

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

**Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ZACHARY M. MCALLISTER
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100085
GENERAL COURT-MARTIAL**

Sentence Adjudged: 13 January 2011.

Military Judge: CAPT Tierney Carlos, JAGC, USN.

Convening Authority: Commander, U.S. Naval Activities,
Rota, Spain.

Staff Judge Advocate's Recommendation: LCDR R.T. Kline,
JAGC, USN.

For Appellant: CDR Don Evans, JAGC, USN.

For Appellee: Capt Paul Ervasti, USMC.

29 December 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

BEAL, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of violating a general regulation and attempting to receive child pornography in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The appellant was sentenced to confinement for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's brief and the Government's answer.¹ We conclude that the appellant suffered no material prejudice to his substantial rights and we affirm the findings and the sentence. Art 59(a), 66(c), UCMJ.

Background

The appellant initially pled guilty to a general orders violation and attempted receipt of child pornography pursuant to a pretrial agreement (PTA) and was found guilty on 9 November 2010. The military judge presiding over the hearing sentenced him to confinement for a period of 18 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The audio recording of this session was lost and the Government was unable to prepare a verbatim record of the proceeding. Record at 11, 14; Clemency Request of 7 Feb 2011. A summarized record of trial, which included the appellant's stipulation of fact, was prepared and forwarded to the CA for his review. Clemency Request of 7 Feb 2011. This summarized record was not authenticated by the military judge. Appellate Exhibit IX. Subsequently, the CA directed "a hearing be held to complete the record of proceedings in U.S. v. McAllister pursuant to [RULE FOR COURTS-MARTIAL 1103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)]." AE V.²

On 13 January 2011, the parties and the same military judge who presided over the 9 November 2010 session reassembled for a rehearing pursuant to R.C.M. 1103(f).³ The appellant was once

¹ The appellant assigned the following errors: (1) the Government failed to compile a complete and accurate record of trial; (2) the appellant's sentence was impermissibly influenced by the military judge's knowledge of the sentence limitation portion of the pretrial agreement and his knowledge of the CA's desires regarding the appellant's sentence; (3) the staff judge advocate's recommendation failed to comment upon the legal errors raised by the trial defense counsel; and (4) the CA's action purports to execute the punitive discharge and fails to grant appellant's credit for pretrial confinement.

² Although the CA's letter references R.C.M. 1103, the trial counsel argued at the subsequent session that the CA actually ordered "a post-trial session under [R.C.M.] 1102 . . . a 39(a) Session to rebuild the portions of the record that are missing." The military judge disagreed. Record at 13.

³ None of the parties were identified at the outset of this session. Nonetheless, the appellant, his detailed defense counsel, and the trial counsel were identified by name during the proceedings. Record at 11, 13, 25. From the context of the record it is clear that the military judge was

again advised of his counsel rights and requested to be represented by his detailed defense counsel. Record at 16. The military judge disclosed he was aware of the sentence limitation provisions of the PTA and offered both parties the opportunity to *voir dire* and challenge, but both parties declined the opportunity. *Id.* at 16-17. The appellant then elected to be tried by military judge alone and, pursuant to the original PTA, once again entered pleas of guilty to a violation of a lawful general order and attempted receipt of child pornography. The military judge found the appellant guilty of both offenses yet again and, after receiving evidence on sentencing, resentenced the appellant to be confined for a period of six months, reduction to pay grade E-1, and a bad-conduct discharge. *Id.* at 64, 84.

Several weeks after the rehearing, the staff judge advocate (SJA) prepared his written recommendation (SJAR) for the CA. A few days later the appellant submitted matters in clemency which asserted several legal errors. Clemency Request of 7 Feb 2011. The record contains no response by the SJA to these asserted errors.

Incomplete Record of Trial

In his first assignment of error, the appellant identifies a number of errors and omissions in the record and argues the Government failed to submit a complete and accurate record of trial, thus precluding meaningful appellate review. Appellant's Brief of 8 Apr 2011 at 9-14. In its response, the Government categorizes the alleged errors and omissions into three groups: (1) errors in the summarized record of the 9 November 2010 proceeding; (2) errors in the verbatim record; and (3) missing documents from the record. The Government acknowledges certain omissions and errors, but argues the omissions and errors are insubstantial, and the record is complete and substantially verbatim.⁴ Government's Brief of 19 May 2011 at 8-12. We find no basis to grant the requested relief for this assigned error.

