

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Chester PLUMMER
Corporal (E-4), U.S. Marine Corps**

NMCCA 200601319

Decided 29 June 2007

Sentence adjudged 18 May 2006. Military Judge: M.P. Gilbert. Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, MCAS, Cherry Point, NC.

CDR THOMAS FICHTER, JAGC, USN, Appellate Defense Counsel
Maj KEVIN C. HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of wrongful use and distribution of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for six months, forfeiture of \$1,000.00 pay per month for six months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's two assignments of error,¹ 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

¹ I. APPELLANT SUFFERED ILLEGAL PRETRIAL CONFINEMENT IN VIOLATION OF ARTICLE 13, UCMJ, WHEN HE WAS CONFINED UNDER CONDITIONS MORE RIGOROUS THAN THOSE REQUIRED TO ENSURE HIS PRESENCE AT TRIAL.

II. THE SENTENCE IMPOSED WAS INAPPROPRIATELY SEVERE.

rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant became the subject of a Naval Criminal Investigative Service (NCIS) investigation in July 2005. He was identified by an NCIS cooperating witness (CW) as a source of illegal drugs on board Marine Corps Air Station (MCAS) Cherry Point, North Carolina. The CW worked with NCIS to arrange a controlled purchase of marijuana from the appellant.

While arranging the purchase, the CW spoke with the appellant's wife on 29 July 2005. This conversation was heard by the NCIS agent working the case. The appellant's wife told the CW that she and the appellant were planning a trip to Washington, D.C., to purchase a quarter-pound of marijuana. The couple planned to bring the drugs back to their home located on board MCAS Cherry Point. On 27 August 2005, in front of his on-base residence, the appellant met the CW and sold him 1.7 grams of marijuana for \$10.00.

On 7 November 2005, the appellant provided a sworn statement to NCIS in which he admitted using marijuana approximately 20 times since February 2005. The appellant named four members of his unit who had approached him and specifically asked him to supply them marijuana. The appellant denied ever supplying marijuana or any other drug to anyone. He indicated that he purchased drugs "wherever [he] could find it in the local area," and admitted at trial to smoking marijuana in his residence, in the area surrounding MCAS Cherry Point, and in Washington, D.C. Appellate Exhibit III at 14. The appellant also told NCIS that they could find drug paraphernalia in his residence.

After being interviewed by NCIS, the appellant was placed in pretrial confinement. An Initial Review Officer's (IRO) hearing was conducted on 10 November 2005, and the IRO ordered that the appellant remain in pretrial confinement. At trial, the appellant challenged the decisions to place him in and keep him in pre-trial confinement. The appellant requested confinement credit and that he be released immediately from pretrial confinement, citing RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). AE III; Record at 82-107. The military judge determined that neither the appellant's commanding officer nor the IRO abused their discretion by placing the appellant in or keeping him in pretrial confinement, and he denied the appellant's motion for confinement credit and immediate release from pretrial confinement.

Pretrial Confinement

In his first assignment of error, the appellant argues that he suffered illegal pretrial confinement, because his confinement was more rigorous than necessary to ensure his presence at trial. Appellant's Brief and Assignment of Error, Out of Time, of 29 Nov

2006 at 3. The appellant asserts this issue as violative of both Article 13, UCMJ, and R.C.M. 305. We deny relief under Article 13, UCMJ, as we find that the appellant waived this issue by failing to raise it at trial. We also hold that the appellant is not entitled to relief under R.C.M. 305.

Because the appellant's court-martial was tried after 31 May 2003, we find that the appellant waived any Article 13, UCMJ, issues on appeal by not raising them at trial. We do not find plain error. *See Inong*, 58 M.J. at 465 (holding that Article 13, UCMJ, pretrial confinement issues not raised at trial are waived absent plain error effective 31 May 2003). Therefore, we will only analyze the appellant's issue under R.C.M. 305.

Rule for Courts-Martial 305(h)(2)(B) authorizes pretrial confinement when an accused's commander has probable cause, or reasonable grounds to believe, that:

- (i) An offense triable by a court-martial has been committed;
- (ii) The prisoner committed it; and
- (iii) Confinement is necessary because it is foreseeable that:
 - (a) the prisoner will not appear at trial, pretrial hearing, or investigation, or
 - (b) the prisoner will engage in serious criminal misconduct; and
- (iv) Less severe forms of restraint are inadequate.

