

**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.**

**BRIAN K. BOWERS  
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 200600137  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 7 June 2005.

**Military Judge:** CDR Edward Smith, JAGC, USN.

**Convening Authority:** Commanding Officer, U.S Naval  
Activities, Rota, Spain.

**Staff Judge Advocate's Recommendation:** LCDR Jason T.  
Baltimore, JAGC, USN.

**For Appellant:** LtCol E.C. Durant, USMCR; Capt Anthony  
Burgos, USMC.

**For Appellee:** LCDR Brian Keller, USMC; LCDR Paul Bunge,  
JAGC, USN.

**10 January 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

**GEISER, Senior Judge:**

The appellant was convicted, contrary to his pleas, by a special court-martial with enlisted representation, of failure to go, willful disobedience of a superior commissioned officer (SCO), and two specifications of willful disobedience of a superior noncommissioned officer (SNCO), in violation of Articles 86, 90, and 91, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 890, and 891. The appellant was sentenced to a reduction to pay grade E-1 and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his appeal, the appellant raised seven assignments of error: (1) there is insufficient evidence to support a finding of guilty to Charge III, Specification 1 (willful disobedience of SNCO); (2) the military judge committed plain error by failing to instruct the members concerning the availability of the defense of duress to Charge III, Specification 2 (willful disobedience of SNCO); (3) there is insufficient evidence to support a guilty finding to Charge II and its specification (willful disobedience of SCO);<sup>1</sup> (4) trial defense counsel was ineffective; (5) the sentence is inappropriately severe; (6) the staff judge advocate's recommendation is flawed; and (7) the amended convening order was improperly signed by the acting Commanding Officer.<sup>2</sup>

Upon consideration of the record of trial and the pleadings, we determined that the appellant had made a colorable claim of ineffective assistance warranting further inquiry. On 16 January 2007, we ordered the Government to obtain an affidavit from the trial defense counsel addressing the appellant's allegations. On 15 February 2007, we granted the Government's Motion to Attach the ordered affidavit.

We further noted that the court-reporter, Legalman First Class (LN1) Eric Cobb, USN, signed "for" the military judge to authenticate the record. On 16 October 2007, we ordered the Government to show cause why the record should not be remanded for proper authentication and post-trial processing. The Government subsequently submitted a statement from the military judge indicating that he personally authenticated an electronic copy of the record in this case and directed the LN1 to sign on his behalf.<sup>3</sup> Although signing by direction is somewhat irregular, the military judge's subsequent signed affidavit indicating that he personally authenticated the record of trial in this case satisfies us that the requirements of RULE FOR COURTS-MARTIAL 1104(a)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) have been met.

We have carefully considered the record of trial and the pleadings of the parties, to include the trial defense counsel's affidavit and the military judge's affidavit. 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. Arts. 59(a) and 66(c), UCMJ.

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<sup>1</sup> This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>2</sup> This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

<sup>3</sup> Statement of Captain Edward G. Smith, JAGC, USN of 10 December 2007.

## Background

Specification 2 of Charge III: On 3 January 2005, the appellant had a 30-day limited duty chit for chronic problems with his back. The chit recommended that the appellant not work more than an 8-hour day and that he not perform certain strenuous physical activities. It indicated, however, that the appellant could "do administrative work." Prosecution Exhibit 1. In consideration of the chit, Master Chief Information Technician (ITCM) Robert Medina ordered the appellant to page-check confidential publications. This task involved visually reviewing each page of various publications to ensure completeness and currency.<sup>4</sup> The appellant acknowledges that he refused to obey ITCM Medina's order claiming that compliance with the order would cause permanent damage to his back.

ITCM Medina reviewed the limits of the light duty chit and informed the appellant that the task was well within the terms of the chit. The appellant responded that neither ITCM Medina, nor the person who wrote the chit was qualified to make that determination. ITCM Medina reiterated the order in the presence of the department's leading petty officer. When the appellant continued to refuse to comply, ITCM Medina memorialized the appellant's refusal in a memorandum and had the appellant sign it.

