

**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.

**Nicholas W. RIGGS
Private (E-1), U.S. Marine Corps**

NMCCA 200600768

Decided 29 June 2007

Sentence adjudged 20 November 2003. Military Judge: F.A. Delzompo. Staff Judge Advocate's Recommendation: Col A.E. Turbyfill, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Light Armored Reconnaissance Battalion, 1st Marine Division, Twentynine Palms, CA.

LT KATHLEEN KADLEC, JAGC, USN, Appellate Defense Counsel
Capt JAMES WEIRICK, USMC, 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 two specifications of insubordinate conduct toward a noncommissioned officer (NCO), dereliction of duty, using provoking speech and gestures, and assault, in violation of Articles 91, 92, 117, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 892, 917, and 928. The appellant was sentenced to confinement for 11 months, forfeiture of \$767.00 pay per month for 11 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, pursuant to the pretrial agreement, suspended all confinement in excess of 90 days.

On appeal, the appellant raises four assignments of error (AOE's). First, he contends his guilty pleas to the two specifications under Charge III (insubordinate conduct) were improvident because the military judge failed to inform him of two elements of the offense and failed to define a necessary term ("toward"). Second, he contends his guilty plea under Charge IV

(dereliction of duty) was improvident because at the time the appellant did not have the requisite duties. Third, the appellant avers the military judge failed to conduct the required balancing test under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), before admitting evidence of uncharged misconduct during sentencing. Finally, the appellant claims he was denied speedy post-trial processing because it took 923 days for the case to be docketed with this court and as a result he was materially prejudiced.

We have examined the record of trial, the four AOE's, the Government's response, and the appellant's reply. We find this case warrants relief pursuant to our Article 66(c), UCMJ, discretionary authority due to unreasonable post-trial processing delay. Otherwise, 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.

Improvident Pleas

In his first and second AOE's the appellant claims his guilty pleas were improvident. The first AOE contends the military judge failed to inform him of all the required elements and failed to define a necessary term. The second AOE claims the appellant did not have the requisite duties. We disagree with the appellant as to both AOE'S.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); see also RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

1. AOE as to insubordinate conduct.

Under Charge III the appellant was charged with two specifications of insubordinate conduct toward an NCO in violation of Article 91, UCMJ. The elements of the offense of insubordinate conduct toward an NCO under Article 91 are:

- (1) that the accused was a warrant officer or enlisted member;
- (2) that the accused did or omitted certain acts, or used certain language;

(3) that such behavior or language was used toward and within sight or hearing of a certain warrant, noncommissioned, or petty officer;

(4) that the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

(5) that the victim was then in the execution of office; and

(6) that under the circumstances the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 15b(3). The military judge properly instructed the accused on these elements as to both specifications under Charge III. Record at 16-17.

The appellant contends the military judge failed to instruct him on two additional elements of Article 91. Specifically, (1) that the victim was the superior noncommissioned officer of the accused; and (2) that the accused then knew that the person toward whom the behavior or language was directed was the accused's superior noncommissioned officer. Appellant's Brief of 29 Sep 2006 at 4, 8-10. The appellant's contention is unfounded.

In order to be found guilty of insubordinate conduct to an NCO under Article 91, the six elements cited above must be proven or admitted to. MCM, Part IV, ¶ 15b(3). The two additional elements to which the appellant refers are required only if the victim was the "superior noncommissioned officer" of the accused *and* the Government charged it as such. *Id.* (emphasis added). Under neither specification of Charge III was the "superior" status of the victim alleged. *See* Charge Sheet; *see also* MCM, Part IV, ¶¶ 15b(3) (elements) and 15f(3) (sample specifications). At trial there was no confusion about conduct with which the appellant was charged. Record at 15-17; *see also* MCM, Part IV, ¶ 15e(7) & (8) (maximum punishment). Because the Government only charged and prosecuted the "six-element form" of these Article 91 offenses - the form to which the appellant pled guilty - there was no requirement whatsoever for the military judge to instruct on the two optional elements. The appellant's assertion to the contrary is without merit.

The appellant's related assertion that the military judge failed to properly instruct the appellant on the meaning of "toward" similarly lacks merit. Such guidance is not a requirement and requires no further discussion. MCM, Part IV, ¶¶ 15b(3) and 15c(5); Military Judges' Benchbook, Dept of the Army Pamphlet 27-9, ¶ 3-15-3; *see also* Record at 16-17, 39.

