

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

**Before
J.D. HARTY, R.G. KELLY, W.M. FREDERICK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KENNETH C. HANNA II
Information Systems Technician Seaman Recruit (E-1), U.S. NAVY**

**NMCCA 200602469
GENERAL COURT-MARTIAL**

Sentence Adjudged: 31 August 2006.
Military Judge: Capt Daniel O'Toole, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC, USN.
For Appellant: LT Kristina Reeves, JAGC, USN.
For Appellee: LCDR J.A. Lien, JAGC, USN; LT J.E. Dunlap, JAGC, USN.

27 September 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of attempting communicate indecent language to a child under the age of 14 years, and using the internet in an attempt to persuade and entice an individual under the age of 14 years to engage in carnal knowledge and indecent acts, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The appellant was sentenced to confinement for five years and a

dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, and suspended all confinement in excess of 30 months for twelve months.

This case was originally submitted without assignments of error, but after our review of the record of trial, we specified the following issues:

1. WHETHER THE CONVENING AUTHORITY'S FAILURE TO IDENTIFY THE START DATE FOR THE 12-MONTH PERIOD OF SUSPENSION CREATES AN AMBIGUITY REQUIRING A NEW OR CORRECTED ACTION.
2. WHETHER THIS COURT CAN IMPOSE THE DATE OF THE CONVENING AUTHORITY'S ACTION AS THE START DATE FOR THE 12-MONTH SUSPENSION PERIOD, IN LIEU OF RETURNING THE RECORD FOR A NEW OR CORRECTED ACTION. *Compare United States v. Jackson*, No. 8600551, unpublished op. (N.M.C.M.R. 16 Jun 1986)(fixing the date of trial as the suspension period start date), *with United States v. Gilbert*, 6 M.J. 826, 828 (N.C.M.R. 1979)(fixing the date of the convening authority action as the suspension period start date).
3. WHETHER THE 12-MONTH SUSPENSION PERIOD SHOULD RUN FROM THE DATE THE APPELLANT COMPLETES HIS CONFINEMENT, IN ACCORDANCE WITH THE PRETRIAL AGREEMENT AND THE STAFF JUDGE ADVOCATE'S RECOMMENDATION.

After further examination of the record of trial, review of the appellant's brief, the Government's answer, and the appellant's reply, 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. However, we will direct the supplemental court-martial order to reflect that the period of confinement suspension ran for 12 months from the date of the trial.

Background

The appellant negotiated a pretrial agreement with the CA that required the CA to suspend all adjudged confinement in excess of thirty months "for such period of confinement served plus twelve (12) months thereafter." Appellate Exhibit V at 1. The staff judge advocate (SJA), in his recommendation (SJAR), advised the CA of the terms of the pretrial agreement, and its impact on the CA's

action, including the effect on confinement. Staff Judge Advocate's Recommendation of 21 Nov 2006 at 4. The SJA recommended that the CA approve the adjudged sentence, subject to the terms of the pretrial agreement. *Id.* at 5.

Following service of the SJAR, the appellant submitted a clemency request to the CA requesting that the CA disapprove the dishonorable discharge and "suspend twelve months of the thirty months confinement [the appellant] was awarded on 31 August 2006 pursuant to a pretrial agreement." Request for Clemency of 1 Dec 2006 at 1. In his addendum to the SJAR, the SJA informed the CA of the appellant's clemency request, but recommended that the CA "approve the findings and sentence as adjudged and, in accordance with the terms of the pretrial agreement." Addendum to SJAR of 4 Dec 2006. In taking action on the appellant's sentence, the CA ordered that "the execution of that part of the sentence adjudging confinement in excess of thirty (30) months is suspended for twelve (12) months." Convening Authority Action of 4 Dec 2006 at 2.

The appellant contends that our first specified issue has previously been answered by us in the negative, citing *United States v. Pereira*, 1997 CCA LEXIS 492, No. 96-01840, unpublished op. (N.M.Ct.Crimp.App. 5 Sep 1997). Appellant's Brief of 11 Jun 2007 at 4. The Government, in stark contrast, argues that not only is the CA's action ambiguous and in need of corrective action, but that the actual suspension period itself is vague and incomplete as well. Government's Answer of 6 Jul 2007 at 3.

