

**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.

**STACIE M. SOWELL
SEAMAN (E-3), U.S. NAVY**

**NMCCA 9901777
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 May 2006.

Military Judge: CDR Lewis Booker, JAGC, USN.

Convening Authority: Commanding Officer, Transient
Personnel Unit, Naval Station, Norfolk, Va.

Staff Judge Advocate's Recommendation: Rehearing: LCDR
L.M. Beacoat, USN; SJAR: LCDR David G. Wilson, JAGC, USN.

For Appellant: LT Richard H. McWilliams, JAGC, USN; LT
William Stoebner, JAGC, USN.

For Appellee: Maj Wilbur Lee, USMC.

11 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

In October 1998, a special court-martial composed of officer and enlisted members convicted the appellant, contrary to her pleas, of conspiracy to commit larceny and larceny, in violation of Articles 81 and 121, UCMJ. The court-martial sentenced the appellant to confinement for 30 days, a fine of \$550.00, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged on 22 July 1999.

On appeal, a panel of this court affirmed the findings, but set aside the sentence and remanded the case for rehearing on sentence. *United States v. Sowell*, 59 M.J. 552 (N.M.Ct.Crim.

App. 2003). Upon *en banc* reconsideration, we reversed our decision, and affirmed the findings and sentence. *United States v. Sowell*, 59 M.J. 954 (N.M.Ct.Crim.App. 2004). The court of Appeals for the Armed Forces (CAAF) affirmed this court's decision with respect to the findings, but set aside our decision on the sentence and remanded, authorizing a rehearing on sentence. *United States v. Sowell*, 62 M.J. 150, 153 (C.A.A.F. 2005).

A rehearing on the sentence was held on 30 May 2006. A special court-martial composed of a military judge alone sentenced the appellant to confinement for 45 days, a fine of \$600.00, reduction to pay grade E-1, and a bad-conduct discharge. On 16 October 2006, the CA disapproved the reduction in pay grade to E-1 and the bad-conduct discharge. The CA also disapproved all confinement in excess of 30 days and all fines in excess of \$550.00.

This case is again before us for an Article 66(c), UCMJ, review of the sentence approved by the CA on 16 October 2006. In this appeal, the appellant has assigned three new supplemental assignments of error. First, she contends that the military judge abused his discretion by limiting evidence at the rehearing on sentence to facts in existence on or before the date findings were entered, which was 22 October 1998. Second, the appellant asserts that the Government has failed to protect the appellant's right to timely appellate review. Finally, the appellant argues that the CA did not have the authority to set aside findings in a case remanded for rehearing on the sentence.

We have considered the record of trial, the appellant's three assignments of error, the Government's answer, and the appellant's reply. We find merit in the appellant's first assignment of error, and agree that the sentence should be set aside in its entirety. In light of our disposition of this issue, we need not address the remaining assignments of error.

Limited Rehearing Sentencing Information

In connection with the appellant's May 2006 rehearing on sentence, the military judge ruled that evidence of the appellant's post-sentencing activity was irrelevant and inadmissible. Appellate Exhibit XC. The standard of review of a military judge's decision to exclude evidence is an abuse of discretion. *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005); *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion if his decision is based on an erroneous view of the law. *Griggs*, 61 M.J. at 406.

The procedures for rehearings on sentence only are set forth in RULE FOR COURTS-MARTIAL 810, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Specifically, that Rule provides that "In a rehearing on sentence only, the procedure shall be the same as in an original trial . . .", R.C.M. 810(a)(2), and that "[s]entences

at rehearings . . . shall be adjudged within the limitations set forth in R.C.M. 1003." R.C.M. 810(d)(1).

R.C.M. 1001 establishes presentencing procedures at a court-martial. Subsection (b) of that rule specifies "matter to be presented by the prosecution." More specifically, R.C.M. 1001(b)(4) states that "the trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." (Emphasis added). Likewise, subsection (c) of R.C.M. 1001 specifies "matters to be presented by the defense." R.C.M. 1001(c)(1) permits the defense to "present matters in extenuation and mitigation regardless whether the defense offered evidence before findings." "Matter in mitigation of an offense is introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency." R.C.M. 1001(c)(1)(B). Evidence in mitigation includes "particular acts of good conduct or bravery and evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember." *Id.*

