

**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.

**EMERSON B. MCCLAIN, Jr.
SEAMAN (E-3), U.S. NAVY**

**NMCCA 200700220
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 24 October 2006.

Military Judge: CAPT Michael McGregor, JAGC, USN.

Convening Authority: Commanding Officer, USS THEODORE ROOSEVELT (CVN 71).

Staff Judge Advocate's Recommendation: LCDR Byron A. Divins, Jr., JAGC, USN.

For Appellant: CDR Ted Yamada, JAGC, USN.

For Appellee: CDR Russell J.E. Verby, JAGC, USN; LT Justin E. Dunlap, JAGC, USN.

31 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of making a false official statement, and two specifications of larceny, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The appellant was sentenced to a bad-conduct discharge, confinement for 9 months, forfeiture of \$800.00 pay per month for 9 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 6 months pursuant to a pretrial agreement.

In his first assignment of error, the appellant claims that the convening authority committed plain error prejudicial to the substantial rights of the appellant when he failed to wait 10 days following service of the staff judge advocate's recommendation (SJAR) on the trial defense counsel before taking his action. In his second assignment of error, the appellant asserts that the record of trial is incomplete because it is missing a clemency request submitted to the convening authority by the appellant's detailed defense counsel.

After carefully considering the record of trial, the appellant's 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. Arts. 59(a) and 66(c), UCMJ.

The record of trial was authenticated on 8 December 2006. The trial defense counsel signed a clemency request to the convening authority on 13 December 2006, which was submitted to the CA on 22 January 2007. The SJAR was signed on 19 January 2007 and served on the trial defense counsel on 22 January 2007. The SJAR states that no clemency matters were submitted by the appellant, and no clemency request is contained in the record. However, the convening authority's action dated 30 January 2007 clearly states that the appellant's clemency request of 13 December 2006 was considered by the convening authority before he took action in this case.

Convening Authority's Action

Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. RULE FOR COURTS-MARTIAL 1107(b)(3)(A)(iii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); *see also United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). The accused may submit clemency matters or comments on the SJAR within 10 days of receipt of the SJAR. R.C.M. 1105(c)(1). In the absence of a waiver by the accused, the convening authority may take action only after this 10-day period has expired. R.C.M. 1107(b)(2). Before we will set aside a convening authority's action for violation of R.C.M. 1107(b)(2), "an accused must make some showing that he would have submitted material to the convening authority if that officer had not acted prematurely on his case." *United States v. DeGrocco*, 23 M.J. 146, 148 (C.M.A. 1987)(citing *United States v. Skaar*, 20 M.J. 836, 840 (N.M.C.M.R. 1985)(*en banc*)).

In this case, it is apparent that the convening authority acted prematurely by two days, in contravention of R.C.M. 1107(b)(2). Given that this constitutes an error that is plain or obvious, we must still find that "the error materially prejudiced a substantial right" of the appellant before he can prevail. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)(quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F.

2000)); see also *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998).

The appellant has failed to show that he would have submitted additional clemency matters to the convening authority if he had not acted prematurely or that the SJAR contained errors upon which he would have commented.¹ Such a showing should include an offer of proof as to the nature of the material which would have been submitted. *DeGrocco*, 23 M.J. at 148 (citing *United States v. Diamond*, 18 M.J. 305 (C.M.A. 1984) and *United States v. Babcock*, 14 M.J. 34 (C.M.A. 1982)). In the absence of an offer of proof, we find that the appellant has failed to make "some colorable showing of possible prejudice." *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998)(quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)). We conclude that this assignment of error is without merit.

Missing Clemency Request

The law requires that a record of trial be "complete" and contain a "substantially verbatim" transcript of the proceedings. Art. 54(c)(1), UCMJ; R.C.M. 1103(b)(2). Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *Id.* at 111 (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981), *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979), and *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. *Id.* The determination of what constitutes a substantial omission from the record of trial is decided on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Once again, the appellant has failed to make "some colorable showing of possible prejudice" by the absence of his clemency request from the record. *Wheelus*, 49 M.J. at 289 (citations omitted). To the contrary, it is evident from the convening authority's action that the appellant's clemency request was considered. *United States v. Blanch*, 29 M.J. 672, 673 (C.M.A. 1989)(Government is permitted to "enhance the 'paper trail' and show that the information was indeed transmitted to and considered by the convening authority."). We find that the absence of the appellant's 13 December 2006 clemency request from the record does not constitute a "substantial omission" and, therefore, this assignment of error has no merit.

¹ We note that a mere averment by appellate counsel in their brief does not constitute a sufficient showing by the appellant.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court