

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

**BEFORE**

**D.A. WAGNER**

**R.E. VINCENT**

**P.D. KOVAC**

**UNITED STATES**

**v.**

**Herman J. VALDEZ  
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600377

Decided 24 May 2007

Sentence adjudged 10 December 2004. Military Judge: D.S. Oliver. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st First Force Service Support Group, Camp Al Taqaddum, Iraq.

CDR JEFFREY W. McCRAY, JAGC, USN, Appellate Defense Counsel  
LCDR PAUL D. BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KOVAC, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to introduce marijuana onto a military installation, false official statement, driving a military vehicle while impaired by marijuana, and introduction, distribution, and wrongful use of marijuana in violation of Articles 81, 107, 111, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 911, and 912a. The appellant was sentenced to confinement for 34 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad conduct discharge. The convening authority approved the adjudged sentence, but suspended confinement in excess of 15 months and all forfeitures, in accordance with the pretrial agreement.

The appellant raises three assignments of error. First, he asserts that the staff judge advocate erred when he failed to inform the convening authority of companion cases. Second, the appellant alleges a due process violation as a result of the

convening authority's delay in forwarding his case to this court. Third, the appellant avers that his sentence is inappropriately severe.<sup>1</sup>

We have carefully examined the record of trial, the appellant's brief and assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

### Companion Cases

In his first assignment of error, the appellant focuses the Court's attention the staff judge advocate's recommendation (SJAR) and its omission of any reference to companion cases. The appellant contends that this omission prevented him from fully exploring the issue of disparate sentencing in his clemency request to the convening authority (CA). He requests that the record be returned for a new SJAR and CA's action. We conclude, however, this action is not necessary because the appellant failed to meet his burden of proving that the cases were convened by the same CA.

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7D § 0151a(2)(15 Mar 2004). "The requirement, however, is limited to those cases convened by the same convening authority." *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000)(citing *United States v. Swan*, 43 M.J. 788, 790 (N.M.Ct.Crim.App. 1995)). The burden is upon the appellant to show that the related case was convened by the same convening authority. *Id.*; *United States v. Watkins*, 35 M.J. 706, 716 (N.M.C.M.R. 1992). Additionally, the failure to list companion cases is harmless error, unless an appellant can demonstrate prejudice from the error. *United States v. Bruce*, 60 M.J. 636, 642 (N.M.Ct.Crim.App. 2004).

It is clear that the CA did not specifically mention any companion cases in his action.<sup>2</sup> However, the CA did note that he

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<sup>1</sup>We note that the appellant missed the filing deadline for his brief without filing an enlargement motion. This case was docketed with the Court on 17 April 2006, making the appellant's brief due (under the rules in effect at that time) 120 days later on 15 August 2006. The appellant did file a "Motion for Enlargement Out of Time," but this was not done until November 29, 2006. This motion failed to provide any explanation for why the filing deadline was missed or why an enlargement request was not previously filed. Despite our concern, we grant the appellant's enlargement motion filed out of time and accept appellant's brief with the added cautionary reminder to show respect for the court's deadlines and filing rules or risk rejection of future briefs.

considered appellant's clemency requests and the entire record of trial. Appellant's clemency request, dated 28 January 2005, mentions the alleged companion cases and states that Sergeant (Sgt) Figueroa received 10 months of confinement. During voir dire of the military judge, defense counsel mentioned the two companion cases of Sgt Figueroa and Lance Corporal (LCpl) Lohr and the fact that they were tried by special court-martial. Record at 5-7. However, nothing was mentioned regarding the identity of the CA in those two cases. Nor does our review of the record contain any further information regarding the identity of the CA in these cases. On appeal, the appellant fails to offer any additional information on this issue that is helpful to the Court. Accordingly, the appellant did not meet his burden of proving that the companion cases were referred to trial by the same CA and we decline to grant relief.

Assuming, *arguendo*, that Sgt Figueroa and LCpl Lohr were referred to trial by the same CA, we find no harm to the appellant. "The purpose of this requirement [to note the companion cases] is . . . to ensure that the convening authority makes an informed decision when taking action on an accused's court-martial." *Ortiz*, 52 M.J. at 741. For the reasons stated above, we believe the CA had knowledge of the alleged companion cases and approved appellant's sentence accordingly.

#### **Post-Trial Delay**

The appellant requests that this court disapprove his bad-conduct discharge because the convening authority delayed approximately 14 months in sending the record for appellate review. We deny appellant's request.

Our superior court has held that we may dispose of a due process issue by "assuming error and proceeding directly to the conclusion that any error was harmless." *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). In this case, we note that the appellant fails to allege any specific prejudice in his brief and likewise we find none. Accordingly, we conclude that any error was harmless beyond a reasonable doubt. We also do not find that the delay affects the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc).

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<sup>2</sup> We note that the mentioning of companion cases is not required in the SJAR according to R.C.M. 1106(d)(3)("Required contents").

### Sentence Appropriateness

The appellant characterizes his offenses as "relatively minor" and, because he served in a combat zone and now expresses remorse for his actions, he claims that a bad-conduct discharge is "inappropriately harsh." We disagree. It is the very fact that appellant was serving in a combat zone at the time of his offenses that make this case egregious. The appellant was entrusted with the critical position of providing ammunition to United States forces during a major military operation. Around this time, the appellant enlisted the aide of a civilian in the United States and effectuated a conspiracy that introduced marijuana into a combat environment. The appellant later shared this drug with two other Marines and then operated a military vehicle while under the drug's influence. Unrebutted evidence during sentencing demonstrates that appellant's actions were detrimental to other Marines within his unit. Given these facts, we find that the sentence is appropriate for this offender and these offenses. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

### Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL  
Clerk of Court