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

Before
E.E. GEISER, J.R. PERLAK, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MARK E. BARBEE II
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200900452
SPECIAL COURT-MARTIAL

Sentence Adjudged: 11 March 2009.
Military Judge: LtCol Peter S. Rubin, USMC.
Convening Authority: Commanding Officer, 7th Marines, 1st Marine Division (Rein), I Expeditionary Force, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.
Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.
For Appellant: CDR R.D. Evans, Jr., JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

11 March 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy and one specification of larceny in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921. The military judge sentenced the appellant to confinement for 4 months, to forfeit $933.00 pay per month for 4 months, and a bad-conduct discharge. The convening authority (CA) approved the sentence, but suspended all confinement in excess of 120 days.

The appellant now asserts the following errors: that the CA erred in failing to advise this court of a companion case and that the CA was improperly made aware of a communication between the trial defense counsel and the appellant regarding appellant’s desire not to submit any further clemency matters to the CA.

We find that these assignments of error are without merit and, after carefully considering the parties’ briefs and examining the record of trial, we are convinced that the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

In his first assignment of error, the appellant alleges that the CA’s action and the staff judge advocate’s recommendation (SJAR) fail to reference the case of Lance Corporal O, with whom the appellant conspired to steal military property. The appellant contends that the failure to advise this court of the action taken against the appellant’s co-conspirator limits our ability to conduct proper appellate review with regard to the appropriateness of the appellant’s sentence. We disagree.

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E § 0151a(5)(Ch-2, 16 Sep 2008). The purpose of this requirement is to ensure that the CA makes an informed decision when taking action on an appellant's court-martial. Where the record does not identify a companion case, the appellant must demonstrate that one exists and that it was referred to court-martial by the same CA. *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000). There is no evidence in the record or in the appellant’s pleadings that Lance Corporal O’s case was ever referred to trial by court-martial. Having failed to establish that there is a companion case, the appellant has not met his burden and we reject this assignment of error. *Id*. (citing *United State v. Watkins*, 35 M.J. 709, 716 (N.M.C.M.R. 1992)). Moreover, in light of the maximum permissible punishment, the severity of the offenses, i.e., conspiracy to steal military property and larceny of military property, and the appellant’s two prior nonjudicial punishment proceedings for larceny, we are satisfied that the punishment was appropriate.

In his second assignment of error, the appellant argues that the CA was improperly made aware of trial defense counsel's

(TDC) Memo to File in which the TDC wrote “On 4 June 2009 I spoke to Pvt. [sic] Barbee myself regarding clemency. Pvt. [sic] Barbee directed me not to submit any further post-trial clemency matters on his behalf.” Although the TDC's memo is attached to the record of trial, there is no evidence in the record or in appellant’s pleadings that demonstrates that the CA was ever made aware of the TDC’s memo. The SJAR does not list the memo as an enclosure and the CA does not include it as one of the listed matters that he considered prior to taking his action. Moreover, even if the CA was aware that the appellant desired to submit no “further” clemency, we conclude that the CA would not infer from this statement that the appellant did not desire that the CA grant the clemency that the appellant requested on 11 March 2009, specifically the deferment and waiver of forfeitures. Accordingly, we find that this assignment of error is without merit.

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court