Because the appellant's sentence at a general court-martial includes a bad-conduct discharge, the Government is required to prepare a complete record of trial which includes a

the same judge who presided over the arraignment and the previous session for which there was no recording. *Id.* at 13.

⁴ One of the omissions identified by the appellant was Prosecution Exhibit 3, a compact disc containing a collection of images linked to the appellant's computer profile. This omission was cured by the production of the missing exhibit by the Government's Motion to Attach of 22 February 2011.

substantially verbatim transcript. Art 54(a), UCMJ; *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982); R.C.M. 1103(b)(2). The requirement for a complete record of trial and substantially verbatim transcript is one of jurisdictional proportion that cannot be waived. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). A record with insubstantial omissions satisfies the verbatim requirement, but a record with substantial omissions gives rise to a presumption of prejudice. *Lashley*, 14 M.J. at 8-9. Whether or not omissions are substantial may be determined by the nature of the omission or by the number of omissions. *Id.* at 9. Appellate courts determine whether an omission is substantial on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). While the record for this case is imperfect, we find it substantially complete and verbatim. We address each category of the alleged errors below.

Summarized Record

Pursuant to R.C.M. 1103(f)(2), when a verbatim record cannot be produced due to the loss of a recording, a CA may order a rehearing as to any offense of which the accused was found guilty "if the finding is supported by the summary of the evidence contained in the record." In this case, the CA was provided an unauthenticated summarized record which contained a number of procedural errors, but the summary of the evidence contained within the record supported the findings and was consistent with the stipulation of fact and the appellant's providence inquiry at the rehearing. In regard to any procedural errors contained in the summarized record, the appellant has not claimed and we have not found any prejudice.

Verbatim Record

The appellant also notes a number of irregularities within the verbatim transcript of the 13 January 2011 session: (1) the parties, the bailiff, and the court reporter were not identified on the record; (2) an inconsistency between the time announced by the military judge when he closed the court for deliberations on sentence, with the time recorded by the court reporter; and (3) portions of the sentencing argument of both counsel were reported as being inaudible a total of sixteen times. We find none of these alleged errors amount to a substantial omission.

As noted above, the appellant, military judge, defense counsel, and trial counsel were all identified in the context of the record. Likewise, it is obvious from the context of the

record that the members were not present. As to the trial counsel's failure to announce the court reporter's status as to oath (see R.C.M. 901(c)), we note that the defense was provided an opportunity to examine the record prior to authentication by the military judge and did not raise this error as a substantial omission. Record at 89; Clemency Request 9 Feb 2011. Furthermore, authentication of the record by the military judge confirmed the court reporter did faithfully perform his or her duties as reporter for this court-martial as required by oath.

The inconsistency between the military judge's announcement of the time and the court reporter's annotation of the time when the military judge closed the court for deliberations is not an omission at all, simply an inconsistency. The appellant does not demonstrate, nor do we find, any possible prejudice associated with this inconsistency.

As for the inaudible portions of the sentencing arguments delivered by both counsel (six from the trial counsel's; ten from the defense counsel's), we also find that these are not necessarily omissions, but rather a reflection that counsel failed to make a clear record of what they were trying to say. Even if we were to view these as omissions, they are insubstantial. The general context of each argument flows reasonably well notwithstanding the missing words or phrases; neither party objected to the other's arguments; neither party attempted to clarify the omitted portions of their argument during authentication of the record; and the defense did not raise this as an omission in his clemency request.

Missing Documents

The appellant identifies four documents as being missing from the record which renders the record incomplete: 1) a case management order; 2) the charge sheet; 3) Prosecution Exhibit 3, and a court order to seal the exhibit; and 4) the defense counsel's letter to the CA dated 29 November 2010, in which he requested relief due to the lost recording of the trial and the SJA's response to the 7 February 2011 clemency request in which the appellant alleged certain legal errors.

