

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

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**James R. AUSTIN
Gunnery Sergeant (E-7), U. S. Marine Corps Reserve**

NMCCA 200500132

Decided 28 February 2007

Sentence adjudged 12 February 2003. Military Judge: J.P. Colwell. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 4th Marine Aircraft Wing, Marine Forces Reserve, New Orleans, LA.

Capt PETER H. GRIESCH, USMC, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to his pleas, of conspiracy to commit larceny and wrongful disposition of property belonging to the United States Government, failure to obey a lawful general regulation, wrongful disposition of military property of the United States, larceny of military property of the United States, and larceny, in violation of Articles 81, 92, 108, and 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 881, 892, 908, and 921. The appellant was sentenced to a \$7,500.00 fine,¹ reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. In his first assignment of error, the appellant asserts that he has

¹ The sentence included the provision that the appellant would serve two months confinement if he did not pay the fine.

been denied appropriate appellate review because the record of trial does not contain one and one-half days of verbatim trial transcript. The appellant's second assignment of error contends that, in accordance with RULE FOR COURTS-MARTIAL 1103(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), the missing pages of the verbatim transcript precludes this court from affirming his bad-conduct discharge.

We have carefully reviewed the record of trial, the appellant's two assignments of error, and the Government's response. We conclude 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's court-martial concluded on 12 February 2003. On approximately 21 July 2003, Staff Sergeant (SSgt) [J], the court reporter, informed the military judge that, due to a transcription malfunction, the Article 39(a), UCMJ, sessions held on 13 and 14 November 2002 were unrecorded. Record at 959.

The military judge apprised the parties of this matter and held a post-trial Article 39(a) session on 24 September 2003 in order to address the issue. At this post-trial session, SSgt [J] testified that she was the court reporter for the unrecorded sessions, described the recording devices used during those sessions, and explained the exhaustive, but unsuccessful, measures she had undertaken in order to recover the unrecorded sessions. *Id.* at 960-78.

The military judge informed the parties that he had reviewed the notes he took during the unrecorded sessions, as well as the applicable appellate exhibits contained in the record of trial, and reconstructed the missing sessions by preparing Appellate Exhibit CLXXX, an 18-page document which he entitled, *The Military Judge's Reconstruction of the Missing Portions.* *Id.* at 959, 978. He also noted that when he ruled on motions in the unrecorded Article 39(a) sessions, he did not issue written findings of fact, conclusions of law, or rulings. Rather, he read his findings of fact, conclusions of law, and rulings into the record from word documents that he had created on his laptop computer. He stated that he had preserved those documents and used them to reconstruct the missing sessions. *Id.* at 980.

The first nine pages of AE CLXXX reconstruct the Article 39(a) session held on 13 November 2002. The military judge's reconstruction indicates that, during the initial portion of this session, the military judge: (1) announced that he and the court reporter were replacing the military judge and court reporter who handled the earlier court-martial sessions; (2) directed Captain Brian Kasprzyk, USMC, the appellant's individual military counsel, to identify himself and list his qualifications for the record; (3) directed the appellant to identify himself and directed Captain Kasprzyk to inform the court if the appellant was wearing all of his awards and decorations and to list them for the record; (4) reviewed the appellant's counsel rights with him, noting that the appellant understood that his detailed defense counsel had been excused from further participation in the case (see AE XXXII at 1), and ascertained that the appellant wanted to be represented by Captain Kasprzyk and Mr. Walter Furlong, his civilian counsel (see AE XXXIV); and, (5) stated that he had been detailed to this case because of a shortage of judges in the Southeast Circuit, listed his qualifications for the record, and indicated that neither party had any *voir dire* questions for him. AE CLXXX at 1-3.

The reconstruction next indicates that the appellant challenged the military judge for cause based on unlawful command influence. *Id.* at 2-3; see AE XXXIII. The reconstruction contains a synopsis of the counsels' arguments, as well as the military judge's specific findings of fact, conclusions of law, and ruling denying the motion. *Id.* at 2-4. The reconstruction indicates that the military judge then denied the civilian defense counsel's request for a two-day continuance in order to further explore the unlawful command influence allegation and synopsized a telephonic RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) conference that he held with the counsel on 6 November 2002. *Id.* at 4-5.