ITCM Medina then had the appellant meet with the Officer in Charge (OIC) of Naval Computer and Telecommunications Area Master Station (NCTAMS), Lieutenant Commander (LCDR) Sonya Cox. LCDR Cox personally directed the appellant to follow ITCM Medina's order. Again, the appellant refused. When questioned by LCDR Cox, the appellant informed her that he was not going to work at all as "it was not in his best interest to work." Record at 146.

A week later, after consulting with a military attorney, the appellant finally complied with the order. As a result of his refusal to obey ITCM Medina's order, the appellant was given extra military instruction (EMI) to correct his behavior. The EMI consisted of writing a memo and giving training on what constitutes a lawful order, and what the consequences were for not following a lawful order. Shortly thereafter, the appellant was sent on temporary additional duty (TAD) to Ground Electronics Maintenance Division (Ground Electronics) on Naval Station Rota.

Specification of Charge II: On 10 February 2005, the appellant had an authorized appointment at legal which ended at 1520. Pursuant to direction from his new supervisor, Lieutenant (LT)

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<sup>4</sup> In further consideration of the appellant's limited duty chit, ITCM Medina arranged for other petty officers to deliver the publications to the appellant for his review, and to retrieve them from him upon completion of his review, so that the appellant would not have to lift the publications during his performance of the page-checking. ITCM Medina had also arranged other accommodations for the appellant and instructed him that he could take a break and stretch as needed during the performance of this task.

Todd Johnston, the appellant called to inform LT Johnston that he had just finished his appointment. The appellant further asserted that he would be back in the office the next day. LT Johnson responded that the appellant had not worked the full 8 hours of the day provided for in his limited duty chit. He directed the appellant to report immediately to complete his daily obligation of 2 hours of EMI.

The appellant refused, asserting that to do so would exceed his 8-hour workday limit as set forth in his limited duty chit. The appellant further told LT Johnston that he would report back to Ground Electronics as soon as he finished at legal. The appellant thereafter met with his attorney and obtained confirmation that the order was legal and did not violate his limited duty chit. At that point, the appellant returned to his command and completed his daily EMI.

Specification 1 of Charge III: The appellant was subsequently permitted to go on emergency leave from 10 February to 25 March 2005. When he checked back in from leave on 25 March 2005, he reported directly to ITCM Medina at NCTAMS. ITCM Medina gave the appellant various pieces of administrative paperwork to include a hard-copy of an email from LCDR Cox to ITCM Medina. The email directed ITCM Medina to have the appellant make an appointment with his doctor to finish his medical board. Defense Exhibit C.

When they were finished, ITCM Medina specifically ordered the appellant to report directly to LT Johnston in his office. If LT Johnston was not there, the appellant was directed to report in to the next senior person in charge and document his return in the quarter deck log. ITCM Medina went so far as to have the appellant repeat the order back to him. The appellant did so and affirmatively indicated that he understood the order. The appellant departed and disobeyed the order by going to get something to eat and then going to medical to schedule appointments. He thereafter reported to LT Johnston's office as directed.

### **Sufficiency of the Evidence**

In his first and third assignments of error, the appellant challenges the sufficiency of the evidence as to the charged willful disobedience of the order from ITCM Medina on 25 March 2005 to report immediately to LT Johnston (Charge III, Specification 1), and the charged willful disobedience of the order from LT Johnston on 10 Feb 2005 to report immediately to his office (specification under Charge II).

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62

(N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

With regard to the order from ITCM Medina, the appellant contends that the Government failed to prove beyond a reasonable doubt that he was told to *immediately* comply with the order to report to LT Johnston. The appellant essentially argues that he was given conflicting orders, (that is, the verbal order to report from ITCM Medina and the email to take care of medical appointments). We disagree.

