

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

**Before  
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRYAN J. VANCOURT  
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200900397  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 27 March 2009.

**Military Judge:** Col Daniel Daugherty, USMC.

**Convening Authority:** Commanding General, 2d Marine  
Aircraft Wing, Cherry Point, NC.

**Staff Judge Advocate's Recommendation:** LtCol M.P. Gilbert,  
USMC.

**For Appellant:** Capt Jeffrey Liebenguth, USMC.

**For Appellee:** Capt Michael Aniton, USMC.

**30 April 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 general court-martial convicted the appellant, pursuant to his pleas, of indecent conduct, receipt and possession of child pornography, and receipt of obscene material in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The military judge also convicted the appellant, contrary to his pleas, of disobeying a lawful general regulation in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The military judge sentenced the appellant to confinement for five years, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but,

pursuant to the terms of a pretrial agreement, suspended all confinement in excess of 24 months.

The appellant's sole assigned error alleges the military judge abused his discretion by denying the appellant's motion for appropriate relief for illegal pretrial confinement pursuant to RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). We have examined the record of trial and the pleadings of the parties. We conclude that the findings and sentence are correct in law and fact. However, we conclude that the military judge abused his discretion in not releasing the appellant from pretrial confinement and awarding him R.C.M. 305(k) credit. We will set forth our remedy in our decretal paragraph.

### **Background**

In mid June 2008 the appellant's commanding officer received information which prompted an investigation by the Naval Criminal Investigative Service (NCIS) into the appellant's suspected possession of child pornography and other offenses.<sup>1</sup> On 25 September 2008, NCIS agents informed the appellant he was suspected of possession of child pornography and executed a search warrant of the appellant's off-base home.<sup>2</sup>

At the time of these events the appellant was a Marine staff noncommissioned officer (SNCO) with almost 19 years of active duty service.<sup>3</sup> Later that day the appellant indicated thoughts of harming himself and he was escorted to the emergency room at Camp Lejeune, North Carolina by MSgt (B), a squadron representative.<sup>4</sup> The appellant was admitted to the hospital's psychiatric ward for inpatient care and remained there until discharged on 3 October 2008.<sup>5</sup>

On the day of his discharge, Lieutenant Colonel (LtCol) (M) issued the appellant a military protective order (MPO) which prohibited him from having physical contact with his children and ordered him to reside at the MCAS Cherry Point Noncommissioned Officer (NCO) Quarters until further notice.<sup>6</sup> In addition to the MPO, the command further restricted the appellant's liberty by requiring him to muster daily with MSgt (B), now assigned as the appellant's mentor.<sup>7</sup> The appellant was also reassigned duties

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<sup>1</sup> Appellate Exhibit I at 15-17, 20-25.

<sup>2</sup> Record at 14; AE I at 43

<sup>3</sup> AE I at 32.

<sup>4</sup> Record at 15-16.

<sup>5</sup> Record at 16.

<sup>6</sup> AE I at 27-28.

<sup>7</sup> Record at 22-23.

within the squadron and ordered to avoid unnecessary contact with junior Marines.<sup>8</sup>

In early October, the squadron requested the North Carolina Department of Social Services (DSS) to conduct a child welfare investigation of the appellant's home in light of the alleged child pornography offenses.<sup>9</sup> On 21 October 2008, DSS advised NCIS that they found no evidence the appellant had abused his children or groomed them for sexual abuse; nor did they find any evidence that the appellant exposed them to any pornography.<sup>10</sup> LtCol (M) relaxed the MPO on 24 October 2008, allowing the appellant unsupervised visits at home with his family between the hours of 0700 and 2200.<sup>11</sup> LtCol (M) relaxed the appellant's MPO a second time on 17 December 2008 by allowing the appellant to stay overnight on Christmas Eve and visit with his family all day on Christmas Day.<sup>12</sup>