With regard to both specifications under Charge III the appellant was properly instructed on the relevant elements and definitions of Article 91, UCMJ. The appellant thereafter acknowledged that he understood these elements and they were true. Record at 16-17, 23, 56. A factual basis to support the appellant's guilty pleas to Specifications 1 and 2 under Charge III was established during the providence inquiry. We find that there is no substantial basis in law or fact to question the appellant's guilty plea to either specification under Charge III. *United States v. Barton*, 60 M.J. 62 (C.A.A.F. 2004). We find, therefore, that the military judge did not abuse his discretion by accepting the appellant's pleas of guilty to Specifications 1 and 2 of Charge III.

2. AOE as to dereliction of duty.

In his second AOE, the appellant argues his guilty plea to dereliction of duty under Charge IV was improvident because at the time of the offense he did not have the duties of an "0311 scout" in Third Platoon (3d PLT), and thus, could not be derelict when he chose not to perform those duties. Appellant's Brief at 4-5, 10-11. We disagree.

The elements of dereliction of duty under Article 92, UCMJ, are: (1) that the accused had certain duties; (2) that the accused knew or reasonably should have known of the duties; and (3) that the accused was willfully, or through neglect or culpable inefficiency, derelict in the performance of those duties. MCM, Part IV, ¶ 16b(3).

The appellant was an 0311¹ scout with 3d PLT. Record at 42-43. Because of disciplinary issues, he was transferred from 3d PLT to Headquarters (HQ) PLT. While with HQ PLT, the appellant was not required to conduct 0311 scout duties. Sometime thereafter, the appellant's first sergeant (1stSgt) ordered him to return to 3d PLT and resume his 0311 scout duties. *Id.* at 42-46. The appellant refused. *Id.*

The appellant was trained as and held the billet of an 0311 scout. *Id.* at 42-43. He admitted he was capable of performing his 0311 scout duties either with or without a weapon.² *Id.* at 44. The appellant understood he had those 0311 scout duties and had been ordered by his commanding officer to return to 3d PLT to

¹ An "0311" designation is the military occupational specialty (MOS) for a "basic Marine infantryman." Record at 42. It is an MOS in which every Marine is initially trained, regardless of rank or billet. An "0311 scout" entails additional training in areas to include clearing enemy lines and protecting specific Marine vehicles. *Id.* at 43.

² At the time, the appellant was without his M-16 service rifle. It was taken from him by the command because of mental instability based in large part on the fact the appellant made statements he may hurt himself or others. Record at 31, 45, 73, 78, 86, 92.

perform them. He refused to do so. *Id.* at 44-47. As a result of these admissions, a factual basis to support the appellant's guilty plea to Charge IV was established.

We find that there is no substantial basis in law or fact to question the appellant's guilty plea to Charge IV. *Barton*, 60 M.J. at 62. We find, therefore, that the military judge did not abuse his discretion by accepting the appellant's plea of guilty to the sole specification of Charge IV.

Uncharged Misconduct

The appellant's third AOE contends the military judge erred by admitting evidence of uncharged misconduct without first conducting the required balancing test under MIL. R. EVID. 403. We disagree.

In its case in extenuation and mitigation, the appellant called Master Sergeant (MSGT) Cody W. Melvin. MSGT Melvin opined the appellant's "rehabilitative potential would be fairly high." Record at 123. To test this opinion, on cross-examination the Government elicited the following testimony:

- Q. Okay. So the opinion you said he has rehabilitative potential, you base that also upon his performance while he's been here in Twentynine Palms?
- A. Yes, sir, I would agree with that.
- Q. Did you know he's been trying to influence witnesses involved in this case?
- DC: Objection, sir, uncharged misconduct, sir.
- MJ: Overruled.

Questions by the prosecution:

- Q. Master Sergeant, did you know he's been trying to influence the testimony of witnesses in this case?
- A. I'm not aware of Private Riggs doing that, sir, no, sir.
- Q. Did you know that he kicked in the front door of a house of a witness in this case and punched him several times in the head?
- A. I know, sir, there are allegations to that. I'm assuming just like everything until the talk I had with Private Riggs concerning that. I guess like a lot of our things there are two sides to every story, but I understand there are allegations concerning that, sir.
- Q. And knowing that, does that change your opinion at all of Private Riggs?

- A. Quite honestly, I was disappointed in that episode because of this court-martial we're in and I expressed my disappointment with Private Riggs. That, however, does not change my opinion concerning his rehabilitative condition, sir.

Id. at 123-24.

