

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.W. ROLPH, J.D. HARTY, R.G. KELLY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL A. WILD
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700108
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 June 2004.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding Officer, MALS-11, MAG-11, 3d Marine Aircraft Wing, MCAS Miramar, CA.

Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC.

For Appellant: LCDR Derek Hampton, JAGC, USN.

For Appellee: LT David Lee, JAGC, USN.

11 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

KELLY, Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of wrongfully possessing drug paraphernalia, introducing marijuana onboard a vessel of the Armed Forces, distributing marijuana on board a vessel of the Armed Forces, and using marijuana on divers occasions, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The

appellant was sentenced to confinement for 6 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence. The pretrial agreement had no effect on the appellant's sentence.

We have reviewed the copy of the record of trial docketed with the court, the appellant's assignments of error,¹ and the Government's response. We find merit in the appellant's second assignment of error, and agree that the copy of the record of trial that was received at this court must be returned for proper authentication.

Background

On 15 June 2004, the appellant was convicted pursuant to his pleas and was sentenced. The military judge authenticated the record of trial on 29 October 2004.² The staff judge advocate (SJA) prepared his recommendation (SJAR) on 26 January 2005. Trial defense counsel accepted service of the SJAR on 3 February 2005, and waived comment. The CA took action on the case on 4 March 2005. In doing so, the CA stated that he considered "the results of trial, the recommendation of the Staff Judge Advocate under R.C.M. 1106, and the matters submitted by the accused's defense counsel in accordance with R.C.M. 1105 and/or R.C.M. 1106."³ CA's Action of 4 Mar 2005 at 2.

Nearly two years later, three copies of the record of trial were received at the Navy-Marine Corps Appellate Review Activity (NAMARA). On 1 February 2007, NAMARA forwarded a copy of the record to this court for action. Attached to the record, was a letter from the Head, NAMARA Case Management Branch, which informed the Clerk of this court that three copies of the record of trial had been forwarded to NAMARA without an original, and after attempting to resolve the issue with the command, NAMARA

¹ I. WHETHER THE UNREASONABLE POST-TRIAL DELAY IN THE POST-TRIAL PROCESSING OF THIS CASE MATERIALLY PREJUDICED THE APPELLANT'S RIGHT TO SPEEDY POST-TRIAL REVIEW, AS WELL AS AFFECTS THE SENTENCE THIS COURT SHOULD APPROVE.

II. WHETHER, IN ACCORDANCE WITH R.C.M. 1104(c) THE GOVERNMENT SHOULD BE REQUIRED TO CAUSE ANOTHER RECORD OF TRIAL TO BE PREPARED FOR AUTHENTICATION IN THIS MATTER.

² The record of trial also contains what purports to be the trial defense counsel's receipt of service of the authenticated copy of the record of trial on 10 September 2004. We are, however, at a loss to explain how the trial defense counsel received a copy of the "authenticated" record approximately one month prior to the military judge's authentication.

³ The appellant waived his right to submit clemency matters pursuant to R.C.M. 1105 and 1106, on 13 September 2004, and the record before us does not contain any post-trial submissions. We are also at a loss to explain how the CA was able to consider matters that were not submitted by the appellant or his trial defense counsel.

had been informed that the original record of trial was no longer available. Head, NAMARA Case Management Branch letter of 1 Feb 2007. The case was docketed at this court on 7 March 2007. From the copies provided to this court, there is no indication that any trial participant reviewed the copies to validate their completeness.

Authentication of the Record

In his second assignment of error, the appellant claims that the Government should be required to cause another record of trial to be prepared for authentication in this matter. Appellant's Brief and Assignments of Error of 7 May 2007 at 1. We agree, and find that the copy of the record of trial received at this court is not an authenticated record as contemplated by Article 54(b), UCMJ, or RULE FOR COURTS-MARTIAL 1104(a)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Each special court-martial record of trial "shall be authenticated in the manner required by . . . the President." Art. 54(b), UCMJ. The President has prescribed that the military judge shall authenticate all special courts-martial records of trial in which a bad-conduct discharge, confinement for more than six months, or forfeiture of more than six months of pay is awarded. R.C.M. 1104(a)(2)(B). R.C.M. 1104(a)(1) provides, "A record is authenticated by the signature of a person specified in this rule who thereby declares that the record accurately reports the proceedings." The purpose of authentication is to ensure the verity of the record. See *United States v. Galloway*, 9 C.M.R. 63, 65 (C.M.A. 1953).