We view the lack of a case management order to be irrelevant. The appellant was arraigned on 31 August 2010. During this session, the military judge summarized an R.C.M. 802 conference stating that the parties agreed to a 5 October 2010 trial date, and concluded the session by directing the trial counsel to prepare a case management order. The appellant

signed the pretrial agreement under which he pled guilty on 17 September and the CA signed the agreement four days later. At the January 2011 rehearing, the defense had no motions of any kind. Under these circumstances, the lack of a case management order in the record, assuming one was created, is a matter of no import whatsoever.

We find that the charge sheet is not missing from the record; although the charge sheet was not included in the verbatim transcript where it is normally found, it was included in the record with the allied papers which precede the verbatim transcript. The context of the verbatim transcript makes us confident this is the charge sheet from which the appellant pled guilty, particularly since it includes pen changes addressed on the record by the military judge and counsel during the presentencing stage of the trial.

Likewise, we also reject the argument that the sealing order is missing. As noted earlier, the Government produced PE 3 through their motion to attach of 22 February 2011. Nowhere in the record is it indicated that the military judge issued a sealing order. While the lack of a sealing order may indicate a failure of the trial counsel or the military judge to comply with the requirements of R.C.M. 1103A, it does not amount to an omission from the verbatim transcript. The appellant does not demonstrate, nor do we find, any prejudice to the appellant's substantial rights arising from this error.⁵

There is no record of the appellant's clemency request of 29 November, 2010. Even if it existed, the appellant has not made a colorable showing of possible prejudice resulting from its omission. The appellant first learned of the missing audio recording on 24 November 2010. Clemency request of 9 Feb 2011. He claims to have submitted a written request to the CA requesting that the CA approve only so much of the appellant's adjudged sentence as permitted by law when a verbatim transcript was not available. *Id.* Such a request would have been properly made under R.C.M. 1105 and under R.C.M. 1103(b)(3). Likewise, it would have been a required attachment to the record. Nonetheless, the appellant has the burden of establishing a colorable showing of possible prejudice resulting from post-trial review errors. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). When the CA was presented a non-verbatim transcript of the original proceedings, procedurally he had only three options: 1) approve a sentence that did not include a

⁵ We will take appropriate action in our decretal paragraph to safeguard the contraband images contained within PE 3.

punitive discharge or confinement in excess of 12 months; 2) order a proceeding in revision under R.C.M. 1102; or 3) order a rehearing under R.C.M. 1103(f). The appellant has not provided a copy of his 29 November 2010 request nor has he alleged how it's omission from this record affected his substantial rights. The appellant has failed to make a colorable showing of possible prejudice resulting from the missing request of 29 November 2010.

Several weeks after the rehearing, the SJA prepared his written recommendation from the CA. A few days later the appellant submitted matters in clemency which asserted the following legal errors: 1) the Government provided a non-verbatim transcript of the first trial containing substantial factual error thereby prejudicing the CA's review of the first trial, 2) both the Government and the military judge failed to comply with the CA's order to conduct a hearing under R.C.M. 1003, 3) the results of trial from the first trial were neither properly dismissed by the CA nor are they discussed in the SJAR, and 4) the SJA failed to address the original reasons for post-trial relief which were submitted on 29 November 2010. Clemency Request of 7 Feb 2011.

The SJA was required to submit a written addendum to his recommendation which summarized the complaint of legal errors and stated his agreement or disagreement with the matters raised by the appellant. R.C.M. 1106(d)(4). By failing to do so, he erred, but the failure to comment on an allegation of error does not always result in a remand. In order to obtain relief due to errors in the post-trial review of a case, the appellant must make a colorable showing of possible prejudice. See *Wheelus*, 49 M.J. at 283.

The appellant has failed to make a colorable showing of possible prejudice; where there is no error at trial, there can be no prejudice flowing from the SJA's failure to address the defect asserted. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). We find that the first three errors asserted by the appellant in his clemency request of 7 February 2011 did not exist. Additionally, for the reasons stated above, we find that the appellant has failed to make a colorable showing of possible prejudice resulting from the forth alleged error. Accordingly we resolve this assigned error against the appellant.⁶

⁶ This conclusion also resolves the appellant's third assignment of error in which he seeks remand for completion of post-trial review due to the SJA's