The fact that ITCM Medina made the appellant repeat back the verbal order and had the appellant indicate that he understood the order satisfies us that the immediate nature of the order was clear. Further, if the appellant was in any way confused by his "conflicting orders," it was incumbent on him to resolve the issue before departing. He elected not to do so. We are satisfied that reasonable members could have found the appellant guilty of each element of this offense beyond a reasonable doubt. Recognizing that we did not see or hear the witnesses at trial, we are nonetheless also convinced of the appellant's guilt beyond a reasonable doubt.

With regard to the appellant's failure to obey an order from LT Johnston to immediately report to his office, the appellant specifically asserts that the evidence is insufficient to prove that the order was to *immediately* report. We note that LT Johnston specifically testified that he ordered the appellant to return to complete his assigned 2-hour EMI that was normally accomplished after working hours. He further testified that the appellant expressly stated that he would not do so. Record at 154.

The appellant's express refusal and subsequent consultation with an attorney regarding the legality of the order indicates that the appellant was not focused on whether he had to obey the order immediately, but rather whether he was legally obligated to obey it at all. "[A]rguing about [his] obligation to comply with what is clearly a lawful order demanding immediate compliance constitutes a failure to obey that order." *United States v. McLaughlin*, 14 M.J. 908, 913 (N.M.C.M.R. 1982). Considering the evidence in the light most favorable to the Government, a rational fact-finder could have found all the necessary elements of the offense beyond a reasonable doubt. We, too, are convinced beyond a reasonable doubt of the appellant's guilt. These issues are without merit.

### Failure to Instruct

The appellant contends in his second assignment of error that the military judge plainly erred by failing to *sua sponte* instruct the members concerning the availability of the duress defense with respect to the appellant's failure to obey ITCM Medina's order to page check publications (Charge III, Specification 2).<sup>5</sup>

Since the appellant never requested the instruction at trial, we review the issue for plain error. R.C.M. 920(f); see *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). R.C.M. 916(h) provides that duress involves a *reasonable apprehension* that the accused or another innocent person would be immediately killed or would *immediately suffer serious bodily injury* if the accused did not commit the act." (Emphasis added).

In the instant case, it is clear that the appellant refused to obey the order based on his belief it would aggravate his chronic back condition, not because he believed that it would immediately cause serious bodily injury. We find the military judge did not commit plain error by failing *sua sponte* giving a duress instruction to the members. This issue is wholly without merit.

### Effective Assistance of Counsel

The appellant avers in his fourth assignment of error that he was denied effective assistance of counsel, because counsel failed to: (1) adequately investigate the appellant's case prior to trial; (2) interview critical witnesses prior to the commencement of trial; (3) effectively impeach witnesses; (4) establish an attorney-client relationship; (5) present evidence of the appellant's medical problems; and (6) review the legality of the convening order.

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The

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<sup>5</sup> We note, however, that the military judge twice *sua sponte* raised the issue of duress with the parties. Record at 224-25, 318-19. On each occasion, the defense declined to request a duress instruction.

appellant "'must surmount a very high hurdle.'" *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

Based on our review of the record and the trial defense counsel's affidavit, we conclude that the appellant has demonstrated neither deficient performance by his trial defense counsel nor prejudice. The affidavit of trial defense counsel clearly reflects that she interviewed all relevant Government and defense witnesses, communicated regularly with the appellant, and conducted adequate pretrial investigation and preparation. Moreover, trial defense counsel's affidavit and the record conclusively establish, contrary to the appellant's assertion, that trial defense counsel presented extensive evidence, including the appellant's medical board report, and testimony from a board certified anesthesiologist and the appellant, himself, regarding the severity of his medical problems.

In addition, the record further reflects that, contrary to the appellant's assertion on appeal, the trial defense counsel effectively cross-examined witnesses. The appellant's allegations that counsel did not enter into an attorney-client relationship or discuss the merits of his case with him are also without merit. Finally, as resolved below, we find that the appellant's assignment of error regarding the legality of the convening order is wholly without merit, and therefore, we find that the trial defense counsel's performance was not deficient, or otherwise ineffective.

#### **Sentence Appropriateness**

The appellant's fifth assignment of error contends that his sentence to a bad-conduct discharge and reduction to pay grade E-1 is inappropriately severe based on the nature of the offenses and the character of the offender. We disagree.

