

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

**BEFORE**

**J.D. HARTY**

**R.G. KELLY**

**W.M. FREDERICK**

**UNITED STATES**

**v.**

**Austin M. BARR  
Electrician's Mate Fireman Apprentice (E-2), U.S. Navy**

NMCCA 200602492

Decided 17 July 2007

Sentence adjudged 10 August 2006. Military Judge: D.M. Mcquiston. Staff Judge Advocate's Recommendation: CDR C.D. Jung, JAGC, USN. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS DWIGHT D. EISENHOWER (CVN 69).

LCDR DEREK HAMPTON, JAGC, USN, Appellate Defense Counsel  
LT DEREK BUTLER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, one specification of wrongful use of marijuana, two specifications of breaking restriction, and one specification of wrongful use of a military identification card and liberty card in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. A substitute convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. Pursuant to a pretrial agreement, the CA suspended all confinement in excess of four months for a period of twelve months from the date of his action.

We have examined the record of trial, the appellant's two assignments of error,<sup>1</sup> and the Government's response. We conclude that the CA erred by not addressing the judicially ordered confinement credit in his action. We will order corrective action in our decretal paragraph. We may only act with respect to the findings and sentence as approved by the CA. Art. 66(c), UCMJ. Because we are returning the record of trial to the CA to withdraw his action and substitute a corrected action, we will not conduct our statutory review until this case is returned to us following the corrective action. We can, however, address the appellant's assignments of error concerning post-trial processing.

#### **Staff Judge Advocate's Recommendation (SJAR)**

For his first assignment of error, the appellant argues there is "no description of the amount of pre-trial confinement" that the appellant served and, that the SJAR incorrectly stated there was no judicially ordered confinement credit. Appellant's Brief of 12 Feb 2007 at 3. He further argues this is plain error.

The appellant did not raise this issue after being served with the SJAR. See Clemency Request of 30 Nov 2006. We conclude that the appellant waived this issue on appeal by failing to raise it in his response to the SJAR, absent plain error. We do not find plain error. See *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) ("If defense counsel does not make a timely comment on an omission in the SJA's recommendation, the error is waived unless it is prejudicial under a plain error analysis."). We will explain why we do not find plain error.

The appellant bears the burden to show a material prejudice to a substantial right resulting from the error in order to convince us there is plain error. *Id.* "To meet this burden in the context of a post-trial recommendation error, whether that error is preserved or is otherwise considered under the plain error doctrine, an appellant must make 'some colorable showing of possible prejudice.'" *Id.* at 436-37 (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). The appellant has failed to meet his burden in the present case.

First, the appellant's assertion that there is "no description of the amount of pre-trial confinement" in the SJAR is incorrect. Although the SJAR is silent as to judicially ordered credit, the SJAR does reflect "confinement from 28 May

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<sup>1</sup> I. WHETHER THE FORCE JUDGE ADVOCATE COMMITTED PLAIN ERROR IN HIS RECOMMENDATION BY OMITTING A DESCRIPTION OF THE NATURE AND DURATION OF PRETRIAL RESTRAINT SERVED BY APPELLANT AND INCORRECTLY DESCRIBING THE JUDICIALLY ORDERED CONFINEMENT CREDIT.

II. WHETHER THE CONVENING AUTHORITY ERRED IN HIS ACTION BY NOT CREDITING APPELLANT WITH THE FIVE DAYS CREDIT FOR ILLEGAL PRETRIAL CONFINEMENT AWARDED BY THE MILITARY JUDGE.

2006 to 10 August 2006." SJAR of 21 Nov 2006 at 3. Second, while the SJAR does not mention pretrial restriction, it is clear from the providence inquiry that the appellant was placed on pretrial restriction on 16 May 2006 after terminating the period of unauthorized absence (UA) alleged in Specification 2 under Charge I. Record at 65. The appellant then broke that restriction on 21 May 2006, as alleged in Specification 2 under Charge IV. *Id.* at 66. He remained in a UA status until 27 May 2006 as alleged in Specification 1 under Charge I. After returning to military control on 27 May 2006, he again broke restriction on 28 May 2006. *Id.* at 68. Third, the CA considered the results of trial and the entire record of trial in taking his action. CA Action of 4 Dec 2006 at 3. Therefore, the CA was aware that: (1) the appellant had been in pretrial restriction; (2) the appellant received 74 days of pretrial confinement credit; and, (3) the appellant received an additional five days of judicially ordered confinement credit. See Results of Trial of 10 Aug 2006 at 2; Record at 65-66, 39-41, 90.

