

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

**BEFORE**

**D.D. VOLLENWEIDER**

**V.S. COUCH**

**B. E. DELURY**

**UNITED STATES**

**v.**

**John D. GUIDI  
Private First Class (E-2), U. S. Marine Corps**

NMCCA 200600493

Decided 30 January 2007

Sentence adjudged 20 October 2005. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 3d Marines, 3d Marine Division (-)(Rein), Marine Corps Base Hawaii, Kaneohe Bay, HI.

LCDR RICARDO A. BERRY, JAGC, USNR, Appellate Defense Counsel  
LT A.M. SOUDERS, JAGC, USN, Appellate Defense Counsel  
Capt ROGER E. MATTIOLI, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DELURY, Judge:

A special court-martial composed of military judge alone convicted the appellant, pursuant to his pleas, of unauthorized absence, missing movement, and wrongful use of marijuana, in violation of Articles 86, 87, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 912a. The appellant was sentenced to confinement for five months, forfeiture of \$800.00 pay per month for five months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence but, in accordance with the pretrial agreement, suspended all confinement in excess of 120 days.

This case was submitted to the court without specific assignment of errors on 30 May 2006 by the appellant. On 4 August 2006, the court specified the following issues:

**WHETHER IT WAS ERROR FOR SOMEONE OTHER THAN THE  
CONVENING AUTHORITY TO SIGN THE REFERRAL BLOCK OF  
THE CHARGE SHEETS "BY DIRECTION FOR THE COMMANDING**

OFFICER," ABSENT CLEAR INDICATION OF THE SIGNER'S AUTHORITY FROM THE CONVENING AUTHORITY PURSUANT TO RULE FOR COURTS-MARTIAL (R.C.M.) 601 (E) (1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ED.)?

[and]

IF IT WAS ERROR, WAS IT A JURISDICTIONAL ERROR OR AN ERROR WAIVED PURSUANT TO R.C.M. 905(B)(1)?

The court ordered briefs from the appellant and the Government. On 26 September 2006, the appellant filed his brief on the issues specified above. The Government answered on 2 November 2006 and argued that the appellant's charges were properly referred for trial by special court-martial, and even if they were not, the appellant waived any error pursuant to R.C.M. 905 (b)(1).

We have examined the record of trial, the appellant's brief and the Government's response and we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66 (c), UCMJ.

#### **Facts**

The charges in this case were referred by Commanding Officer, 1st Battalion, 3rd Marines, 3d Marine Division (-)(REIN) to a special court-martial convened by his order dated 06 July 2005, which was personally signed by the Commanding Officer, Lieutenant Colonel J. W. Bierman, USMC. The referral blocks of the charge sheets were signed by an individual whose signature is not entirely legible. Next to the signature on the charge sheet is the pen and ink annotation of "1st Sgt By direction" followed by the typed written annotation "For the Commanding Officer". The additional charge sheet is similarly executed, but the indication of "1st Sgt" is lacking, although the signature appears to be the same.

#### **Analysis**

The proper referral of the charges by the convening authority requires that the convening authority be a person who is authorized to convene a court-martial and who is not disqualified from performing the duties of a convening authority. *United States v. King*, 28 M.J. 397, 399 (C.M.A. 1989). The court-martial receives this information when the trial counsel announces the jurisdictional data for the convening of the court and the referral of the charges. At the appellant's court-martial, the trial counsel recited the jurisdictional information for the court-martial. Record at 2. The defense counsel did not object and the military judge did not raise any question or note

any irregularity regarding the execution and endorsement of the referral sections of the charge sheets.

R.C.M. 601(e) and the Discussion that follows it in the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) indicate that, while referral is a personal, non-delegable responsibility of the convening authority, the act of signing the charge sheet to reflect that decision is delegable.

Referral is ordinarily evidenced by an indorsement on the charge sheet. . . . The signature may be that of a person acting by the order or direction of the convening authority. In such a case the signature element must reflect the signer's authority.

In this case the record is clear that the court-martial was convened by one authorized to convene special courts-martial and the charges were properly referred for trial by him. Record at 2. When the charge sheets were signed for the commanding officer, apparently by and at his direction by someone under his command, they were effectively done by him, albeit with the ministerial act of another. It is well-settled that a commander may delegate his authority in matters great and small, in accordance with law, regulation, custom and tradition. In matters of the administration of military justice, "in the absence of a contrary indication, the delegation of such authority to sign may be presumed. . . [w]e will not look beyond the presumption the 'By direction' meant the same as if the convening authority's name appeared." *United States v. Moschella*, 43 C.M.R. 383, 386 (C.M.A. 1971).

R.C.M. 103 (c) defines a convening authority as "a commissioned officer in command for the time being and successors in command." In this case a Marine Corps first sergeant, a non-commissioned officer, purportedly signed the referral endorsements. This fact is of no moment. The signer, even if he was a noncommissioned officer, was not signing as a successor in command, but merely and solely as the properly delegated agent of the convening authority. The appellant urges that this court require the personal signature of the convening authority or his lawful successor in command to avoid "a misinformed understanding of the signer's authority to sign for the convening authority." Appellant's Brief of 25 Sep 2006 at 6. To be sure, a clearer record could have been made below by taking a few moments to explain the presence of a ministerial signature rather than the personal execution by the convening authority.

This appears to be the first time this issue has been presented to this court. The Air Force Court of Military Review addressing the same issue stated "[w]e specifically decline to impose on commanders who convene courts-martial the administrative burden to personally sign the charge sheet or another document reflecting their decision." *United States v.*

*Plott*, 38 M.J. 735, 738 (A.F.C.M.R. 1993). This court similarly rejects such an imposition on those authorized to convene courts-martial for the Navy and Marine Corps.

The burdens of command are great enough without requiring every jot and tittle to be penned by the commanding officer. The import of the matter is that the commander acts personally when making decisions bearing upon the administration of military justice and making his decisions effectively known. Provided his actions are personally made, it is not necessary that he actually take hold of a pen. As we have discussed herein, it is not a jurisdictional defect for a convening authority to permit others to sign at his direction. As such, any claim of irregularity or defect pertaining to the referral of charges must be made by trial defense counsel prior to the entry of pleas otherwise such claim is waived. R.C.M. 905(b)(1) and R.C.M. 905(e).

### **Conclusion**

The approved findings and the sentence are affirmed.

Senior Judge VOLLENWEIDER and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court