

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

**Before
W.L. RITTER, E.S. WHITE, R.E. VINCENT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**KEIR A. HARRIS
ELECTRONICS TECHNICIAN FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200700531
GENERAL COURT-MARTIAL**

Sentence Adjudged: 03 November 2006.

Military Judge: CAPT Salvador Dominguez, JAGC, USN.

Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.

Staff Judge Advocate's Recommendation: LCDR Edward Korman, JAGC, USN.

For Appellant: LT Brian Korn, JAGC, USN.

For Appellee: LT Timothy Delgado, JAGC, USN.

18 March 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of unauthorized absence, sodomy with a child between the ages of 12 and 16, and five specifications of committing indecent acts upon a child under the age of 16, in violation of Articles 86, 125, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 925, and 934. The appellant was sentenced to confinement for 25 years, reduction to pay grade E-1, and a dishonorable discharge. The convening authority (CA) approved the sentence and, pursuant to the terms of a pretrial agreement, suspended confinement in excess of 20 years for a period of 21 years from the date of the CA's action. The CA also deferred automatic forfeitures provided

the appellant established an allotment for his wife and waived automatic forfeitures for six months from the date of the action. The appellant asserts five assignments of error.¹

We have examined the record of trial, the appellant's brief, and the Government's response. Additionally, we have examined the affidavits of the appellant, Lieutenant (LT) [K], detailed trial defense counsel, and LT [R], a defense counsel who accepted service of the staff judge advocate's recommendation [SJAR], but, apparently was never detailed to the appellant's case. We conclude we must set aside the CA's action and return the case to the Judge Advocate General for remand to the CA for new post-trial processing. Because we are returning the record of trial for a new SJAR and CA's action, we will not conduct our statutory review until this case is returned to us following corrective action.

Background

In his post-trial affidavit, the appellant asserted he was never contacted by LT K or LT R regarding clemency matters. He contends that, if consulted, he would have submitted (a) a written statement to the CA expressing remorse for his actions, and detailing his steps while in confinement to ensure his conduct would never be repeated, and (b) five letters of support from family members. Affidavit of Appellant of 28 Aug 2007. LT K and LT R submitted affidavits pursuant to this court's order of 12 December 2007 in response to appellant's assertion of post-trial ineffective assistance of counsel.

LT K served as the appellant's detailed trial defense counsel at trial. After trial, but before being served with the SJAR, she deployed to Iraq.² In her affidavit, LT K states that,

¹ I. THE MILITARY JUDGE ERRED IN ADMITTING SENTENCING EVIDENCE OF UNCHARGED SEXUAL ABUSE BY APPELLANT OF HIS DAUGHTER.
II. APPELLANT'S TRIAL DEFENSE COUNSEL WAS INEFFECTIVE BY FAILING TO CONTACT APPELLANT BEFORE SUBMITTING CLEMENCY MATTERS ON APPELLANT'S BEHALF.
III. IN THE SECOND PARAGRAPH OF DETAILED DEFENSE COUNSEL'S INITIAL CLEMENCY REQUEST, APPELLANT IS LISTED AS "LT CHAPPELL" INSTEAD OF PETTY OFFICER HARRIS. NEITHER THE STAFF JUDGE ADVOCATE NOR THE CONVENING AUTHORITY COMMENTED ON THIS ERROR, DEMONSTRATING THAT THEY DID NOT PROPERLY REVIEW THE CLEMENCY REQUEST.
IV. APPELLANT WAS PREJUDICED WHEN HIS DETAILED DEFENSE COUNSEL, IN THE THIRD PARAGRAPH OF THE INITIAL CLEMENCY REQUEST, STATED THAT THE APPELLANT'S CHILDRENS' LIVES HAVE BECOME MORE DIFFICULT BECAUSE OF APPELLANT'S ACTIONS, IMPROPERLY FOCUSING ON APPELLANT'S UNLAWFUL ACTIONS RATHER THAN A LEGITIMATE BASIS FOR CLEMENCY.
V. THE STAFF JUDGE ADOCAVE RECOMMENDATION WAS DELIVERED TO AND RECEIVED BY LT [R], WHO NEVER FORMED AN ATTORNEY-CLIENT RELATIONSHIP WITH APPELLANT. Assignments of Error III, IV and V were submitted pursuant to *United States V Grostefon*, 12 M.J. 431 (C.M.A. 1982).

² LT K deployed in early January 2007. The SJAR was dated 12 January 2007 and the CA's action was dated 30 January 2007.

prior to her deployment, upon the advice of her officer in charge (OIC), she submitted a clemency request to the CA, even though she had been unable to contact the appellant at the brig. The clemency submission requested the CA reduce the appellant's confinement in order to enable him to reunite with his family and provide them financial support. The submission also indicated LT R would assume responsibility for providing further post-trial clemency submissions. Clemency Request of 5 Jan 2007.

LT K also states that, immediately prior to her deployment, she electronically mailed LT R advising him he would be assigned to provide the appellant post-trial representation, informing him she had submitted initial clemency matters to the CA, and requesting him to contact the appellant to ascertain what additional clemency matters he wanted to submit to the CA. Affidavit of LT K of 8 Jan 2008 at 2.

In his affidavit, LT R states he interpreted LT K's electronic mail message as a request to conduct "ministerial duties" on her behalf for the appellant. He further states no competent authority authorized him to enter into an attorney-client relationship with the appellant, so he did not do so. Affidavit of LT R of 9 Jan 2008, ¶ 4. Despite LT R's assertions, he, nevertheless, signed for receipt of the SJAR and indicated his intention to submit additional clemency matters. SJAR Receipt of 16 Jan 2007. LT R never contacted the appellant, nor did he submit any additional clemency matters on the appellant's behalf.

Discussion

RULE FOR COURTS-MARTIAL, 1106(f)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2005 ed.) provides that if the detailed defense counsel is not reasonably available to represent the accused, substitute military counsel shall be detailed. Substitute defense counsel shall enter into an attorney-client relationship with the accused before examining the SJAR and preparing any response.

In the instant case, LT K, the detailed trial defense counsel, was not reasonably available to represent the appellant after her deployment to Iraq in early January 2007. It is also apparent from LT R's affidavit that he was never detailed to represent the appellant and never entered into an attorney-client relationship with the appellant. We note the Government has not produced any evidence indicating LT R was detailed to represent the appellant.

Therefore, the "appellant was not represented by counsel under Article 27(b), UCMJ, 10 U.S.C. § 827(b), at this critical point in the criminal proceedings against him, as required by R.C.M. 1106(f)(2)" *United States v. Johnston*, 51 M.J. 227, 229 (C.A.A.F. 1999)(citing *United States v. Hickok*, 45 M.J. 142 (C.A.A.F. 1996) and *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992).

Accordingly, the CA's action is hereby set aside. The record is returned to the Judge Advocate General for remand to an appropriate convening authority for new post-trial processing in compliance with R.C.M. 1105-1107.

Senior Judge WHITE concurs.

For the Court

R.H. TROIDL
Clerk of Court

Chief Judge RITTER did not participate in the decision of this case.