

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
E.E. GEISER, F.D. MITCHELL, J.G. BARTOLOTTA  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DEREK C. BURCH  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700047  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 24 May 2005.

**Military Judge:** LtCol Jeffrey Meeks, USMC.

**Convening Authority:** Commanding Officer, Marine Wing Support Squadron 371, Marine Wing Support Group 37, 3d Marine Aircraft Wing, MarForPac, MCAS, Yuma, AZ.

**Staff Judge Advocate's Recommendation:** Col C.J. Woods, USMC.

**For Appellant:** LT HEATHER CASSIDY, JAGC, USN.

**For Appellee:** LT JUSTIN DUNLAP, JAGC, USN; LT LARS JOHNSON, JAGC, USN.

**13 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

GEISER, Senior Judge:

The appellant was convicted, consistent with his pleas, by a military judge sitting as a special court-martial of damaging military property and two specifications of assault consummated by a battery, in violation of Articles 108 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 928. The appellant was sentenced to a bad-conduct discharge, confinement for one year, and reduction to paygrade E-1. The convening authority approved the sentence as adjudged but suspended, *inter alia*, all confinement over 45 days in accordance with the pretrial agreement.

The appellant raises two assignments of error. First, he asserts that the military judge erred when he considered false statements made by the appellant during a rejected guilty plea as evidence of the appellant's lack of rehabilitative potential following a subsequent successful guilty plea to the same offenses. Second, the appellant argues that he was forced to serve 269 days of confinement in excess of that authorized under the pretrial agreement and provided for in the convening authority's action.

We have examined the record of trial, the assignments of error, and the Government's response. We have also considered the appellant's and the Government's briefs of our specified issue.<sup>1</sup> We find merit in the appellant's second assignment of error but decline to provide relief. 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.

### **Background**

On 1 November 2004, the appellant was arraigned before a military judge sitting as a special court-martial. Pursuant to a pretrial agreement (PTA), the appellant elected a judge-alone trial and entered pleas of guilty to one specification of damaging military property (Art. 108, UCMJ) and two specifications of assault consummated by a battery involving his wife and infant child (Art. 128, UCMJ).<sup>2</sup> The military judge accepted the appellant's plea to the Article 108, UCMJ, charge and specification and entered findings of guilty.

During the providence inquiry into the Article 128, UCMJ, assault and battery offenses, the appellant testified that the attack on his wife occurred immediately after he awoke from a violent Iraq-induced nightmare/flashback and that he didn't fully understand it was his wife he was striking. The military judge identified the potential for a Post-Traumatic Stress Disorder (PTSD) defense and correctly rejected the appellant's pleas of guilty to the assaults, entering pleas of not guilty on his behalf. The Government indicated that the convening authority would no longer be bound by the PTA and that the Government would go forward on the two assault charges.

On 24 May 2005, the appellant was back in court before the same military judge with the same charges and specifications and a new PTA. Pursuant to his new PTA, the appellant again elected trial by military judge alone and again pled guilty to the identical two assault specifications. During this providence inquiry the appellant acknowledged striking and biting his wife and throwing his infant child. When questioned about the nightmare issues he related during the November 2004 providence inquiry, the appellant stated that he'd been trying to

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<sup>1</sup> MAY THIS COURT CONSIDER MATTERS OUTSIDE THE 4-CORNERS OF THE CONVENING AUTHORITY'S ACTION TO DETERMINE IF THAT ACTION IS INCOMPLETE, AS THAT TERM IS USED IN RULE FOR COURTS-MARTIAL 1107(G), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ED.)?

<sup>2</sup> It was alleged that the appellant became angry at his wife and struck/damaged a door in military housing with his fist during the course of an argument (Art. 108, UCMJ) and that he thereafter assaulted his wife by striking and biting her and assaulted his infant child by throwing the child 2-3 feet through the air to his wife (Art. 128, UCMJ). Record at 16, 73, 78.

“minimize his conduct” and that at the time of the assaults he was “just drunk.” Record at 71. The appellant acknowledged that he knew he was assaulting his wife and child and that the attack had nothing to do with his service in Iraq.

On this occasion, the military judge accepted the appellant’s guilty pleas and, following a careful review of the new PTA, found him guilty of the two assault specifications in addition to the November 2004 finding of guilty to the Article 108, UCMJ, offense. During presentencing for all three specifications, the Government asked the court to consider the appellant’s responses during the providence inquiry as a matter in aggravation. The defense did not object or ask for clarification whether the ruling included the November 2004 providence inquiry. *Id.* at 92. The Government thereafter presented documentary evidence and witness testimony unrelated to the issue at bar.