Unlawful Command Influence

At the outset of the rehearing, the trial counsel unsuccessfully argued that the nature of the proceeding was a "proceeding in revision" pursuant to R.C.M. 1102. Record at 13. At the end of the rehearing, before announcing the appellant's sentence, the military judge revisited the issue. He indicated that with the loss of the recordings of the original guilty plea, the CA was properly advised by the trial counsel that he had three options: (1) order a proceeding in revision; (2) approve only so much of the original sentence that did not exceed six months confinement or include a bad-conduct discharge; or (3) order a rehearing. Record at 82-84. Additionally, the military judge indicated that if the summarized record had been routed through him for authentication before being forwarded to the CA, he would have *sua sponte* ordered a rehearing. *Id.* at 84. The military judge concluded his remarks with the following statement:

MJ: [I] believe the convening authority was properly informed about the various options and that he chose not to approve a sentence that did not include a BCD or confinement in excess of six months and that he wanted a rehearing, and so it was clear to me that he was not going to approve a sentence that did not include a BCD or confinement in excess of six months, so that I would have ordered a rehearing on this case even if the convening authority hadn't. If the government had come to me and asked me under 1102, I would have directed a rehearing. All right. I hope that's clear on the record.

Id. at 84.

The appellant argues the military judge was influenced by the CA's decision to order a rehearing rather than approving the maximum allowable sentence when a verbatim transcript was not available. The appellant argues the military judge's awareness of the sentence protection afforded under the PTA, coupled with his stated belief that the CA would not approve a sentence that did not include a punitive discharge, raises the issue of actual and apparent unlawful command influence. We disagree.

failure to respond to the appellant's clemency request wherein he asserts legal error.

"At trial and on appeal, the defense has the initial burden of producing sufficient evidence to raise unlawful command influence. The burden of proof is low, but more than mere allegation or speculation. The quantum of evidence required to raise unlawful command influence is 'some evidence.'" *United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003) (internal citations and quotation marks omitted). "On appeal, an appellant must (1) show facts, which if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that the unlawful command influence was the cause of the unfairness." *Id.* (citation and internal quotation marks omitted).

The appellant's argument that the second sentence imposed by the military judge was improperly influenced by his knowledge of the sentence limitation and the CA's decision to order a rehearing disregards the fact that the military judge awarded a punitive discharge at the appellant's initial guilty plea, and that the military judge would have ordered a rehearing *sua sponte* if he had been given the opportunity to authenticate the summarized record.⁷

Additionally, the appellant has failed to show how the proceedings were unfair. At the appellant's first trial he was convicted, pursuant to his pleas, and sentenced to confinement for a period of eighteen months, total forfeitures, reduction to pay grade E-1, and a bad-conduct discharge. At the appellant's rehearing, the same military judge found him guilty of the same charges, pursuant to his pleas, but adjudged a considerably less severe sentence, i.e., reduction in confinement time from 18 to 6 months and no adjudged forfeitures. Considering the totality of the circumstances, the proceedings were eminently fair.

CA's ACTION

The appellant's fourth assigned error argues the CA's action is faulty in two manners: first, it purports to execute the bad-conduct discharge; second, it fails to grant the appellant proper credit for confinement. The issue as to whether the action purports to execute a punitive discharge is well-settled by *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). To the extent that language contained in a CA's action

⁷ The military judge did not have the authority to order an actual rehearing at which he could have reassessed the sentence, but he could have ordered a hearing in revision to reconstruct the record. If he had, then the appellant's original sentence would have remained in effect. R.C.M. 1102.

purports to execute a punitive discharge prior to finality of appellate review, that language is a legal nullity. *Id.*

We agree that the appellant was entitled to 65 days of credit for his confinement from 9 November 2010 to 12 January 2011 (the period between his original sentencing date and his subsequent sentencing date on 13 January 2011) and that the CA's action fails to direct that credit be awarded. See R.C.M. 1107(f)(4)(F). But the appellant does not explain how suffered prejudice from this omission, nor do we find any. Nonetheless, we will order corrective action in our decretal paragraph.

Conclusion

Prosecution Exhibit 3 is ordered sealed. The findings and sentence as approved by the CA are affirmed. The supplemental court-martial order shall indicate that the appellant is credited with 66 days of credit for pretrial confinement (with full pay and allowances). This grant covers the period between the initial sentencing date and the rehearing, during which the appellant was continuously confined. This action obviates any prejudice that might have manifested against the appellant.

Senior Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court