"Serious criminal misconduct" includes offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command. *Id.* The commanding officer's decisions to initiate or to continue pretrial confinement do not go unchecked. Within 7 days of the imposition of confinement, a neutral and detached officer reviews the commanding officer's probable cause determination and the necessity for continued pretrial confinement. R.C.M. 305(i)(2). At the IRO hearing, the reasons for confinement must be proved by a preponderance of the evidence. R.C.M. 305(i)(2)(A)(iii). If the IRO finds the evidence does not support the initial decision to place an accused into pretrial confinement, or that the evidence does not support continued pretrial confinement, the accused is ordered released. If the IRO finds sufficient evidence to continue pretrial confinement, an accused can seek redress from a military judge once charges are referred. R.C.M. 305(j).

A military judge may order an accused released from pretrial confinement only if: (1) the IRO abused his discretion and insufficient information is presented to the military judge justifying continued pretrial confinement; or, (2) information that was not presented to the IRO establishes that the accused should be released; or, (3) the rules controlling the initial

48-hour probable cause determination and 7-day review of pretrial confinement were not complied with, and insufficient evidence is presented to the military judge to justify continued pretrial confinement. R.C.M. 305(j)(1)(A)-(C). We will address the military judge's review of the IRO's decision and the military judge's decision not to release the appellant from pretrial confinement.

1. Military judge's review of the IRO's decision

The appellant argues that the military judge erred when he determined that the IRO did not abuse his discretion when he determined the appellant should remain in pretrial confinement. In conducting a review of an IRO's decision to continue pretrial confinement, a military judge is limited to reviewing the information that was before the IRO at the time the IRO made his decision. *Gaither*, 45 M.J. at 351. Here, the military judge considered the information presented to the IRO, including the 72-hour letter, the appellant's statement,² and statements from the command representative and the NCIS agent who attended the hearing. AE III, IV. After considering the information provided to the IRO, the military judge announced detailed findings of fact on the record³ and concluded that the IRO had not abused his discretion.⁴ Record at 102-07.

² The appellant's sworn NCIS statement was attached to the 72-hour letter, and referenced therein. In addition to the appellant's admissions cited in the 72-hour letter, the appellant informed NCIS that drug paraphernalia was located in his on base residence. *Id.*

³ The military judge announced his findings in narrative form. We encourage military judges to make enumerated findings of fact.

⁴ The military judge found, in part, that although charged with the introduction of 1.5 grams of marijuana, it "would be proper for the IRO to consider that an accused or his wife had articulated to a CW that the accused would or had the intent to acquire as much as a quarter pound of marijuana." Record at 105. This fact "goes towards whether or not the prisoner would or will engage in serious criminal misconduct, misconduct that is a threat to safety of the community or to the effectiveness, morale, discipline, readiness or the safety of the command." *Id.* The military judge also determined that "the fact the accused was scheduled for leave, whether or not he was going to buy marijuana or not, two days after interviewing at NCIS and admitting culpability and at least use of a drug on 20 different occasions, would also lend weight to the IRO's determination of him being a flight risk as well as the commanding officer's." *Id.* at 105-06. Further, that the appellant's statement that he never distributed drugs to anyone, and the conflicting observations by NCIS and the confidential witness (CW), created an inconsistency that "also goes to the nature of the misconduct that the accused may commit in the future." *Id.* at 106. The military judge rejected the defense argument that between the date of the misconduct, 27 August 2005, and date of confinement, 7 November 2005, the appellant did not try to flee the area or engage in further misconduct. The military judge noted that the appellant was not aware of the NCIS investigation until 7 November 2005, and only after being confronted by NCIS would he form any latent intent to flee. *Id.* at 107. He also found the appellant had engaged in criminal misconduct as evidenced by admission he had used marijuana twenty times since February. *Id.* at 106.

A military judge's ruling on the legality of pretrial confinement is reviewed for an abuse of discretion and an appellate court "should limit its review to the facts before the deciding official." *Gaither*, 45 M.J. at 351-52. We start by adopting the military judge's findings of fact, as they are well supported by the evidence in the record. Record at 102-07.

