the substantial rights of the appellant. The Government cites to *United States v. Miller,* 45 M.J. 149, 151 (C.A.A.F. 1996), as establishing that the error must be tested for prejudice under Article 59(a), UCMJ. In *Miller,* our superior court held that failure of substitute defense counsel to enter into an attorney-client relationship with appellant was equivalent, in a legal and ethical sense, to never becoming appellant's counsel. *Id.* (citing *United States v. Brady,* 24 C.M.R. 266, 270 (C.M.A. 1956)). Consequently, when the SJA caused a copy of his recommendation to be served on substitute counsel, the SJA *unknowingly* failed to comply with the requirement of R.C.M. 1106(f) that such service be "on counsel for the accused." *Id.* Nevertheless, the court recognized that a functioning lawyer with a legal duty to protect an appellant's interests was present and the error of improper service of the SJAR could be tested for prejudice. In reaching this conclusion our superior court noted "that the SJA had no way of knowing that substitute counsel had not become 'counsel for the accused' and, so, apparently had every reason to believe that he had complied fully with his responsibility under R.C.M. 1106(f)(1)." *Id.* The *Miller* court concluded there was no prejudicial error.

In the appellant's case, the SJA knew or should have known that service of the SJAR was not in compliance with R.C.M. 1106(f). As a result of this important distinction, we are not persuaded that *Miller* is controlling in the appellant's case. In *Miller,* our superior court recognized that the SJA could rely on a presumption of regularity and assume that substitute defense counsel would fulfill his responsibility under R.C.M. 1106(f)(2) and establish an attorney-client relationship with the appellant, before examining the recommendation and preparing any response. Again, the appellant's case is quite different and distinguishable from *Miller.* The SJA was clearly put on notice that service of the SJAR was not in compliance with R.C.M. 1106 (f)(1). Substitute defense counsel stated on the receipt of the SJAR that no attorney-client relationship had been established. At a minimum, the SJA had a duty to inquire into the matter and determine whether or not substitute counsel had fulfilled his professional obligation under R.C.M. 1106(f)(2) in representing the appellant prior to allowing the forwarding of the SJAR to the CA for action without comment by the appellant. Service of the SJAR on counsel who has not legally or ethically become counsel for the appellant is tantamount to no service at all.

This court has previously dealt with the issue of failing to serve a copy of the SJAR on trial defense counsel. *United States v. Klein,* 55 M.J. 752 (N.M.Ct.Crim.App. 2001). In *Klein*, the trial defense counsel was not served a copy of the SJAR until five days after the CA had taken action on the case. While this constituted error, the appellant failed to indicate what, if anything, he would have commented upon had he been given a chance. Lacking a colorable showing of possible prejudice, the *Klein* court did not find plain error. *Id.* at 755. Here, as in *Klein*, the appellant has been give an opportunity to show what he would have commented on after having reviewed the record of trial and the SJAR, and has made no such showing. While we find service of the SJAR was improper, without a colorable showing of possible prejudice, we find the error to be harmless.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court