

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Aaron J. CHAPMAN  
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200700035

Decided 17 July 2007

Sentence adjudged 12 July 2006. Military Judge: J.G. Meeks.  
Staff Judge Advocate's Recommendation: LtCol R.M. Miller, USMC.  
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial  
convened by Commanding Officer, 2d Battalion, 11th Marines, 1st  
Marine Division, Camp Pendleton, CA.

CAPT WILLIAM VAN BLARCUM, JAGC, USN, Appellate Defense Counsel  
Maj ROBERT M. FUHER, USMC, Appellate Government Counsel  
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of unauthorized absence and missing movement by design, in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The appellant was sentenced to confinement for seven months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have examined 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.

## Sentencing Evidence

The appellant's two assignments of error concern the Government's presentation of evidence in aggravation. The appellant first contends the military judge erred when he allowed testimony in aggravation regarding the unexpected deployment of another Marine (*i.e.*, Lance Corporal (LCpl) Alvarez) to Iraq and then considered facts not in evidence based on that testimony. The appellant's second assignment of error contends the military judge erred when he allowed testimony in aggravation, and later argument on sentencing, regarding the injuries sustained in Iraq by a third Marine due to the appellant's actions. We disagree with both assignments of error.

### A. Facts

In its case in aggravation, the Government called Corporal (Cpl) Anthony. The relevant portions of Cpl Anthony's testimony at issue are:

Q. When was it noticed that Lance Corporal Chapman was not with Golf 2/11?

A. It was about the last week of February, sir.

Q. And when was it - did he ever, to had [sic] best of your knowledge, come back to 2/11?

A. No, sir. I have no clue where he was, sir.

Q. Was he replaced with someone?

A. I'm not [sic] if he was replaced, but we definitely picked up another guy soon as he was no longer a [sic] picture, sir. Lance Corporal Alvarez, sir.

Q. Did - do you know if Lance Corporal Alvarez volunteered for that?

A. He did not volunteer. He was picked, sir.

Q. Does Lance Corporal Alvarez - What kind of notice did he get?

DC: Objection. Speculation, sir.

MJ: Do you know what kind of notice he received? What was he doing? What unit was he with?

WIT: Lance Corporal Alvarez, sir?

MJ: Yes.

WIT: He was with Kilo? [sic]

MJ: And was Kilo deploying with you?

WIT: No, sir.

MJ: Okay. So he was with Kilo, and then he was pulled over to Golf to deploy with Golf?

WIT: Yes, sir.

MJ: I am not sure what your objection is.

DC: Well I think the question was how much notice did he have.

MJ: Okay. Then on that basis the objection is overruled. He said the guy was at another battery and got pulled over to his battery? [sic]

DC: Aye, aye, sir.

MJ: Okay. So the objection is overruled.

. . . .

Q. Did you receive any injuries while in Iraq?

A. Yes, sir.

Q. And can you explain what happened?

DC: Objection. Improper evidence and [sic] aggravation, sir.

MJ: Overruled.

Q. Please explain what happened to you?

A. Yes, sir. Basically, on June 16th EOD security went out and laid the Humvee to the tread. It was a busy day, and while we were on mission for investigating an IED, I was standing on a building rooftop, and that is when I heard a shot and felt something punch me in the right eye, sir.

Q. What actually happened to you?

A. It was actually a sniper's bullet and from [sic] they could tell me, it bounced off the 50-cal in front of me and went into my eye, sir.

TC: Corporal Anthony, thank you. The defense counsel may have questions for you and the military judge.

MJ: I will note that the testimony that was just provided, I believe is directly relating to or resulting from

the conduct of the accused. It is directly relating to and it provides information to me to the type of duty that the accused took action to avoid. I will consider it for that purpose.

I believe that on the scale of aggravation in the area of missing movement by design, the type of danger the unit is moving into is relevant in considering what the nature of the specific intent of the accused [sic], what he was seeking to avoid and the actual danger that he was in fact seeking to avoid are relevant factors, and I will [sic] them.

I also conducted a 403 balancing test. I found this information to be highly provative [sic]. I find its prejudicial effect to be low. I find that the purpose of the [sic] Article 87 in part, is to allow punishment for individuals who take action to not only avoid their obligation to be with their unit, but also to avoid the risks associated with military service, and on that basis I will allow the evidence to come in.

Record at 37-39.

During trial counsel's short sentencing argument the following transpired:

TC: Sir, the government is going to recommend 90 days confinement, forfeiture of two-third [sic] pay for three months, reduction to E-1, and a bad-conduct discharge. 90 days, Lance Corporal Chapman needs to be punished, sir. He chose to not be with the Marine Corps. He chose to not go with his unit to war.

MJ: He sent Lance Corporal Alvarez over there seven months early by his actions; correct?

TC: Say it again, sir.