On 18 December 2008, the Marine Air Group-14 sergeant major (SgtMaj), called down to the squadron and told them to send the appellant up to see him at the group headquarters. Shortly thereafter, MSgt (B) escorted the appellant to headquarters and briefed the SgtMaj on the measures the squadron had taken regarding the appellant during the course of the investigation.<sup>13</sup> After the brief, SgtMaj (T) called the appellant into his office and told the appellant he was going to recommend that appellant's MPO not be relaxed.<sup>14</sup> SgtMaj (T) also told the appellant he was surprised the appellant was not already in pretrial confinement and that he expected the appellant to go into pretrial confinement soon because every other case that he had dealt with, the offenders were put in pretrial confinement.<sup>15</sup>

Charges were preferred against the appellant on 9 January 2009 and were served on 13 January 2009. The day before the actual service of charges, LtCol (M) informed MSgt (B) that he was going to serve charges on the appellant and then place him into pretrial confinement.<sup>16</sup> LtCol M explained that he wanted MSgt (B) present to support the appellant in the event he reacted

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<sup>8</sup> Record at 21.

<sup>9</sup> Record at 62.

<sup>10</sup> AE I at 32.

<sup>11</sup> AE I at 29; Record at 18.

<sup>12</sup> AE I at 30.

<sup>13</sup> Record at 21.

<sup>14</sup> Record at 21.

<sup>15</sup> Record at 21.

<sup>16</sup> Record at 23.

to the news adversely.<sup>17</sup> On 13 January the appellant's executive officer, Major (W), acting as CO for the day, personally informed the appellant of the preferred charges.<sup>18</sup> MSgt (B) described the event as follows:

Q: How did Staff Sergeant Vancourt act when the charges were read to him?

A: I couldn't see his face, but he was standing at attention in front of Major [W]. Major [W] methodically went down and read each order (sic), and asked him if he understood everything. And he said, "Yes, sir. I do." Respectfull (sic) and stood there at attention. He didn't really react to anything, one way or the other, until he was told he was going . . . into pretrial confinement.

Q: What happened at that point?

A: [I] could see him take a deep breath, that he was a little bit surprised. I don't remember if he asked why or anything. I don't think he did . . . Major [W] said, "Dismissed." And he said, "Dismissed, aye-aye." He did his about face and walked out into the hallway and then collapsed, basically. I was still inside speaking to Major [W] about making sure that we had everything . . . .<sup>19</sup>

Maj (W) signed the confinement order that day and appellant was confined.<sup>20</sup> On 15 January 2009, Colonel (C), the executive officer of Marine Corps Air Station Cherry Point, presided at the appellant's 7-day review hearing and decided that the appellant's continued confinement was appropriate under the circumstances.<sup>21</sup>

In his post-hearing memorandum, Col (C) indicated continued confinement was required because "a lesser form of pretrial restraint is considered inadequate," the appellant was "accused of a crime for which lengthy confinement may be awarded," and that confinement was necessary to prevent serious criminal misconduct because the appellant's psychiatric record "indicates unstable character or mental condition" and the "alleged and potential acts of the detainee pose a serious threat to the safety of the community or the effectiveness, discipline, readiness, or safety of the command."<sup>22</sup>

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<sup>17</sup> Record at 23.

<sup>18</sup> Record at 23.

<sup>19</sup> Record at 24.

<sup>20</sup> AE I at 38.

<sup>21</sup> AE I at 35.

<sup>22</sup> AE I at 35.

## Discussion

### A. Legal Principles

Pretrial confinement is only warranted when the evidence shows probable cause (i.e. reasonable grounds) to believe: 1) an offense triable by court-martial was committed; 2) the prisoner committed the offense; 3) confinement is necessary because it is foreseeable the accused will not appear at future hearings or that he will engage in serious criminal misconduct; and, 4) less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B). Within seven days of confinement a neutral and detached officer shall review the probable cause determination and necessity for continued pretrial confinement and must determine whether the requirements for confinement have been proven by the preponderance of the evidence. R.C.M. 305(i)(2). After the charges are referred to a court-martial and upon motion for appropriate relief, a military judge shall review the propriety of pretrial confinement. R.C.M. 305(j). The military judge shall order an accused released from pretrial confinement if: (1) the review officer's decision was an abuse of discretion and there is insufficient evidence presented to the military judge to justify continued pretrial confinement under R.C.M. 305(h)(2)(B); or (2) information not presented to the review officer establishes the prisoner should be released under R.C.M. 305(h)(2)(B). *Id.*