Our superior court has consistently recognized that an accused has a broad right to present mitigation evidence. *United States v. Perry*, 48 M.J. 197, 199 (C.A.A.F. 1998); *United States v. Becker*, 46 M.J. 141, 143 (C.A.A.F. 1997)(citing *United States v. Combs*, 20 M.J. 441, 442 (C.M.A. 1985)). In 1958, the Air Force Board of Review, in *United States v. Rivers*, 27 C.M.R. 949 (A.F.B.R. 1958), found that the trial judge had erred by ruling that "anything that occurred subsequent to . . . the time the first sentence was adjudged could not be considered in determining the sentence on rehearing," and held that "[m]atters in mitigation occurring up to the time of sentence may be considered. Evidence in aggravation of the offense may also be introduced." *Rivers*, 27 C.M.R. at 950-51 (citation omitted). Further, while not directly on point, insofar as the Rules define mitigation to include evidence furnishing grounds for a clemency recommendation, we note our superior court has held that, when a case is remanded for a new CA's action, a CA may consider changes in circumstance following the initial action, for the purpose of determining whether clemency is warranted. *United States v. Rosenthal*, 62 M.J. 261, 262-63 (C.A.A.F. 2005)(per curiam).

Subsequent to the appellant's rehearing on sentence, this court directly addressed the issue presented in this case. In *United States v. Davis*, ___ M.J. ___, No. 9600585, 2007 CCA LEXIS 347, at 8, (N.M.Ct.Crim.App. 30 Aug 2007), we held, based on the Rules for Courts-Martial, recognized military sentencing principles and the persuasive authority of *Rivers* and *Rosenthal*, *supra*, and considering the practical difficulties in limiting evidence on resentencing to facts in existence prior to a certain date, that the Rules for Courts-Martial do not establish any temporal limit on evidence that may be considered at a rehearing on sentence. Moreover, we rejected a *per se* rule excluding

evidence of facts arising after the date of the original sentence as impractical, difficult to implement and capricious. Specifically, we held that "it is much fairer, easier to administer, and more consistent with the language and spirit of the Rules to admit all relevant evidence occurring up to the time of the rehearing on sentence." *Id.* at 13.

We conclude, therefore, that the military judge applied an erroneous view of the law when he excluded evidence of facts arising after 22 October 1996. We further find that the evidence of the facts arising after the date of the original sentencing proffered by the appellant was otherwise admissible and that the military judge abused his discretion by precluding its admission.¹

We must next determine whether the appellant was materially prejudiced by this error.² This court tests "the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence. *Griggs*, 61 M.J. at 410.

In this case, we find the probative value and weight of the excluded evidence was substantial, in light of the significant facts of the appellant's rehabilitation in society, as illustrated in the letters from the appellant's college English professor, church and college choir directors, mother, husband, friends, and recent military supervisors. We conclude that the military judge's erroneous ruling denied the appellant a full and fair opportunity to present valuable mitigation evidence and its exclusion may have substantially influenced the sentence adjudged. We, therefore, conclude that the error was prejudicial to the appellant's substantial due process rights.

¹ We again conclude, as we did in *Davis*, that the Federal Sentencing Guidelines suggest a different conclusion. In adopting guideline § 5K2.19, cited by the military judge, the United States Sentencing Commission was attempting, in part, to respect Congressional intent in enacting a complex overhaul of federal criminal sentencing and parole policy. 18 U.S.C.S Appx § 5K2.19, Commentary. Federal civilian sentencing procedures, however, are vastly different from military sentencing procedures, and we conclude they are of little use in deciding the correct resolution of the question presented in this case.

² We reject the Government's argument that the appellant waived the issue by entering into a Memorandum of Agreement (MOA) in which she agreed not to make a motion under R.C.M. 1001 to introduce facts not in existence on or before the original sentencing date. The issue was raised at the rehearing, and the military judge issued his ruling on the issue prior to the appellant entering into the MOA with the CA. Moreover, even after the MOA was executed, the appellant, through counsel, raised the issue when the rehearing reconvened when she offered evidence that she believed was relevant to the issue, and when she twice renewed her request that the judge consider the contents of the proffered exhibits in deliberating on sentence. *See Record* at 486 and 492. Thus, despite the MOA provision, the appellant did not concede or waive the issue, but preserved the issue for appeal.

Having determined that the exclusion of the evidence was prejudicial error, we must decide whether to reassess the sentence or remand the case for a sentence rehearing. We conclude that we can reassess the sentence in accordance with the *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Conclusion

The findings having previously been affirmed, we affirm a sentence of no punishment as the appropriate sentence in this case.

Senior Judge GEISER and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court.