Next, the military judge's reconstruction indicates that the military judge approved, with the appellant's consent, two Government Motions for Minor Changes to the Charge Sheet. *Id.* at 5; see AE XXXV and XXXVI. The reconstruction then notes that the appellant filed a written Motion to Dismiss - Violation of Constitutional Rights and the Government filed a written response. See AE XXXVII and XXXVIII. The reconstruction indicates that the appellant did not present any evidence on the motion, synthesizes counsels' arguments, and states that the military judge took the matter under advisement. AE CLXXX at 5-6.

The military judge's reconstruction next summarizes his 7 November 2002 electronic order to counsel regarding witnesses. The reconstruction lists the ten defense witnesses that the Government will produce for trial. *Id.* at 6-7. The appellant's Motion for Appropriate Relief (Compel Witness Production) and Government's response were then placed into the record. See AE XXXIX and XL. Both parties presented argument concerning additional witnesses requested by the appellant. AE CLXXX at 6-10.

Pages 10 through 18 of Appellate Exhibit CLXXX reconstruct the Article 39(a) session held on 14 November 2002. After receiving additional documentation from the appellant in support of his request for production of a witness (see AE XLI), the military judge's reconstruction indicates that he issued his ruling concerning the appellant's Motion to Dismiss - Violation of Constitutional Rights (AE XXXVII). The military judge's reconstruction summarizes the nature of the motion, noting that the civilian defense counsel concurred with the military judge's summation. It also contains the military judge's extensive ruling denying the motion. AE CLXXX at 10-12. Next, the reconstruction indicates that the military judge made a specific ruling concerning each additional witness requested by the appellant at the 13 November 2002, Article 39(a) session. *Id.* at 12-15.

The reconstruction then denotes that the appellant filed a Motion for Appropriate Relief based on Improper Service and the Government provided a written response. See AE XLII and XLIII. The reconstruction synopsised the counsels' arguments and indicates that the military judge took the matter under advisement. AE CLXXX at 15. Next, the reconstruction indicates that the military judge summarized the appellant's Motion for Appropriate Relief due to improper referral of charges, which was denied by the court on 31 July 2002. See AE XLIV, XLV, and XLVI. The military judge noted that the appellant had filed a Motion for Reconsideration and the Government had filed a response. See AE XLVII, XLVIII, and XLVIX. The reconstruction synopsised the counsels' argument and denotes that the military judge took the matter under advisement. AE CLXXX at 15-16.

Additionally, the reconstruction indicates that the appellant raised an issue concerning withdrawal and re-referral of charges and contains a synopsis of the counsels' arguments. The military judge took the matter under advisement. *Id.* at 16-17. The reconstruction also states that the Government's Motion

for Preliminary Ruling on Admissibility of Evidence was moot at this time. *Id.* at 17-18. Finally, the reconstruction addresses another Government Motion for Preliminary Ruling on Admissibility of Evidence, synthesizes counsels' arguments and then denotes that the "verbatim transcript picks up at this point". *Id.* at 18.

The military judge provided both parties an opportunity to review Appellate Exhibit CLXXX and provide any comments, additions and/or objections. Record at 979-85. SSgt [J] was recalled to the stand and testified that her court-martial worksheet indicates that no witnesses testified at either of the unrecorded Article 39(a) sessions. *Id.* at 986; AE CLXXXI. Both parties concurred with SSgt [J]'s testimony that no witnesses testified at these sessions and concurred that the record of trial contains the evidence presented at the unrecorded sessions. Record at 987-88.

Next, the military judge afforded the appellant's defense counsel the opportunity to be reheard on any issues raised in the unrecorded sessions, including the unlawful command influence, military judge challenge for cause and compulsory process motions. *Id.* at 988-89. The appellant's trial defense counsel informed the military judge that they were not prepared to reargue any of these motions and indicated that this was a hollow remedy since the military judge had previously denied the motions. *Id.* at 989. After a short recess, the appellant's trial defense counsel informed the military judge that they did not desire to be heard on any of the issues raised at the unrecorded sessions. *Id.* at 990. However, the appellant's trial defense counsel objected to the military judge's reconstruction as an inadequate substitution because the appellant "does not have the benefit of a full appellate review of the facts and arguments as they were made at the time." *Id.* at 996.

