

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RYAN W. NELSON
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200700262
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 October 2006.

Military Judge: Col Bruce Landrum, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col R.W. Koeneke, USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: CAPT F.E. Matthews, JAGC, USN; LT Justin Dunlap, JAGC, USN.

5 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of larceny and one specification of wrongfully brandishing a replica firearm, in violation of Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934. The appellant was sentenced to confinement for 6 months, reduction to pay grade E-1, a fine of \$2,013.97, and a bad-conduct discharge. Pursuant to the pretrial agreement, the convening authority (CA) could approve the sentence as adjudged,

but was required to suspend all confinement in excess of 150 days for the period of confinement served plus six months thereafter. Prior to taking action on the case, alleged post-trial misconduct by the appellant prompted the CA to order the appellant to serve that portion of his confinement which was to have been suspended under the terms of the pretrial agreement. Ultimately, the appellant served the entire sentence adjudged.

We have examined the record of trial, the appellant's sole assignment of error,¹ and the Government's response. We agree that the CA erred when he ordered the appellant to serve that portion of his confinement which was to have been suspended under the terms of the pretrial agreement. We will take appropriate corrective action in our decretal paragraph. After our action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Post-Trial Misconduct

On 13 September 2006, the appellant and the CA entered into a pretrial agreement which provided, *inter alia*, that the CA would suspend all confinement in excess of 150 days for the period of confinement plus six months. On 12 October 2006, the appellant pled guilty in accordance with the pretrial agreement and immediately began serving his adjudged confinement. In November 2006, a portion of the adjudged fine was improperly deducted from the appellant's pay. Fines may not be executed until approved by the CA. RULE FOR COURTS-MARTIAL 1003(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The CA's action was not executed until 26 February 2007. It is unclear if the appellant was aware that the fine had been deducted from his November 2006 entitlements.

On 9 November 2006, while still in confinement, the appellant submitted a Request Mast to the Commanding General of Marine Corps Base Okinawa, Japan, requesting that he be allowed to go the Navy Federal Credit Union and to disbursing. The appellant's stated purpose was to withdraw \$1,500.00 for his and his family's needs and to correct an allotment to his family.

¹ THE CONVENING AUTHORITY ERRED IN WITHDRAWING FROM THE SENTENCE LIMITATIONS PROVISIONS OF THE PRETRIAL AGREEMENT BASED ON THE RECORD OF PROCEEDINGS OF APPELLANT'S POST-TRIAL HEARING WHERE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH THAT APPELLANT HAD COMMITTED POST-TRIAL MISCONDUCT.

When questioned about his request by the base inspector, the appellant stated that he had sufficient funds in his bank account to cover his intended actions. Based on the appellant's representations, command representatives attempted to carry out the appellant's requests on his behalf. When the command representative contacted the credit union, however, he was informed that the appellant did not have sufficient funds for the withdrawal.

The appellant was notified on 12 December 2006 that the CA was convening a post-trial vacation hearing under R.C.M. 1109, regarding alleged post-trial misconduct.² The charges asserted, *inter alia*, that the appellant made a false official statement to the command when he stated that he had sufficient funds in his account to cover the intended withdrawal. A vacation hearing was held on 14 and 18 December 2006. Based on the investigating officer's report, the CA withdrew from the pretrial agreement sentence limitations on 17 January 2007, after having found that the appellant had made a false official statement regarding the funds in his bank account.³

The improper deduction of a portion of the adjudged fine from the appellant's November 2006 pay and allowances does not appear to have been addressed either at the post-trial misconduct hearing or by the CA. One element of making a false official statement is the appellant's knowledge of the falsity of the statement. We find that the evidence presented at the post-trial misconduct hearing did not address this element adequately.

Conclusion

The findings are affirmed. Only that portion of the approved sentence that extends to confinement for 150 days, reduction in rank to E-1 and a bad-conduct discharge are

² The pretrial agreement contained a provision permitting the CA to withdraw from the sentence limitation portion of the agreement if, *inter alia*, the appellant committed post-trial misconduct. Memorandum of Pretrial Agreement of 6 Oct 2006 at 3.

³ There were two additional allegations of misconduct that the investigating officer failed to substantiate.

affirmed. That portion of the sentence extending to a fine of \$2,013.17 is disapproved.

Senior Judge GEISER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court