

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

**Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ALEC J. GUDGER, JR.
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200900414
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 January 2009.

Military Judge: LtCol Eugene H. Robinson, USMC.

Convening Authority: Commanding Officer, Chemical
Biological Incident Response Force, II Marine Expeditionary
Force, Indian Head, MD.

Staff Judge Advocate's Recommendation: Col R.G. Sokoloski,
USMC.

For Appellant: Maj Kirk Sripinyo, USMC.

For Appellee: LT Brian Burgtorf, JAGC, USN.

4 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A special court-martial with enlisted representation convicted the appellant, contrary to his pleas, of two specifications of disrespect to a superior commissioned officer, impersonation of a commissioned officer, and obstruction of justice, in violation of Articles 89 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 889 and 934. The approved sentence was confinement for four months, forfeiture of \$466.00 pay per month for a period of four months, reduction to pay grade E-1, and a bad-conduct discharge.

On appeal, the appellant raises two assignments of error. First, the appellant asserts that the court-martial lacked jurisdiction over the offenses because the charges had been previously referred to an earlier court-martial and were never properly withdrawn. Second, the appellant avers that the evidence was legally and factually insufficient to support a finding of guilty to any of the charges and specifications.

After carefully considering the record of trial, the appellant's two assignments of error, the Government's response, and the appellant's reply, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

Jurisdictional Error

The instant charges were initially referred to the courts-martial established by court-martial convening order (CMCO) 1-08 dated 4 March 2008. The appellant was initially arraigned on 29 May 2008. At arraignment, the appellant was informed of his counsel and forum rights, election of which he reserved. Various discovery and motion dates were set by the military judge with an eye towards trial in early August 2008.

Following an unsuccessful defense motion for a continuance, the court reconvened on 5 August 2008 to consider a defense motion for a court-ordered RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) psychiatric evaluation and a delay of the trial until October 2008. Appellate Exhibit III. The Government did not oppose the motion which was ultimately granted by the military judge. In granting the motion, however, the military judge expressed concern that the case had been percolating since April 2008 and that the defense request on the eve of trial would necessarily cause weeks or months of further delay. Record at 12. The military judge ascertained that the appellant was not in pretrial confinement. He went on to obtain assurances directly from the appellant that he understood the nature of the motion and agreed to this additional delay. The appellant further expressed agreement that the additional delay would not in any way be prejudicial to his defense. Record at 14-15. The military judge ordered litigation of any motions on 1 October 2008. *Id.* at 16.

The R.C.M. 706 report was, in fact, not signed out until 3 November 2008. AE VI. On 15 December 2008, CMCO 2-08 was promulgated by the convening authority. In pertinent part, the latter document expressly provided that "all cases referred to the Special Court-Martial convened by this headquarters' order number 1-08 dated 4 March 2008, *in which proceedings have not begun*, will be brought to trial before the court-martial hereby convened." (italics added).

The appellant's court-martial reconvened on 6 January 2009 to consider a Government motion to pre-admit certain evidence. At this session, the appellant was re-advised of his forum rights. Record at 26. The appellant elected members with enlisted representation. The appellant was then re-arraigned and entered pleas of not guilty to all charges and specifications. *Id.* at 27. On 9 January 2009, the convening authority issued CMCO 2-08a which deleted four and added three officer members to the CMCO 2-08 venire. In accordance with the appellant's forum selection, CMCO 2-08a also added three enlisted members to the venire expressly for the pending courts-martial of "Sergeant Alec J. Gudger, Jr. . . . only."

The court reconvened on 13 January 2009 to discuss administrative matters, to include voir dire and witness lists. Prior to this session, at an R.C.M. 802 conference, the defense generally raised the matter of whether the court-martial was properly convened pursuant to R.C.M. 602 under the new 15 December 2008 CMCO 2-08. The military judge then summarized the trial counsel's response which indicated that the convening authority had, in fact, referred the appellant's case to CMCO 2-08 as modified by CMCO 2-08a. The military judge stated that he had invited defense counsel to brief the issue. The defense did not "take up the court" on that offer. Record at 31. The military judge then asked counsel whether they concurred with his summation of the R.C.M. 802 session. The civilian defense counsel said that she had "[n]othing to add." *Id.*

We review jurisdictional challenges *de novo*. *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). Military courts have routinely held that referral errors are non-jurisdictional when the basic requirements of R.C.M. 601 have been met. *United States v. King*, 28 M.J. 397, 399 (C.M.A. 1989).

In the instant case, the referral under CMCO 2-08, pursuant to which the appellant's trial was held, met all three elements of R.C.M. 601. Specifically, the charges were referred by a convening authority authorized to convene courts-martial who was not otherwise disqualified; the referral was based on properly preferred charges received by the convening authority; and the charges were referred to a court-martial convened by that convening authority. We agree with the appellant that the language in CMCO 2-08 stating that the new CMCO applied, *inter alia*, to existing cases "in which proceedings have not begun," standing alone, seems to exclude the appellant's court-martial from the new CMCO inasmuch as the appellant was initially arraigned in May, 2008. These words do not, however, stand alone.

The record is clear that the appellant's defense team was aware of the potential issue and declined to raise it when offered the opportunity by the military judge. Further, the trial counsel advised that the convening authority, in fact, had intended the appellant's case be tried pursuant to CMCO 2-08.

This advisement by counsel is further evidenced by the language in CMCO Amending Order 2-08a which references the appellant by name.

We find, therefore, that any administrative irregularities inherent in CMCO 2-08 are not jurisdictional and were sufficiently resolved on the record by the military judge. The appellant raises no specific prejudice from the military judge's resolution of the issue. Having carefully reviewed the record, we find no prejudice to the appellant's substantial rights and that the inclusion of the language cited by the appellant was harmless beyond a reasonable doubt.