The military judge overruled the appellant's objection to AE CLXXX and concluded that he was satisfied that it adequately reported the proceedings. *Id.* at 998. Specifically, the military judge determined that the omission from the record of trial was substantial since it consisted of over four hours of court-martial proceedings. *Id.* at 998-1000. The military judge noted that since he concluded that the omission was substantial, a presumption of prejudice to the appellant is raised. However, the military judge concluded that the appellant was not prejudiced for the following reasons:

(1) The issue was discovered prior to authentication of the record of trial;

(2) The military judge was able to recreate a detailed account of the missing sessions;

(3) Counsel have been afforded the opportunity to comment on the military judge's reconstruction document;

(4) Counsel have been afforded the opportunity to be reheard on any issue addressed during the unrecorded sessions, but declined to do so;

(5) All of the evidence presented on the issues addressed during the unrecorded sessions is contained in the record of trial;

(6) All of the military judge's rulings on the issues addressed during the unrecorded sessions were read into the record of trial; and,

(7) The record of trial is only missing the verbatim arguments provided by counsel on the issues addressed during the unrecorded sessions.

Id. at 1000-01.

The military judge then denied the appellant's motion for a mistrial. *Id.* at 1002-04.

Applicable Law

A complete record of the proceedings and testimony must be prepared for any general court-martial resulting in a discharge. Art. 54(c)(1), UCMJ; R.C.M. 1103(b)(2)(A). The court-martial related documentation delineated under R.C.M. 1103(b)(2)(D), which includes all appellate exhibits, must be included in order for the record to be considered complete.

Additionally, a verbatim transcript is required for any trial resulting in a bad-conduct discharge. R.C.M. 1103(b)(2)(B). A verbatim transcript includes all proceedings, arguments of counsel, ruling and instructions by the military judge, and matters which the military judge orders stricken from the record or discarded. *Id.*, Discussion. However, a complete record does not necessarily mean that the entire record is verbatim. *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R 179, 181 (C.M.A. 1953)). Moreover, our superior court has long recognized that literal compliance with the verbatim requirement is impossible. *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982). Accordingly, a record of trial must be substantially verbatim. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *Id.* at 110. As we conduct our *de novo* review, we are mindful that "[t]he requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived. *Id.* (citing *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Whitney*, 48 C.M.R. 519 (C.M.A. 1974)). We also recognize that "[a] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *Id.* at 111 (citing *McCullah*, 11 M.J. at 237; *Gray*, 7 M.J. 296; and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

In this case, we note that the record of trial contains all of the required documentation, including all of the evidence and appellate exhibits that pertained to the motions addressed during the unrecorded 13 and 14 November 2002, Article 39(a) sessions. As we previously noted, no witnesses testified during the unrecorded sessions. Record at 987-88. During the post-trial Article 39(a) session, the military judge informed the parties that he did not issue written findings of fact, conclusions of law, or rulings. Instead, he read his findings of fact, conclusions of law, and rulings into the record from word documents he created on his laptop computer. The military judge retained these documents and used them to reconstruct the unrecorded sessions.

Upon review of the post-trial Article 39(a) session and Appellate Exhibit CLXXX, we have determined that the only portion of the record of trial that is not verbatim are the arguments of counsel, which were made in support of, or in opposition to, the motions addressed during the unrecorded sessions. We have previously held that "[w]e do not view the absence of defense counsel argument as a substantial omission so as to raise a presumption of prejudice." *United States v. Maxwell*, 2 M.J. 1155, 1156 (N.C.M.R. 1975)(citing *Boxdale*, 47 C.M.R. 351 and *United States v. Webb*, 49 C.M.R. 667 (C.M.A. 1975)). Accordingly, we are convinced that the record of trial is complete and substantially verbatim.

Assuming, *arguendo*, that the record of trial is incomplete because the omission of the counsels' arguments is substantial, thus triggering a presumption of prejudice, we find that the

Government has rebutted the presumption for the following reasons:

(1) The military judge directed a post-trial Article 39(a) session in order to resolve the issue with both parties prior to authenticating the record of trial;

(2) The military judge was able to recreate a detailed account of the unrecorded sessions;

(3) Counsel were afforded the opportunity to comment on the military judge's reconstruction document;

(4) Counsel were afforded the opportunity to be reheard on any issue or motion addressed during the unrecorded sessions, but declined to do so;

(5) All of the evidence presented on the issues addressed during the unrecorded sessions is contained in the record of trial;

(6) All of the appellate exhibits pertaining to the issues and motions litigated during the unrecorded sessions are contained in the record of trial;

(6) All of the military judge's rulings on the issues addressed during the unrecorded sessions are contained in the record of trial; and,

(7) On appeal, the appellant has not alleged that the military judge erred in denying any of the motions or issues raised by the appellant during the unrecorded sessions.

Conclusion

The appellant's two assignments of error are without merit. Accordingly, we affirm the findings of guilty and the sentence, as approved by the convening authority.

Chief Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court