A military judge shall award administrative credit for any pretrial confinement served as a result of an abuse of discretion or noncompliance with the provisions of R.C.M. 305(h) or (i). R.C.M. 305(j)(2). As R.C.M. 305(h)(2)(B) and (i)(2) define the responsibilities of two different officials, the commander who ordered pretrial confinement and the IRO who reviewed it, a court may award administrative credit for abuse of discretion on the part of either, or both, of these officials.

We review a military judge's ruling on the legality of pretrial confinement for an abuse of discretion. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003) (citing *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996)). An abuse of discretion occurs if a finding of fact is clearly erroneous (i.e., unsupported by the record) or, if a decision is based on an erroneous view of the law. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

### B. Analysis

Preceding his confinement, the appellant fully complied with the terms of his MPO and the restrictions on his liberty.<sup>23</sup> Additionally, the appellant had no prior history of disciplinary problems, and there was no

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<sup>23</sup> Record at 23, 69.

evidence the appellant harmed or posed any danger to harm his wife, children or any other individuals.<sup>24</sup> Likewise, there was no evidence that the appellant had engaged in serious criminal misconduct for the 110 days since he was placed on liberty conditions and issued an MPO.

In reviewing Col (C)'s decision to continue confinement, the military judge found that "[t]he command applied the appropriate criteria when determining whether to place the accused in pretrial confinement" and that Col (C) "applied the criteria set forth in R.C.M. 305(h)(2)(B) when making his determination of whether to continue the accused in pretrial confinement."<sup>25</sup> Actually, Col (C)'s decision to continue pretrial confinement was based, in part, on an erroneous view of the standard for pretrial confinement as it is set forth under R.C.M. 305(h)(2)(B). At the motion for appropriate relief, Col (C) testified that understood continued pretrial confinement was appropriate when there "is a *risk of flight, a risk of injury to the Marine or others, the seriousness of the crime, and whether or not the Marine may do additional serious crimes, and that a lesser form of restriction was considered.*"<sup>26</sup> The standard for continued pretrial confinement is that there is probable cause to believe, by the preponderance of the evidence, that: 1) an offense triable by court-martial was committed; 2) the prisoner committed the offense; 3) confinement is necessary because it is *foreseeable* that the prisoner will not appear at future hearings or will engage in serious criminal misconduct; and 4) less severe forms of restraint are inadequate.

We find the military judge abused his discretion in denying the motion for appropriate relief because in reviewing the IRO's decision for an abuse of discretion, he found that the IRO applied the correct standard for pretrial confinement under R.C.M. 305(h)(2)(B) when he clearly did not. Furthermore, the finding that a less severe form of restraint was inadequate was clearly unsupported by the record at the time the appellant was confined, at his seven-day review hearing, and at the appellant's motion for appropriate relief. We believe that the appellant's acting commanding officer abused his discretion in ordering the appellant into pretrial confinement and the initial review officer also abused his discretion in allowing the pretrial confinement to continue.

### **Conclusion**

Accordingly, we affirm the findings and the sentence as approved by the convening authority. However, having found both the command and initial review officer abused their discretion,

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<sup>24</sup> Record at 53.

<sup>25</sup> AE XI at 3.

<sup>26</sup> Record at 43.

we award an additional 146 days of administrative credit (two days for each of the 73 days the appellant spent in illegal pretrial confinement) in addition to the 73 days awarded by the military judge pursuant to *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Record at 285.

For the Court

R.H. TROIDL  
Clerk of Court