

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

**Before
J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID D. GARDNER
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200900545
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 19 June 2009.

Military Judge: LtCol Robert Ward, USMC.

Convening Authority: Commanding Officer, 2d Assault Amphibian Battalion, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col W.G. Perez, USMC.

For Appellant: LT Brian Korn, JAGC, USN; Maj Kirk Sripinyo, USMC.

For Appellee: LT Timothy Delgado, JAGC, USN; Capt Michael Aniton, USMC.

29 July 2010

OPINION OF THE COURT

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

MAKSYM, Senior Judge:

A panel of members with enlisted representation sitting as a special court-martial convicted the appellant, contrary to his pleas, of six specifications of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The members sentenced the appellant to six months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has submitted three assignments of error: (1) the evidence was legally insufficient as related to Specification 5 of Charge II, as there was no evidence to show the alleged victim did not consent to the appellant's conduct; (2) the sentence was inappropriately severe; and, (3) the military judge erred when he ruled that the appellant was not entitled to credit for his pretrial confinement.

Background

The appellant deployed to Iraq in 2008 and served as "Corporal of the Guard" with a platoon of Marines. Record at 108, 120. The evidence showed that the appellant slapped one of the victims, Corporal (Cpl) Enos, in the face at least twice. *Id.* at 115, 146; Prosecution Exhibits 5-6. The appellant kicked Lance Corporal (LCpl) Mitchell in the back with enough force to cause him to hit the side of a building. Record at 116-19, 136, 147-48. Although LCpl Mitchell was wearing body armor, it was well-known within the unit that he had broken his back prior to deploying, and the kick worsened a preexisting injury. *Id.* The appellant also slapped LCpl Mitchell in the face. *Id.* at 138, 164. The appellant struck two other victims, LCpl Triplett and Cpl Prendergast, in the groin, and on another occasion grabbed Cpl Prendergast by the collar and threw him to the ground. *Id.* at 113, 126-36, 192; PE 4.

Legal Sufficiency

We review issues of legal sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citation omitted).

To prove assault consummated by a battery, the Government must prove that: (i) the accused did bodily harm to a certain person; and (ii) that the bodily harm was done with unlawful force or violence. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 54b(2). The bodily harm must be done "without the lawful consent of the person affected." *Id.* at ¶ 54c(1)(a). "Bodily harm" means any offensive touching of another, however slight. *Id.*

After a thorough review of the record below, including review of extensive video recorded evidence, we find the evidence related to Specification 5 of Charge II was legally sufficient. While Cpl Enos was lying in his rack, facing away from the appellant and seemingly asleep, the appellant proceeded to slap him in the face. PE 6. Thus, a reasonable fact finder could have found the appellant guilty of all the essential elements beyond a reasonable doubt. There was additional evidence that the appellant slapped Cpl Enos in the face while he was mustered with his fellow Marines while waiting to stand post. Record at

146. Based on the record, we decline to disturb the members' verdict.

Pretrial Confinement Credit

The proper application of credit for pretrial confinement is a question of law we review *de novo*. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002). In *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984), the Court of Military Appeals recognized that Department of Defense Directive 1325.4 made federal sentence computation procedures applicable to courts-martial and, based upon 18 U.S.C. § 3568, held that military accused were entitled to day-for-day sentence credit for military pretrial confinement. *United States v. Chaney*, 53 M.J. 621, 622 (N.M.Ct.Crim.App. 2000). The procedures applicable in this case are found in 18 U.S.C. § 3585(b): A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed--that has not been credited against another sentence. *Id.* at 623.

The appellant was placed on pretrial restriction from 19 February to 15 May 2009. Record at 264-66. On 15 May 2009, the appellant broke restriction and was placed in pretrial confinement, where he remained until 19 June 2009, when he was tried and sentenced for the assaults that are the subject of this litigation. *Id.* During sentencing, the defense counsel argued that the 35-day pretrial confinement term should be applied toward any adjudged sentence of confinement. *Id.* The military judge denied the request, ruling that the pretrial confinement stemmed from charges of breaking restriction, and that credit could be applied toward a sentence on those charges.¹ *Id.* at 266. The military judge recognized that there remained unaccounted for pretrial confinement, but speculated, at his peril, that further proceedings would absorb the additional detention. In so doing, the military judge erred.

The appellant is entitled to pretrial confinement credit for the 35 days he was confined prior to trial that were never applied towards his sentence. See *Chaney*, 53 M.J. at 623. We agree and provide appropriate relief in the decretal paragraph.

Sentence Appropriateness

A court-martial is free to impose any lawful sentence that it considers fair and just. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). Article 66(c), UCMJ, requires this court

1 Though not in the record, appellate Government counsel asserts that charges for breaking restriction were ultimately withdrawn and dismissed some time after sentencing in this case. Appellee's Brief of 1 Mar 2010 at 15. The Government therefore concurs with the appellant that 35 days of confinement credit is due. *Id.* at 15, 21.

to independently determine the sentence appropriateness of each case we affirm. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves," whereas clemency, a "command prerogative," "involves bestowing mercy -- treating an accused with less rigor that he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). In making the assessment of sentence appropriateness, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Given the nature of the assaults, and the abuse of position, the remaining sentence was wholly appropriate for these offenses and this offender. Further sentence relief would amount to clemency. *Healy*, 26 M.J. at 396.

Conclusion

We have carefully reviewed the record of trial, the briefs of the parties, and the assignments of error. We affirm only so much of the sentence as extends to four months of confinement and a bad-conduct discharge. The supplemental court-martial order will credit the appellant with 35 days served in pretrial confinement. The findings and sentence, as modified herein, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Judge PERLAK concurs.

BOOKER, Senior Judge (concurring in the result):

I concur in the resolution of all assignments of error and with the findings and sentence affirmed by the majority, but I write separately because I do not believe that blame for failing to order proper credit for pretrial confinement should be laid at the feet of the military judge. While a military judge may calculate and announce the credit, and while he may award credit for illegal pretrial confinement, see *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983), or for failure to follow the procedures required to impose pretrial confinement, see RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), it is the convening authority, not the military judge, who is responsible for ordering the required administrative credit for pretrial confinement. My conclusion is supported by the clear

weight of authority in the federal system. *E.g.*, *United States v. Wilson*, 503 U.S. 329, 333 (1992); *United States v. Whaley*, 148 F.3d 205 (2d Cir. 1998); *United States v. Gonzales*, 65 F.3d 814 (10th Cir. 1995) (district court had no authority to order credit for pretrial confinement), *vacated and remanded on other grounds*, 520 U.S. 1 (1997).

As the majority correctly points out, the credit is based on Department of Defense policy to apply credit in the same fashion as that mandated for the United States Bureau of Prisons. See *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984); DODINST 1325.7 of 17 July 2001, ¶ 6.3.1.5. See also 18 U.S.C. § 3585. As a practical matter, all trial participants need to be aware of the provisions of the Corrections Manual and section 3585 of title 18. The legal advisor to the convening authority is in the best position to determine, ultimately, whether a service member has been given credit against some other sentence for time spent in official detention, and it is there that I would place responsibility for the failure in this case to award the credit mandated by departmental policy. Because that credit should be properly noted and applied via the court-martial order prepared by the convening authority, I concur with the order that the supplemental action reflect the pretrial confinement credit.

For the Court

R.H. TROIDL
Clerk of Court