

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSE L. URBAEZ  
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000199  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 14 December 2009.

**Military Judge:** CDR Charles Stimson, JAGC, USN.

**Convening Authority:** Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.

**Staff Judge Advocate's Recommendation:** Col S.C. Newman, USMC.

**For Appellant:** CAPT Bill Pinamont, JAGC, USN.

**For Appellee:** CDR M.G. Miller, JAGC, USN; LT Brian C. Burgtorf, JAGC, USN.

**28 December 2010**

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

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of unauthorized absence, missing movement, and wrongful use of marijuana, in violation of Articles 86, 87, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 912a. The appellant was sentenced to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant's sole assigned error is that the convening authority's action failed to suspend a portion of the adjudged confinement in accordance with the pretrial agreement. The Government concedes error and we find the assigned error to be meritorious. However, for the reasons stated below, 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 remains. Arts. 59(a) and 66(c), UCMJ.

On 14 December 2009, the date the sentence was adjudged, the appellant was entitled to 115 days of pretrial confinement credit. He was sentenced, *inter alia*, to serve one year of confinement. Pursuant to the terms of the pretrial agreement, the Government was obligated to suspend all confinement in excess of 150 days for the period of confinement served plus six months thereafter.<sup>1</sup> In his action of 17 March 2010, the convening authority approved the adjudged sentence and ordered it executed "[i]n accordance with the UCMJ, Rules of (sic) Courts-Martial, applicable regulations, the pretrial agreement, and this action . . . ." <sup>2</sup> The convening authority did not suspend any part of the adjudged confinement and, parroting the erroneous advice in the staff judge advocate's recommendation, affirmatively stated that the pretrial agreement had no effect on the adjudged sentence. The appellant does not assert that he was required to spend any additional time in confinement as a result of the error by the convening authority.

Once the convening authority took his action, the period of deferment ended and the portion of the adjudged confinement which should have been suspended began to run, even though the appellant was no longer in confinement. Combining the confinement actually served with the confinement which has run since the date of the convening authority's action, the entire one year has been executed and there is no confinement to suspend.<sup>3</sup> Accordingly, due to the passage of time, the error was harmless.

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<sup>1</sup> We note that the staff judge advocate's recommendation of 5 February 2010 erroneously advised the convening authority that the pretrial agreement had no effect on the adjudged sentence; that the clemency petition submitted by trial defense counsel on 3 March 2010 failed to comment on the error; and that the 15 March 2010 addendum to the recommendation is silent on the matter.

<sup>2</sup> Although not assigned as error, we note that under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to any extent that the convening authority's action purported to execute the bad-conduct discharge, such an effort was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

<sup>3</sup> Even if the year had not already run, there would not be any confinement available to suspend since the suspension was to run from the "period of confinement served plus six months thereafter. . ." and more than six months have elapsed from the date the appellant was released from confinement.

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

For the Court

R.H. TROIDL  
Clerk of Court