In response to the second specified issue, the appellant, citing *United States v. Saylor*, 40 M.J. 715 (N.M.C.M.R. 1994), concedes that "absent an explicit start date, the start date for suspensions is the date of the convening authority's action." Appellant's Brief at 6. Yet, even though the Government agrees with this position, it maintains that the record must be returned because "the incompleteness of the action in this case goes further, as indicated by the pretrial agreement, staff judge advocate's recommendation, and the remainder of the record." Government's Answer at 5.

The third specified issue, as with the two previous, brings the parties no closer to a consensus. The appellant's position being that the issue is "moot" and the Government's position, relying heavily on RULE FOR COURTS-MARTIAL 1107(g) MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), insisting "all the evidence in the record points to the fact that the convening authority intended to comply with the pretrial agreement and the staff judge advocate's recommendation, but did not clearly convey the suspension period in the action. Appellant's Brief at 10; Government's Answer at 6.

Ambiguity in the Action

The parties entered a written agreement that the period of confinement suspension was the period of confinement served plus 12 months thereafter. Appellate Exhibit V. The parties also stated they understood that to be the period of suspension. Record at 183. In order for a period of suspension to run with the period of confinement, the period of suspension must necessarily begin on the date the confinement begins - the date of sentencing. Therefore, the entire agreement as to confinement suspension is that it would begin on the date of trial and run for the period of confinement served plus 12 months thereafter. We must decide whether the CA, in suspending confinement in excess of 30 months for 12 months, created an ambiguity that allows us to look outside the four corners of the CA's action or whether we must stay within the four corners of that action in resolving the issues of length of suspension period and its start date.

In *Pereira*, we were faced with a pretrial agreement that stated confinement in excess of 30 months would be suspended for 12 months from the date of CA's action. The military judge, however, incorrectly advised the appellant that the period of suspension ran from the date of trial, and the parties agreed with that erroneous reading. The CA, in taking his action, suspended confinement in excess of 24 months for 12 months, without stating when the suspension period began. Citing *Saylor*, 40 M.J. at 718, we concluded that confinement suspension begins to run from the date of the CA's action unless there is an agreement between the parties stating a different start date. In order to avoid any possible prejudice to the appellant, we established the date of trial as the suspension start date even though the parties had agreed to the CA's action as the suspension start date. *Pereira*, 1997 CCA LEXIS 492 at 3.

Here, there was an agreement to begin the confinement suspension period on the date of trial, and for the period of suspension to be for the period of confinement plus 12 months. The CA merely stated that the period of confinement in excess of 30 months was suspended for 12 months. If we stay within the four corners of the CA's action, and ignore the pretrial agreement, statements of counsel, and the SJAR, this would indicate that the period of suspension is limited to 12 months and runs from the date of the CA's action. Appellate courts, however, can use surrounding documentation to interpret an otherwise unclear convening authority action. *United States v. Politte*, 63 M.J. 24, 26 (C.A.A.F. 2006). However, "when the plain language of the convening authority's action is facially complete and unambiguous, its meaning must be

given effect." *United States v. Wilson*, 65 M.J. 140, 141 (C.A.A.F. 2007).

The plain meaning of the CA's action is that the period of suspension is 12 months. The same language, however, does not plainly direct us to when that 12-month period begins. In order to determine that date, we must either apply case law that states absent an agreement otherwise, the suspension period begins on the date of the CA's action, or we must consult the record in the event there was an agreement otherwise. Because there was agreement that the suspension period should run from the date of trial, albeit for the period of confinement plus 12 months, we conclude that 31 Aug 2006 is the start date for the 12-month confinement suspension period. Therefore, although we find that the CA's action is ambiguous, that ambiguity can be resolved without sending the record of trial back for a new CA's action.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the CA, are affirmed. The supplemental court-martial order shall show that the period of confinement suspension was 12 months and that it ran from the date of trial, 31 August 2006.

Senior Judge HARTY and Judge FREDERICK concur.

For the Court

R.H. TROIDL
Clerk of Court