During the defense sentencing case, the appellant testified under oath. *Id.* at 126. On direct, he talked about his time in Iraq, his family separation, and mental and emotional changes he experienced following his return from deployment. He acknowledged an ongoing alcohol and anger management problem. On cross-examination, the Government focused, *inter alia*, on the appellant’s statements to the military judge during the November 2004 providence inquiry into the assault charges. The appellant acknowledged that he lied to the military judge during the first providence inquiry and that he had been trying to minimize his misconduct. The defense did not object to this line of questioning. *Id.* at 136.

The prosecution, in its sentencing argument, again emphasized the inaccurate and self-serving assertions made by the appellant during his November 2004 providence inquiry. In particular, the prosecutor averred that the appellant concocted a story and tried to use his service in Iraq as an excuse for his misconduct. *Id.* at 155. The defense did not object. Finally, just prior to announcing sentence, the military judge stated that in arriving at a sentence he’d considered the appellant’s prior self-serving statements made during the November 2004 providence inquiry insofar as they related to the appellant’s rehabilitative potential. *Id.* at 159. Again, the defense made no objection.

### **Use of Statements Made During a Rejected Guilty Plea Inquiry**

The appellant asserts that the military judge erred when he considered statements made by the appellant during a rejected guilty plea inquiry. He argues that the military judge’s error was occasioned by an incorrect interpretation of the law. We examine a military judge’s legal analysis *de novo*.

MILITARY RULE OF EVIDENCE 410(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2005 ed.), states that evidence of “a plea of guilty which was later withdrawn” is not admissible in any court-martial proceeding against the accused who made the plea. This rule has been interpreted by our superior court to also protect statements made during a guilty plea that is rejected by the military judge. *United States v. Heirs*, 29 M.J. 68, 69 (C.M.A. 1989). We concur with the appellant’s general recitation of the relevant law. We also concur with his concession that all of the relevant cases cited by him involving the use of information derived from an unsuccessful guilty plea also involved a subsequent contested trial on the merits of the same

charge or charges.<sup>3</sup> Appellant's Brief and Assignment of Error of 20 Mar 2007 at 9. We do not, however, concur that the military judge violated MIL. R. EVID. 410, UCMJ, when he considered statements made by the appellant during the November 2004 providence inquiry. The record is clear that the appellant expressly waived the protections of MIL. R. EVID. 410, UCMJ, and authorized the military judge to consider for sentencing purposes statements made by the appellant during both phases of the providence inquiry.

We begin by noting that, notwithstanding the approximately six month separation between the appellant's November 2004 providence inquiry and the May 2005 inquiry, the two proceedings were parts of the same trial. Both proceedings involved the same appellant, the same charges, and the same victims. The appellant's sentencing in May 2005 was, in part, premised on his guilty plea to the Article 108, UCMJ, offense entered and accepted during the November 2004 proceeding. Record at 42. The May 2005 proceeding actually began with a recap of the November 2004 hearing to include inquiry whether the Government had complied with the court's November 2004 order to provide the defense with an expert consultant on sanity issues. *Id.* at 57, 65.

As part of his May 2005 providence inquiry, the appellant agreed that his responses during the providence inquiry could be used by the military judge for sentencing purposes. *Id.* at 68. The military judge preceded the May 2005 providence inquiry with reference to the flashback or nightmare scenario set out by the appellant in the November 2004 providence inquiry. The appellant acknowledged discussing the issue with counsel and affirmatively indicated his preparedness to discuss the matters raised in the November 2004 providence inquiry again during the May 2005 inquiry. *Id.* at 64.

The military judge was, in fact, obligated to incorporate the appellant's statements from the November 2004 providence inquiry into his May 2005 providence inquiry to ensure the appellant no longer believed he had a PTSD-related defense to the charged offenses. While the six-month delay between the two hearings is unusual, it is not fundamentally different from a more common scenario where an appellant sets up a matter inconsistent with guilt during an initial providence inquiry session and is granted a recess to consult with counsel prior to resuming the inquiry. All personnel present, including the appellant, clearly viewed the May 2005 proceeding as a continuation of the November proceeding.

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<sup>3</sup> *United States v. Grijalva*, 55 M.J. 223 (C.A.A.F. 2001)(information from unsuccessful guilty plea to attempted premeditated murder could not be used as evidence of premeditation on merits in later contested premeditated murder prosecution); *United States v. Vasquez*, 54 M.J. 303 (C.A.A.F. 2001)(use of an appellant's prior request for an other-than-honorable discharge in lieu of court-martial could not be used as aggravation evidence in subsequent trial for the same offenses); *Heirs*, 29 M.J. at 68 (a statement made during an unsuccessful guilty plea could not be used in a post-trial assessment of the sufficiency of the evidence); *United States v. Barunas*, 23 M.J. 71 (C.M.A. 1986)(statements made in a letter from an accused to his commanding officer setting out the facts of the case and begging for other avenues of punishment short of court-martial could not be used on the merits at a subsequent court-martial for the same drug use); *United States v. Shackelford*, 2 M.J. 17 (C.M.A. 1976)(military judge may not use information obtained during an earlier unsuccessful guilty plea to extensively question an accused testifying on the merits before members on the same charge).

