

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

BEFORE

W.L. RITTER

E.S. WHITE

J.F. FELTHAM

UNITED STATES

v.

**Keith S. SOJDA
Aviation Electrician Airman (E-3), U. S. Navy**

NMCCA 200401746

Decided 17 January 2007

Sentence adjudged 29 November 2000. Military Judge: R.W. Redcliff. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Helicopter Antisubmarine Squadron Light THIRTY-SEVEN, MCB Hawaii, Kaneohe Bay, HI.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of failure to go to appointed place of duty, absence without authority, disobedience of a lawful order, wrongful use of marijuana, and wrongful appropriation of Government property, in violation of Articles 86, 92, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 912a, and 921. Contrary to his plea, the appellant was convicted of a second specification of absence without authority, in violation of Article 86, UCMJ. The appellant was sentenced to confinement for 95 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, but, in accordance with the pretrial agreement, suspended all confinement in excess of 60 days for 12 months from the date of trial.

On appeal, the appellant asserts four assignments of error:
(1) that his guilty plea to Charge I, Specification 10 was

improvident; (2) that the military judge erred to his substantial prejudice in holding that unauthorized absence is a continuing offense; (3) that absence of the legal officer's recommendation from the record requires this court to set aside the CA's action and return the record for new post-trial processing; and (4) that he has been denied his due process right to speedy post-trial review.

After carefully considering the record of trial, the appellant's four assignments of error, and the Government's answer, we conclude there is partial merit to the appellant's contention that his plea to Charge I, Specification 10 was improvident, and that the absence of the legal officer's recommendation from the record requires us to set aside the CA's action, and return the record for new post-trial processing.

Providence of Plea to Charge I, Specification 10

The appellant argues his guilty plea to Charge I, Specification 10 (absence without authority from 3 to 9 July 2000), was improvident as the providence inquiry failed to establish he had a duty to be present at his unit on 3 July 2000. The Government concedes the appellant's plea is improvident, but urges us to affirm a finding of guilty of unauthorized absence from 5 to 9 July 2000. We agree with the parties that the appellant's guilty plea is improvident insofar as it included the dates 3-4 July 2000.

During the providence inquiry, the appellant testified that Monday, 3 July, was a day of liberty for his Squadron, but that he was a member of the duty section that day, and, as such, was required to muster by phone, which he failed to do. He further explained that Tuesday, 4 July, was a day of liberty, that he was required to report for duty again on Wednesday, 5 July, but did not do so, and that he remained absent from his unit until Sunday, 9 July 2000.

The appellant's admission that he was required, but failed, to muster by telephone on 3 July 2000 does not establish he had a duty to be present with this unit on that date, or that he was not in fact present at the place he was required to be. *United States v. Cary*, 57 M.J. 655, 657 (N.M.Ct.Crim.App. 2002). Accordingly, his guilty plea to the specification as charged is improvident. His admissions do establish, however, that he is guilty of unauthorized absence during the lesser included period of 5 to 9 July 2000. We will take corrective action in our decretal paragraph.

Unauthorized Absence as a Continuing Offense

The appellant next argues the military judge erred to his substantial prejudice by holding that unauthorized absence is a continuing offense. We disagree.

The military judge clearly said unauthorized absence is a continuing offense, Record at 167, and in that view, he was clearly mistaken. *United States v. Lynch*, 47 C.M.R. 498, 501 (C.M.A. 1973); *United States v. Emmerson*, 1 C.M.R. 43, 46 (C.M.A. 1951); *United States v. Barnes*, 60 M.J. 950, 953 (N.M.Ct.Crim. App. 2005). This error, however, in no way prejudiced the appellant, and actually appears to have inured to his benefit.

The military judge referred to unauthorized absence as a continuing offense in the context of *overruling* Government hearsay objections to evidence elicited by the Defense on the affirmative defense of duress. Further, a careful reading of the military judge's findings indicates his mistaken view of the law did not affect his findings. The military judge specifically stated he was satisfied that, during the entire duration of the unauthorized absence, the appellant's subjectively held fears were not objectively reasonable. Record at 280. This statement does not indicate, as the appellant argues, that the military judge required his subjective fears to be objectively reasonable for the entire duration of his absence (as opposed to simply at inception) in order to prevail on the affirmative defense of duress. Rather, it is a statement that the military judge found the appellant's subjective fears were never objectively reasonable.

Missing Legal Officer's Recommendation

In his third assignment of error, the appellant argues that the absence from the record of trial of the legal officer's recommendation (LOR), and the receipt therefor, requires us to set aside the CA's action and return the record for new post-trial processing. We agree.

Precedent compels us to conclude that the failure to include the LOR in the record constitutes a substantial omission. *United States v. Mark*, 47 M.J. 99, 102 (C.A.A.F. 1997)(omission from record and allied papers of staff judge advocate's or legal officer's recommendation without any indication of its content renders the proceedings substantially incomplete); *United States v. Massengill*, No. 97-0647, 1997 CAAF LEXIS 717 (C.A.A.F. Nov. 20, 1997).

A substantial omission in the record raises a rebuttable presumption of prejudice, *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000), and so we must consider whether that presumption of prejudice is overcome in this case.

To evaluate whether the presumption is overcome, we must first identify the nature of the presumptive prejudice to the appellant from the omission of the LOR from the record. Where, as here, the LOR was prepared, served on defense counsel, and

considered by the CA prior to taking action,¹ the presumptive prejudice to the appellant is the degraded ability of the appellate courts to properly carry out appellate review without access to the LOR.² Unless we can say categorically that there is no possible error the LOR could have made that would raise a colorable possibility of prejudice, which we cannot, we must conclude that the absence of the LOR from the record prejudicially impacts our ability to conduct appellate review. Since the appellant is prejudiced by the omission of the LOR from the record, we must set aside the CA's action.

Post-Trial Delay

Given our decision to set aside the CA's action and return the record for new post-trial processing, we will defer our consideration of the appellant's fourth assignment of error, that he has been denied speedy post-trial processing.

Conclusion

Accordingly, in Specification 10 of Charge I, the words and figures "0730, 3 July 2000," are excepted and the words and figures "5 July 2000" are substituted therefor. The excepted words are set aside and dismissed. The finding of guilty of specification 10 of Charge I, as excepted and substituted, and the remaining findings of guilty, are affirmed. For the reasons stated above, the CA's action is set aside and the record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority for new post-trial processing in compliance with Chapter XI of the RULES FOR COURTS-MARTIAL, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Senior Judge RITTER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court

¹ The court-martial order states the LOR was served on defense counsel on 13 July 2001, and the convening authority considered it prior to acting. Court-Martial Order 1-00, at 3-4.

² Note that this presumptive prejudice is different from that which would exist in a case where the SJAR or LOR was not prepared, or was prepared but not considered by the convening authority. In that case, the presumptive prejudice would be not only the potential interference with the courts' ability to conduct appellate review, but also the potential harm to the appellant's opportunity for clemency resulting from the convening authority's failure to receive the required advice from his SJA or legal officer.