MJ: He sent another Marine to Iraq a year early on a couple days notice; correct?

TC: Yes, sir.

MJ: Okay.

*Id.* at 46.

## B. Analysis

### 1. AOE I regarding LCpl Alvarez's deployment.

Failure to object to evidence at trial constitutes a forfeiture of the objections to admission of such evidence in the absence of plain error. *United States v. Prevatte*, 40 M.J. 396, 397 (C.M.A. 1994). Failure to object to improper argument before the military judge begins to instruct the members on findings also constitutes waiver absent plain error. *United States v. Haney*, 64 M.J. 101, 105 (C.A.A.F. 2006). "Plain error occurs when: (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

Trial defense counsel objected to Cpl Anthony's knowledge of the notice LCpl Alvarez received regarding deployment.<sup>1</sup> He did not, however, object to Cpl Anthony's testimony inferring that LCpl Alvarez was selected as a deployment replacement for the appellant, nor did he object to the military judge's questions during argument or trial counsel's responses regarding this inference. Therefore, absent plain error, the issue is waived.

Applying the plain error analysis to these facts we find no plain error. Trial counsel may argue the evidence of record as well as all reasonable inferences fairly derived from such evidence. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). As the sentencing authority here the military judge could consider any reasonable inferences derived from the evidence. *United States v. Fraizer*, 33 M.J. 260, 263 (C.M.A. 1991)(quoting *United States v. Stevens*, 21 M.J. 649, 652 (C.M.A. 1985)(Everett, S.J., concurring in the result)). Furthermore prior to arguments on sentencing, the appellant stated in his unsworn statement that his actions "moved up another man a year." Record at 46. Although an accused may not be questioned by trial counsel or the military judge about an unsworn statement, the statement may still be considered by the military judge for purposes of sentencing. RULE FOR COURTS-MARTIAL 1001(c)(2),

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<sup>1</sup> Contrary to the appellant's claim, the military judge did acknowledge and rule on trial defense counsel's objection. Appellant's Brief 14 Jun 2007 at 4; Record at 38. Also incorrect is the appellant's claim that the speculation objection made referred to the "link" between the appellant's actions and LCpl Alvarez's deployment. Appellant's Brief at 4. Trial defense counsel specifically stated his objection was to the question regarding the deployment notice LCpl Alvarez received and, on that basis, it was overruled. Record at 38.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The appellant's unsworn statement reinforced the inference that LCpl Alvarez was his deployment replacement. This assignment of error lacks merit.

## **2. AOE II regarding Cpl Anthony's injuries.**

The Government is permitted to present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty. R.C.M. 1001(b)(4). A military judge has broad discretion in determining whether to admit such aggravation evidence. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). Whether a circumstance is directly related to or results from the offenses calls for considered judgment by the military judge, and courts "will not overturn that judgment lightly." *Wilson*, 47 M.J. at 155 (citing *United States v. Jones*, 44 M.J. 103, 104-05 (C.A.A.F. 1996)). The standard of review for the admissibility of Government evidence on sentencing is whether the military judge "clearly abused his discretion." *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999)(quoting *Rust*, 41 M.J. at 478)). Aggravating evidence admissible under R.C.M. 1001(b) must also pass the balancing test required of MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Evidence will be excluded if its probative value is substantially outweighed by its prejudicial effect. *Id.*; *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). If a military judge is obliged to conduct a balancing test and does not, his ruling is afforded less deference. *United States v. Barnett*, 63 M.J. 388, 396 (C.A.A.F. 2006).

Trial defense counsel objected to Cpl Anthony's testimony regarding his injuries. The military judge, however, properly balanced the evidence under MIL. R. EVID. 403 and determined the testimony was more probative than prejudicial. Additionally, the military judge properly limited his consideration of this evidence to the nature of the environment to which the accused was supposed to move, and the type of danger he specifically intended to avoid. Evidence of the type of danger the appellant was attempting to avoid, including the potential for injury, is directly related to the Article 87, UCMJ, offense of missing movement by design. R.C.M. 1001(b)(4). The admission of Cpl Anthony's testimony regarding his injuries was well within the military judge's broad discretion. *Wilson*, 47 M.J. at 155. For these reasons we cannot conclude that the military judge clearly

abused his discretion in overruling the defense objection. See *Clemente*, 50 M.J. at 37.

Even if we were to find error under either assignment of error, we would find no prejudice. See Art. 59(a), UCMJ. The appellant's unsworn statement reinforced the fact that another Marine was deployed in the appellant's place. Moreover, this was a guilty-plea judge-alone trial and military judges are assumed to be able to appropriately consider only relevant material in assessing sentencing. *United States v. Hardison*, 64 M.J. 279, 284 (C.A.A.F. 2007). On these facts, we find no reasonable possibility that any error affected the appellant's sentence.

### **Conclusion**

Accordingly, the approved findings and sentence are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court