Sentence appropriateness involves the "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In the instant case, the appellant's conduct caused his immediate chain of command to have to spend inordinate amounts of time explaining, documenting, and tracking the appellant's whereabouts and his work output. This was time that could more profitably have been spent pursuing the command's mission. After careful consideration of the entire record, the seriousness of the appellant's offenses, and his military service, we find that the sentence to a bad-conduct discharge and reduction to pay grade E-1 is appropriate to this appellant and is not inappropriately severe.

## Response to Defense Assertion of Error in SJAR

In his sixth assignment of error, the appellant contends that the staff judge advocate's recommendation (SJAR) fails to address all the alleged legal errors raised by the appellant in his post-trial submissions, and does not address the effect of these errors on the findings. Further, the appellant contends that the error was prejudicial because the CA was deprived of information that could have affected his action.

The appellant's trial concluded on 7 June 2005. On 23 November 2005, the appellant submitted a "Request for Special Captain's Mast" to the CA, in which he alleged that the trial defense counsel was ineffective, that he had been the victim of reprisal, that medical and legal documentation was not entered into evidence during his court-martial, and he questioned the command's response to his medical problems. In his letter, the appellant did not request clemency or cite R.C.M. 1105.

On 7 December 2005, the staff judge advocate responded to the issues raised in the appellant's post-trial submission by stating in pertinent part:

Despite the alleged errors raised by the accused in his request for clemency (specifically, ineffectiveness of his defense counsel and numerous other issues he raises about the treatment he received at Naval Station Rota), the sentence as adjudged is legal and appropriate.

SJAR of 7 Dec 2005 at 2.

On 16 December 2005, the appellant responded to the SJAR, by specifically asserting that his 23 November 2005 submission "was in no way a request for clemency" but rather was a "request for an impartial review of all the evidence in my case." Appellant's "Sirrebuttal [sic] to SJA Recommendation" of 16 December 2005 at 2. The appellant also asserted that the SJAR was erroneous in that the court-martial was without jurisdiction, and that the court-martial was improperly convened because the charges were improperly referred and the members were improperly detailed. The appellant also repeated the same claims as he raised in his 23 November 2005 letter.

In taking action on the appellant's case, the CA stated that he considered, *inter alia*, the "two letters of clemency submitted by the accused." CA's Action of 20 Dec 2005 at 2.

The purpose of the SJAR "is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative." R.C.M. 1106(d)(1). If an accused raises an allegation of legal error before the CA has acted on his case, the SJA has an additional responsibility to advise the CA if "corrective action on the findings or sentence should be taken. . . . The response may consist of a statement

of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the [SJA's] statement, if any, concerning legal errors is not required." R.C.M. 1106(d)(4); see *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988).

In the instant case, the SJAR contains the SJA's conclusion that there were no legal errors within the record, and his conclusion that the sentence was not affected by the submitted allegations of legal error. By necessary implication, the SJA clearly disagreed with the allegations of error and did not recommend corrective action on the findings. Moreover, contrary to the appellant's argument, it is clear that the CA was well-aware of the appellant's allegations of legal error in taking action. This issue is wholly without merit.

#### **Amended Convening Order Signed by Acting Commander**

In his seventh assignment of error, the appellant asserts that the Executive Officer of U.S. Naval Activities, Spain, improperly signed the amended convening order because he was the Acting Commander at the time. "It is well established in military law that the power to convene courts-martial 'is to the office, and not to the particular person who occupies the office at the time of the grant.'" *United States v. Brown*, 39 M.J. 114, 117 (C.M.A. 1994)(quoting *United States v. Bunting*, 15 C.M.R. 84, 87 (C.M.A. 1954); see U.S. Navy Regulations, Art. 1026 (1990); see also R.C.M. 601(b). The appellant does not dispute the executive officer was the Acting Commander at the time he signed the amended convening order. The issue is wholly without merit.

#### **Conclusion**

The findings and the approved sentence are affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court