Immediately following the Government's cross-examination, the military judge inquired of MSgt Melvin when the uncharged misconduct allegedly occurred and whether or not he considered it along with everything else he knew about the appellant when he offered his opinion. *Id.* at 124-25. The military judge did not ask the MSgt any further questions about the uncharged misconduct; neither did the trial defense counsel, nor the Government. The Government did not ask any other witness about this or refer to it during argument on sentencing. Trial defense counsel attempted to explain the uncharged misconduct allegation by calling Lance Corporal (LCpl) Daniel L. Paulson. *Id.* at 141. LCpl Paulson testified he was aware of the uncharged misconduct, but believed under the circumstances the appellant was acting in self-defense. *Id.* at 147-51. LCpl Paulson also testified that the incident did not change his opinion that the appellant could be rehabilitated. *Id.*

During presentencing, it is appropriate to consider the rehabilitative potential of an accused. *United States v. Hill*, 62 M.J. 271, 272 (C.A.A.F. 2006) (citing *United States v. Griggs*, 61 M.J. 402, 407 (C.A.A.F. 2005)). On cross-examination a witness's opinion or knowledge may be tested by inquiring into relevant specific instances of conduct. MIL. R. EVID. 405(a); see *United States v. Catrett*, 55 M.J. 400, 406 (C.A.A.F. 2001); *United States v. Pruitt*, 43 M.J. 864, 868 (A.F.Ct.Crim.App. 1996), *aff'd*, 46 M.J. 148 (C.A.A.F. 1997). Even though inquiries into specific instances of conduct are subject to MIL. R. EVID. 403's balancing test, a military judge has "wide discretion" in the application of that test. *United States v. Pearce*, 27 M.J. 121, 123-25 (C.M.A. 1988). A military judge's ruling on an evidentiary matter like this is reviewed under an abuse of discretion standard. *Id.* at 123.

MSgt Melvin was called by the appellant to provide his favorable opinion regarding the appellant's rehabilitative potential. The information elicited by the Government on cross-examination is proper impeachment of that opinion and permissible under MIL. R. EVID. 405(a). Furthermore, trial defense counsel's objection merely stated that these questions described uncharged misconduct. He did not invoke R.C.M. 1001 as a part of this objection. The record does not reflect whether the military judge performed the balancing test under MIL. R. EVID. 403, however, we presume the military judge properly knew and applied the law. *United States v. Stein*, 43 C.M.R. 358, 359 (C.M.A. 1971). We cannot, therefore, conclude that the military judge

clearly abused his discretion in overruling the defense objection and admitting the testimony. *Pearce*, 27 M.J. at 123.

This was proper impeachment evidence. Even if we were to find error, we would find no prejudice. *See* Art. 59(a), UCMJ. The witness's comments were unexploited by the trial counsel. Trial counsel did not emphasize or even refer to this testimony in argument. The appellant introduced his own evidence explaining the uncharged misconduct as well as establishing rehabilitative potential. 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). For these reasons, we do not find that the Government's cross-examination of MSgt Melvin had any substantive impact on the ultimate sentence adjudged. On these facts, we find no reasonable possibility that any error affected the appellant's sentence.

Post-Trial Delay

The appellant's fourth AOE asserts he was denied speedy post-trial processing because it took 923 days following sentencing for his case to be docketed with this court. The convening authority's action was completed 747 days after trial. The appellant claims he was materially prejudiced by the delay because the lack of a DD-214 denied him four employment opportunities and prohibited him from enrolling in the Brevard Community College Fire Training Academy.³ Appellant's Brief at 17; Appellant's Affidavit of 25 Sep 2006; Affidavit of John Fred Jodts of 29 Sep 2006.

While the 923-day delay between sentencing and docketing is facially unreasonable, the post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005) (citing *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)); *see also United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Even assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006).

³ The appellant did not provide sufficient evidence of specific prejudice to support this claim. *See United States v. Jones*, 61 M.J. 80, 83-85 (C.A.A.F. 2005). First, he fails to provide documentation from any of the four prospective employers noted in his affidavit. Second, Mr. Jodts' affidavit (regarding employment with Brevard County Fire Rescue after completion of Brevard Community College Fire Training Academy) merely states "in order to claim veteran's preference for hiring . . . a former military member must present his/her DD-214." Finally, there is no indication the appellant would have been hired by these employers or accepted by the training academy but for the failure to produce his DD-214 discharge certificate, which also would indicate the characterization of the appellant's discharge.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*), we find that the delay does affect the findings and sentence that "should be approved" in this case. See Art. 66(c), UCMJ. We will take corrective action in our decretal paragraph.

Conclusion

We affirm the approved findings of guilty and only that portion of the approved sentence that extends to confinement for two months, forfeiture of \$767.00 pay per month for one month, and a bad-conduct discharge.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court