Legal and Factual Sufficiency

On 3 January 2008, then-Captain Robert Thomas, USMC,¹ was assigned as the Staff Secretary to the Chief of Staff (COS) and Commanding General (CG) of the 2nd Marine Expeditionary Force (II MEF), stationed at Camp Lejeune, North Carolina. That day, a male individual called Major Thomas' office telephone and identified himself as "Admiral Thomas." The caller stated that he was calling on behalf of a family friend and was looking into the appellant's pending permanent change of station (PCS) orders from the Chemical Biological Incident Response Force (CBIRF) in Indian Head, Maryland to Okinawa, Japan.

Major Thomas' caller ID system reflected that the originating telephone number was being blocked. Major Thomas asked the caller for his phone number and was given the number "540-322-6747." According to Major Thomas' testimony, the caller became increasingly belligerent and berated the Major for treating the appellant poorly. The caller demanded to know "what kind of f**ked up organization [would] allow a hard working Marine to get screwed over with short-cut orders to Okinawa." Record at 126. Major Thomas further testified that throughout the conversation the caller repeatedly referred to him as "dog."

According to Major Thomas, the caller then turned to the appellant's pending humanitarian package, which the caller believed would prevent the appellant from being transferred to Okinawa so that he could take care of his ailing father. Major Thomas testified that he was familiar with the package and informed the caller that there were some items that were missing from the package that were necessary to verify the need for a humanitarian transfer. The caller acknowledged that he understood there was a process but that he would call back in a week.

Major Thomas testified that he brought the initial call to the attention of his COS, Colonel Thomas Cariker, USMC. Major Thomas went on to describe two additional conversations with the

¹ Then-Captain Thomas has since been promoted and will be referred to as Major Thomas hereafter.

"Admiral." On one occasion, the caller ID was again blocked. On the other call, however, the system identified the call as originating from the switchboard at the base in Indian Head, Maryland. Indian Head is the base where the appellant's command was located. Calls made from telephone extensions within the base at Indian Head are not individually identified on caller ID. After the second and third calls, Colonel Cariker personally spoke with the caller. As the colonel and Major Thomas had already determined that "Admiral Thomas" was a fraud, the colonel demanded to know who the caller was. The caller asserted that he had a bad signal, was having trouble hearing, and would call back.

As a result of the phone calls, First Lieutenant J.M. Kitka, USMC, was assigned as an investigating officer. The lieutenant testified that he questioned the appellant about his knowledge of the telephone number that the caller had provided. The appellant denied any knowledge of the number. Subsequently, the lieutenant uncovered a superseded unit recall bill from the previous October that listed the identical telephone number as the appellant's contact number. When confronted with the recall bill during a subsequent interview, the lieutenant testified that the appellant initially again denied knowledge of the number but later allowed as it was a number for a family plan cell phone which he and his wife and other family members shared.

The appellant further indicated to the investigating officer that he'd questioned his mother about the telephone calls to Major Thomas and was told that his mother's boyfriend had made the calls in an attempt to help expedite a favorable resolution of the appellant's humanitarian package. When asked by Lieutenant Kitka, the appellant was not able to provide a name or any contact information for this civilian individual. The appellant apparently asserted that the boyfriend had left suddenly. The lieutenant went on to testify that the appellant was further unable to explain how a civilian without military experience would understand the command relationship between II MEF and CBIRF, how such a civilian might have gained access to an extension phone onboard the base at Indian Head, or how the civilian would believe that impersonating an "admiral" would have any influence on a Marine Corps command.

The investigating officer testified that he determined the appellant had been authorized to work on his package in the base library. When library and nearby travel office personnel were interviewed, they confirmed that the appellant had asked to use their phones on several occasions, although they were unable to hear the conversations. One witness from the travel office, however, testified that the appellant did say he was calling a 910 area code in North Carolina. Major Thomas' office telephone number was in the 910 area code. The witness further testified that the appellant approached her on two occasions after the lieutenant's investigation commenced, asking that she not reveal

that any Marines came in to use their phones. She was affronted by this conduct and reported it to the investigating officer.

On appeal, the appellant argues that the Government failed to meet its burden of proof insofar as it failed to offer any direct evidence that it was the appellant who actually made the charged telephone calls to Major Thomas. Further, the appellant asserts that the Government offered no evidence that the conduct was prejudicial to good order and discipline or service discrediting. We disagree.

There is ample circumstantial evidence to support the members' findings of guilty. The evidence revealed that the appellant was unhappy with his pending transfer to Okinawa and was energetically working to get approval for a humanitarian package that would let him stay in the area near his ailing father. The evidence further revealed that the appellant owned the cell phone associated with the contact number given by the caller to Major Thomas. The appellant's initial denial of any knowledge of the number and his subsequent implausible story involving the mysterious boyfriend who had somehow vanished and could not be located or even named, evidence a consciousness of guilt. Further, the appellant's request that library/travel office personnel not tell the investigator that Marines had used the telephones in their offices also compellingly evidences a consciousness of guilt.

The second portion of the appellant's argument implies that the Government is obligated to present direct evidence that the alleged conduct was prejudicial to good order and discipline or service discrediting. Consistent with our ruling above, both this court and the Court of Appeals for the Armed Forces have generally held that all the circumstances of a case can be considered in determining whether disrespectful behavior in violation of Article 89 has occurred. *United States v. Najera*, 52 M.J. 247, 249 (C.A.A.F. 2000). In the instant case, the circumstances surrounding the statements were more than sufficient to satisfy this element.

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of the offenses 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. In addition, 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).

Conclusion

The findings and approved sentence are affirmed.

Senior Judge BOOKER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court