The IRO was aware, through the Commanding Officer's (CO), 2nd LAAD Battalion, 72-hour letter, that the appellant was under investigation by NCIS; had been observed by NCIS distributing marijuana from his on-base residence on 17 August 2005; and, NCIS had evidence that, on two occasions, the appellant discussed obtaining marijuana, including the purchase of a quarter-pound of marijuana. The CO also noted he believed it was foreseeable the appellant posed a serious threat to the community, as he used, sold, and distributed drugs from his government quarters; the appellant was facing lengthy confinement and might possibly flee to avoid incarceration; and it was foreseeable that, if released, the appellant would continue using and distributing drugs to Marines in his command. The IRO also had before him the appellant's statement to NCIS in which he admitted to: using marijuana at least 20 times since February 2005; actively taking measures to avoid detection by urinalysis; and, being approached by Marines in his unit looking to him as a source for marijuana. In his statement, the appellant denied ever providing drugs to any individual, a statement that directly contradicted observations by NCIS agents. AE III at encl. 4.

Limiting review to these facts, we conclude that the military judge properly ruled that the IRO did not abuse his discretion. The facts before the IRO support a finding that continued pretrial confinement was justified to ensure the appellant's presence at trial, to guard against further serious criminal misconduct, and that lesser forms of restraint were inadequate. Record at 107; AE III at encl. 3.

2. Military judge's decision concerning continued pre-trial confinement

The appellant argues that there was additional evidence available after the IRO hearing that should have convinced the military judge to order his release from pretrial confinement. Appellant's Brief at 6-7.

When a military judge is asked to determine whether confinement should be continued *pendente lite*, a different question is presented. An accused's contention that conditions have changed since he was placed in confinement or that new information has been developed which shows that confinement need not be continued requires a *de novo* review. *Gaither*, 45 M.J. at 351 (citing R.C.M. 305(j)(1)(B)). We review the military judge's *de novo* review and decision not to

order release for an abuse of discretion. In doing so, our review is limited to the facts before the military judge. *Id.*

Here, the military judge was presented with virtually the same evidence presented to the IRO. Nothing significant had changed. Record at 106-07. The appellant admitted using marijuana over 20 times on board MCAS Cherry Point, including in the base family housing area where he lived with his family, in the local area surrounding MCAS Cherry Point, and in Washington, D.C. He was also observed by NCIS distributing drugs from his on-base residence, and he informed NCIS that drug paraphernalia could be found in his home. Even at work, the appellant was identified as a drug dealer, as evidenced by fellow Marines seeking him out for marijuana. It was reasonable to believe he would engage in serious criminal misconduct if he were released.

The only additional information that arose after the IRO hearing was the fact that the appellant was not charged with misconduct relating to the potential purchase of a quarter-pound of marijuana referenced in conversations overheard by NCIS. Appellant's Brief at 6-7. Contrary to appellate counsel's assertions, the military judge conducted a full and complete review of all facts before the IRO and those additional facts the appellant claimed were not before the IRO at the 7-day hearing. In his findings of fact, the military judge acknowledged that the appellant was not charged with misconduct relating to the potential purchase of a quarter-pound of marijuana. Record at 105. After acknowledging that the appellant was not charged with the misconduct noted above, and ruling that the IRO had not abused his discretion, the military judge stated, "[a]nd I find that there is sufficient evidence presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of [R.C.M. 305]." *Id.* at 107. We conclude that the military judge did not abuse his discretion in determining that the facts before him did not establish the conditions precedent enumerated in R.C.M. 305 (j)(1)(A)-(C) that authorized him to order the appellant's release from pretrial confinement. Therefore, no relief is warranted.

Sentence Severity

In his second assignment of error, the appellant asserts that a sentence consisting of a bad-conduct discharge is inappropriately severe. Appellant's Brief at 8. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Courts of Criminal Appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority. *Healy*, 26 M.J. at 395. A sentence should not be disturbed on appeal, "unless the harshness of the sentence is so disproportionate as to cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

The appellant's crimes are serious. He distributed marijuana in the family housing area on board MCAS Cherry Point. Additionally, he admitted using marijuana approximately 20 times, and told the court that he smoked the drug in his on-base residence, in the local vicinity of MCAS, and in Washington, D.C. From the evidence, including the appellant's own statement, the appellant was viewed as a source of marijuana at his command which was corroborated by his distribution of marijuana to a fellow Marine. After reviewing the entire record, we find that the adjudged and approved sentence, including a bad-conduct discharge, is entirely appropriate for this offender and these offenses. *See United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 394. We, therefore, decline to grant relief.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court