In view of this, the appellant's express agreement that the military judge could consider his providence inquiry for sentencing purposes included both the November 2004 and the May 2005 providence inquiries. We find, therefore, that the military judge did not abuse his discretion and did not violate Mil. R. Evid. 410, when he considered for sentencing purposes, with the express consent of the appellant, false statements made by the appellant during his November 2004 providence inquiry.

### **Failure to Comply with Pretrial Agreement**

The appellant's second assignment of error asserts that he was wrongfully held in confinement for a period of 269 days beyond that provided for in his PTA. The following additional information is relevant to our disposition of this issue.

#### **Background**

On 24 May 2005, the appellant and the convening authority entered into a PTA providing, *inter alia*, that in return for the appellant's guilty pleas, the convening authority would suspend all confinement in excess of 45 days for a period of 12 months from the date of the convening authority's action. The agreement further provided that such suspension was contingent on the award of a punitive discharge at trial, the appellant's submission of a request for voluntary appellate leave within five days of trial, and the appellant's continued good conduct.

With respect to the last contingency, the agreement provided as follows:

"The appropriate authority may order executed the full sentence, following an evidentiary hearing, if the breach or misconduct occurs after trial, but before the completion of my sentence, to include the time period in which any portion of my sentence is suspended."

Appellate Exhibit VIII at 2.

The appellant was tried on 24 May 2005 and confined the same day. He was released from confinement on 28 June 2005. In accordance with the PTA, his remaining confinement was deferred pending completion and issuance of the convening authority's action. On 3 August 2005, the appellant was observed by a Marine lieutenant colonel to be driving an automobile significantly above the posted speed limit. The appellant was in uniform at the time. The officer followed the appellant into a military parking lot and confronted him. The appellant was disrespectful in tone and body language to the officer. After being ordered to accompany the officer to his staff noncommissioned officer, the appellant made an unsuccessful attempt to hide by blending in with other similarly attired Marines in a formation. The officer located the appellant and delivered him to the staff sergeant in charge of the formation. The officer described the speeding, disobedience, and disrespect, and left the appellant with his chain of command for appropriate corrective action.<sup>4</sup>

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<sup>4</sup> Marine Wing Support Squadron 371 Memorandum of 4 Jan 2006 (Results of Proceedings to Rescind and Withdraw from the Confinement Sentence Limitation Provision ICO Cpl Derek C. Burch, USMC) at 1-2.

On 19 October 2005, the special court-martial convening authority (SPCMA) held a proceeding consistent with the PTA to determine if the appellant had committed additional misconduct. The appellant was represented by legal counsel at the hearing. The convening authority determined that post-trial misconduct had occurred and that the appellant should serve the remaining portion of his confinement. He forwarded a report detailing the hearing, his determination of misconduct and his intent to return the appellant to confinement to his immediate superior for review. On 23 January 2006, the Commanding General, Third Aircraft Wing, endorsed the report of the hearing specifically concurring in the finding of misconduct and further concurring in the SPCMA's decision to rescind the deferment of confinement and order the appellant to serve his remaining confinement. The following day, the appellant was ordered back into confinement by the SPCMA to serve out the remainder of his adjudged sentence.

On 11 March 2006, while the appellant was still serving his remaining confinement, the convening authority took action in the appellant's case. In that action, the convening authority expressly stated that

“execution of that part of the sentence adjudging confinement in excess of 45 days is suspended for a period of 12 months from the date of this action, at which time, unless sooner vacated, the suspended portion will be remitted without further action.”

Special Court-Martial Order No. 70-05 dated 11 Mar 2006. The appellant was not released from confinement until 20 October 2006 when his one year of confinement, minus good-time, had been fully served.

## **Discussion**

Summarizing all the events detailed above, it appears that, on the date of the convening authority's action, the appellant had served 45 days of adjudged confinement as provided for in the PTA. It also appears the appellant had served an additional 46 days of his adjudged confinement pursuant to the SPCMA's post-trial determination that the appellant had violated the post-trial misconduct provision in his PTA. The appellant does not contest the authority of the SPCMA to conduct the post-trial misconduct hearing, the accuracy of the hearing report contained in the record of trial, or the SPCMA's post-trial misconduct determination and action withdrawing deferment of the appellant's adjudged confinement. The appellant does contend, however, that the effect of the unambiguous convening authority's action of 11 March 2006 was to suspend all remaining adjudged confinement after the date of that action.