When an authenticated record is lost or destroyed, the trial counsel shall, if practicable, cause another record of trial to be prepared for authentication, following the procedures in R.C.M. 1103. R.C.M. 1104(c). The newly authenticated record "becomes the record of trial as if there had never been a 'lost' or . . . 'destroyed' record of trial." *United States v. Garcia*, 37 M.J. 621, 622 (A.C.M.R. 1993). In the present case, the Government has failed to have a substitute original of the record of trial authenticated as required by R.C.M. 1104(c). We, therefore, do not have before us a record that has had its verity ensured.⁴ *Galloway*, 9 C.M.R. at 65. Accordingly, we conclude, as we have before, that a copy of the record of trial must be returned for proper authentication. See

⁴ We reject the Government's assertion that the three-part process for resolving post-trial processing error announced in *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998), should be applied to lost original record of trial authentication issues. Government's Answer of 6 Jun 2007 at 6.

United States v. Myers, No. 88 3024R, unpublished op. (N.M.C.M.R. 31 Oct 1990). To hold otherwise would eliminate the need for an original record of trial.

Conclusion

The CA's action is set aside. The copy of the record of trial docketed with this court is returned to the Judge Advocate General for remand to the CA for proper authentication of the record of trial in accordance with R.C.M. 1103, 1104(a)(2)(B), 1104(c), and post trial processing. Thereafter, the record of trial shall be returned to this court at which time Article 66(c), UCMJ, shall apply.⁵

Senior Judge HARTY concurs.

ROLPH, Senior Judge (dissenting):

I respectfully dissent from the majority opinion. The three available records of trial in this case, though not originals, are regular, complete, and identical in all respects. We have an authentication page and signature from the military judge in each copy and nobody in the appellate process has suggested that any portion of the record is missing, inaccurate, or lacks verity. I believe the majority opinion elevates form over substance in its insistence on an "original" authenticating signature in the record, when uncontested copies of the original signature are available in all three records.

The loss of the original record of trial, though problematic, should not preclude us from completing review of the appellant's conviction when three complete and verbatim copies of that same record exist, and no allegations of inaccuracy or prejudice have been asserted. Nothing in RULE FOR COURTS-MARTIAL 1104, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) requires the record to contain an "original" authenticating signature.¹ R.C.M. 1004(c) details the procedures for replacing a lost or destroyed record of trial, but that section is based upon the assumption that no verbatim copies of the original record are available. Indeed, the analysis to R.C.M. 1104(c) clearly states ". . . if more than one copy of the record is

⁵ Given our decision to return the record for proper authentication, we will defer our consideration of the appellant's first assignment of error, that he has been denied speedy post-trial processing.

¹ The majority's citation to R.C.M. 1104(a)(2)(B) as authority for their holding is confusing, as that section addresses the procedures for substitute authentication, which is not in issue in this case where actual authentication by the military judge took place.

authenticated then *each* may serve as the record of trial, even *if the original is lost.*" (emphasis added). That is exactly the case here.

We should apply a presumption of regularity to the handling and authentication of this record of trial based upon the undisputed completeness of the three copies before us. I fail to see how the court-martial process or a "substantial right[] of the accused" is furthered by requiring a new, original authentication signature. See Article 59(a), U.C.M.J.; *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998) (threshold showing of colorable prejudice is low, but nevertheless must be demonstrated in regard to alleged post-trial errors). The authenticated copies of this record of trial more than satisfy R.C.M. 1103 and 1104, and the remedy ordered by the majority opinion merely creates unnecessary post-trial delay.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge Harty participated in the decision of this case prior to detaching from the court.