The omission of pretrial restraint information from the SJAR is not inherently prejudicial. There must be a colorable showing of possible prejudice in terms of how the omission potentially affected the appellant's opportunity for clemency. *Scalo*, 60 M.J. at 437. The appellant has made no such showing, and we are hard pressed to believe that a CA would be persuaded to award clemency if pretrial restraint information that he already considered from the record was repeated in the SJAR. We do not find a colorable showing of possible prejudice, and therefore, do not find plain error. We conclude, therefore, that this issue is waived.

#### **Convening Authority's Action**

For his second assignment of error, the appellant claims that the CA erred by failing to note the administrative confinement credits or the R.C.M. 305(k) judicially ordered confinement credits in his promulgating order, but then cites to the CA's action. The appellant requests a supplemental court-martial order that accurately reflects his confinement credits. Appellant's Brief at 6. The Government argues that the appropriate remedy is to order the credit in our decretal paragraph, citing *United States v. Key*, No. 9602177, unpublished op. (N.M.Ct.Crim.App. 1997). Government's Answer of 9 Mar 2007 at 4. The Government does not attach a copy of that unpublished opinion to its brief.

We are not convinced the appellant is making a clear distinction between a CA's action and a court-martial promulgating order. A CA's action is separate from the court-martial promulgating order, although they are frequently contained in the same physical document. The CA's action contains the CA's orders concerning the approved sentence, including any clemency awarded, and it may, but does not necessarily, address the findings. If a sentence including confinement is approved, the place of confinement is designated.

The CA can also use his action to order rehearings. See R.C.M. 1107. A court-martial promulgating order, however, publishes the results of trial, including the charges, pleas entered, findings, and sentence; it also includes at least a summary of the action taken by the CA. See R.C.M. 1114.

As the appellant correctly points out, the court-martial promulgating order does not reflect the judicially ordered confinement credit. Appellant's Brief at 6. However, there is no requirement that a court-martial promulgating order contain that information. See R.C.M. 1114(c). A CA's action, however, is required to contain information concerning confinement credit ordered by the military judge pursuant to R.C.M. 305(k). See R.C.M. 1107(f)(4)(F).

Even though the CA's action does not contain the required judicially ordered credit information, the appellant specifically states that he "does not allege that he did not receive appropriate credit from the confinement facility . . . ." Appellant's Brief at 6, fn 18. Therefore, we do not find any prejudice to the appellant flowing from the omission of R.C.M. 305(k) confinement credit information from the CA's action. Our superior court, however, faced with an identical shortcoming in a CA's action, specifically found the same lack of prejudice, and, in a unanimous decision without reference to plain error, directed corrective action because they did "not intend that . . . [their] decision encourage deliberate or negligent disregard of presidential rule-making [citation omitted] or create unnecessary doubt concerning this administrative credit." *United States v. Stanford*, 37 M.J. 388, 391 (C.M.A. 1993).<sup>2</sup>

Although our superior court has moved to a prejudice standard for post-trial processing error involving the SJAR, it has not applied that same standard to the omission of judicially ordered confinement credit in the CA's action. Compare *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (adopting a prejudice standard for relief from SJAR errors) with *Stanford*. We believe a prejudice standard should be the appropriate standard of review for the omission involved here, coupled with the appellant's right to have accurate official records. See *United States v. Crumpley*, 49 M.J. 538 (N.M.CT.Crim.App. 1998). This approach would not result in CA actions being returned when they could be corrected at the appellate level. There is some authority for this approach.

Failure to include judicially ordered R.C.M. 305(k) confinement credit in a CA's action results in an incomplete CA's action, in that the action does not contain all the information that is required. R.C.M. 1107(g) grants a service court of criminal appeals the discretion to direct the CA to withdraw the incomplete CA's action and substitute a corrected CA's action. That same discretion should include the appellate authority to

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<sup>2</sup> Neither party cites *Stanford* in their brief.

direct the judicially ordered confinement credit when there has been no prejudice to the appellant.

We, however, are not generally free to ignore precedent established by our superior court. *United States v. Jones*, 23 M.J. 301, 302 (C.M.A. 1987). We will, therefore, as we have in the past, see *United States v. Receskey*, No. 96001574, unpublished op. (N.M.Ct.Crim.App. 3 Apr 1997), reluctantly return the record to the Judge Advocate General for remand to the CA for a corrected CA's action, as have our sister courts. See *United States v. Gaither*, 41 M.J. 774, 780 (A.F.Ct.Crim.App. 1995); *United States v. Youngberg*, 38 M.J. 635 (A.C.M.R. 1993).

### **Conclusion**

The record of trial is returned to the Judge Advocate General for remand to the CA for withdrawal of the action and substitution of a corrected action specifically addressing the judicially ordered R.C.M. 305(k) confinement credit. R.C.M. 1107(g). Thereafter, the record of trial shall be returned to this court at which time Article 66(c), UCMJ, shall apply.

Judge KELLY and Judge FREDERICK concur.

For the Court

R.H. TROIDL  
Clerk of Court