Pursuant to RULE FOR COURTS-MARTIAL 1107(g), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) when an action is “incomplete, ambiguous, or erroneous,” this Court may instruct the relevant convening authority to “withdraw the original action and substitute a corrected action.” The appellant cites *United States v. Loft*, 10 M.J. 266, 268 (C.M.A. 1981), for the proposition that “when only one meaning can be derived from the plain language of the words used in the action, the action is not ambiguous.” Appellant's Reply of 18 Jun 2007 at 2. We agree with the appellant that a plain reading of the convening authority's action without

reference to other post-trial documents in the record of trial unambiguously reflects suspension of all adjudged confinement in excess of 45 days, effective 11 March 2006.

Our superior court's recent decision in *United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007), constrains us from considering anything outside the 4-corners of the unambiguous and complete 11 March 2006 convening authority's action. As asserted by the appellant and conceded by the Government, there is nothing within the 4-corners of the action to suggest that the convening authority did not intend, as an act of clemency, to suspend all of the appellant's remaining confinement. We are bound, therefore, under *Wilson* to give the document effect notwithstanding its glaring inconsistency with the rest of the record. We find, therefore, that the appellant's Fifth Amendment due process rights were violated when he was held in confinement 223 days more than was provided for in the convening authority's action.<sup>5</sup>

We now consider whether this constitutional due process violation was harmless beyond a reasonable doubt. In this regard, we note that while *Wilson* constrains us to give the convening authority's action full effect without reference to any evidence outside the document itself, *Wilson* does not so limit us when we consider whether the constitutional error was harmless beyond a reasonable doubt. After careful consideration of the entire record of trial, we find that the due process violation was harmless beyond a reasonable doubt.

The record contains the results of the SPCMA's 19 October 2005 post-trial misconduct hearing. That hearing appears to have been conducted in accordance with the misconduct provisions of the pretrial agreement signed by the appellant. The record also contains an endorsement by the relevant GCMCA affirming the SPCMA's analysis and intention to return the appellant to complete his adjudged confinement. Records from the confinement facility confirm that the appellant was ordered back into confinement by the SPCMA. The appellant does not contest the accuracy of any of these documents.

With respect to the convening authority's intent, there is no evidence in the record of any subsequent hearings, decisions, clemency petitions, or other communications between the appellant's return to confinement on 24 January 2006 and the convening authority's action on 11 March 2006. Further, there is no evidence in the record of any discussions, requests, or action relating to the appellant's continued confinement between the 11 March 2006 action and the appellant's eventual release from confinement on 20 October 2006. Based on a careful review of the entire record, it is evident that the overwhelming wealth of evidence indicates that, notwithstanding the plain language of the convening authority's action, the convening authority did not intend to release the appellant from confinement prior to completion of his adjudged sentence in October 2006. We, therefore, find that the due process violation was harmless beyond a reasonable doubt.

At first blush, our two-part analysis may appear internally inconsistent. This is not the case, however. As noted by the appellant and conceded by the Government, for purposes of ascertaining the convening authority's intent in the convening authority's action, we are bound

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<sup>5</sup> The appellant claims he served an additional 269 days of confinement but his number includes 46 days served between his re-confinement for post-trial misconduct and the date of the convening authority's action which suspended further confinement.

by *Wilson* to limit our evidentiary scrutiny to the four corners of the document itself. We have done so. With respect to our analysis of harm, however, we are not so bound and have, in fact, considered the entire record of trial to determine beyond a reasonable doubt whether the appellant was harmed by his continued confinement after 11 March 2006. Our consideration of matters outside the four corners of the convening authority's action for purposes of assessing harm in cases involving a constitutional due process violation is entirely consistent with our superior court's practice in cases involving a variety of constitutional violations. *See United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007)(improper reference to invocation of constitutional rights); *United States v. Gosser*, 64 M.J. 93 (C.A.A.F. 2006)(due process violation due to post-trial delay); *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997)(right to assistance of counsel).

Considering the entire record of trial to include the documents relating to the appellant's post-trial misconduct and re-confinement, we find beyond a reasonable doubt that the appellant suffered no prejudice from this error. The record is clear that the additional confinement served by the appellant was due to his own post-trial misconduct and that his re-confinement was preceded by a fair and impartial hearing held in accordance with his pretrial agreement.

### **Conclusion**

The approved findings and the sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL  
Clerk of Court