

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

**Before
J.A. MAKSYM, R.E. BEAL, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROMAN A. CORONA
SERGEANT (E-5), U.S. MARINE CORPS RESERVE**

**NMCCA 201100260
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 24 February 2011.

Military Judge: CDR Donald King, JAGC, USN.

Convening Authority: Inspector-Instructor, 3d Battalion,
23rd Marine Regiment, 4th Marine Division, Belle Chasse,
LA.

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

For Appellant: LCDR Ronald Hocevar, JAGC, USN.

For Appellee: LCDR Clayton Trivett, JAGC, USN; Maj William
C. Kirby, USMC.

28 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.**

PER CURIAM:

A military Judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of fourteen specifications of larceny in violation of Article 121, Uniform Code of Military Justice, 18 U.S.C. § 921. The approved

sentence was confinement for 30 days, reduction to pay grade E-3, and a bad-conduct discharge.¹

The appellant advances one assigned error, that his trial took place within three days of service in violation of Article 35, UCMJ. The Government asserts that the appellant forfeited his right to the waiting period and urges this court to test for plain error.

We have considered the record of trial and the parties' pleadings. We conclude that the findings and sentence are correct in law and fact and that there are no errors materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Factual Background

The appellant was stationed with the 3rd Battalion, 23rd Marine Regiment as an Administrative Clerk. Record at 21. As such, he was responsible for battalion legal issues, pay and promotions, and the unit diary. Prosecution Exhibit 2. On 21 or 22 July 2010, he falsely prepared two unit diaries that changed the direct deposit account information for two Marines who had been on unauthorized absence status since 16 October 2009. Record at 21-32; PE 2.

The appellant substituted his own back account information in place of the back account information for the two Marines so that payments intended for them would be directly deposited into his own personal bank account. PE 2. On fourteen occasions between 23 July 2010 and 13 October 2010, the appellant made false entries in the unit diary that the two Marines were present for annual training active duty periods, when, in reality, both Marines were still in unauthorized absence status and not in an active pay status. *Id.*

Finally, on 18 October 2010, the appellant's gunnery sergeant identified what had transpired, and a preliminary inquiry was conducted. PE 2 at 8. The appellant was served with a copy of referred charges on 22 February 2011, the same day that charges were referred to a special-court martial. Charge Sheet. The special court-martial convened on 24 February 2011, at which time the trial counsel incorrectly informed the

¹ To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543, (N.M.Ct.Crim.App. 2011).

military judge that the appellant was served with the referred charges on 30 November 2010. Record at 2.

A review of the record reveals that 30 November 2010 was the date of preferral and not referral. Charge Sheet. Neither the military judge nor detailed defense counsel noticed trial counsel's error.² The military judge did not advise the appellant of his right to a three-day waiting period and did not ask for an affirmative waiver on the record.

The trial judge asked the appellant whether he had sufficient time to discuss his case with his defense counsel, and the appellant responded affirmatively. Record at 11-12, 33. Defense counsel told the military judge that he had no motions to present. *Id.* at 9. The appellant was not required to waive any motions under the pretrial agreement (PTA). Appellate Exhibit I at 4-5.

Three-Day Waiting Period

We find that the appellant forfeited his right to the statutory waiting period. Article 35, UCMJ, requires the trial counsel to ensure that the accused receives a copy of the charges. The same article then states, "In time of peace no person may, against his objection, be brought to trial or be required to participate . . . in a special court-martial within a period of three days after the service of charges upon him." See RULE FOR COURTS-MARTIAL 901(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion ("Failure to object waives the right to the waiting period, but if it appears that the waiting period has not elapsed, the military judge should bring this to the attention of the defense and secure an affirmative waiver on the record.").

While the military judge should have mentioned the three-day period to the appellant and obtained his consent to move forward, his failure to do so was not fatally deficient under R.C.M. 901 or Article 35, UCMJ. Both require the appellant to object, and here, he failed to do so. Record at 2; AE I at 4-5. The trial counsel certainly lapsed in his duty to ensure service of the referred charges upon the appellant. Art. 35, UCMJ. However, in the final analysis, the appellant, by failing to object as was his right under Article 35, UCMJ, forfeited his

² The military judge did ask the trial counsel, "Tell me again when the accused was served a copy of the charges." Trial counsel again erroneously responded, "30 November 2010, sir." Record at 3.

right to the three-day waiting period. *United States v. Kyles*, 20 M.J. 571, 576-77 (N.M.C.M.R. 1985).³

We therefore test the failure to notify the appellant of the three-day waiting period for plain error. *Id.* Plain error requires there be an error, that the error be plain or obvious, and that the error materially prejudiced a substantial right. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008).

While we conclude that the military judge's failure to notify the appellant of his right to a three-day waiting period constituted error, the appellant suffered no prejudice. *Kyles*, 20 M.J. at 576-77. The detailed defense counsel waived reading of the charges. Record at 8. The appellant indicated to the court that he had sufficient time to discuss the case with his counsel. *Id.* at 11, 33. Moreover, the appellant presented a case in sentencing that included an in-court witness. *Id.* at 50-62. At no point during the providence inquiry or sentencing did the appellant request more time.

The preferred charges were largely the same as the referred changes, with minor pen-and-ink alterations. Charge Sheet. Finally, and of paramount importance, the appellant here pled guilty pursuant to a PTA he signed on 6 January 2011, and which the convening authority signed on 10 January 2011, over a month before the special court-martial convened. The appellant's intent could not be made more manifest. AE I at 12; AE II at 2.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

³ The Government argues that forfeiture, not waiver, is the correct doctrine to apply, and characterizes the R.C.M. 901, Discussion's use of the word "waiver" as incorrect. Government Brief of 11 Aug 2011 at 5-6. We agree that forfeiture is the proper doctrine to apply, given our, and our sister services' precedent. *Kyles*, 20 M.J. at 576-77; *United States v. Oliphant*, 50 C.M.R. 29, 30 (N.C.M.R. 1974); *United States v. Garcia*, 10 M.J. 631, 633 (A.C.M.R. 1980) ("While *Pergande* and *Oliphant* recognize that an accused may knowingly waive the provisions of Article 35, they do not hold that a "knowing refusal to object" must be established on the record by the military judge."); *United States v. Pergande*, 49 C.M.R. 28, 32 (A.C.M.R. 1974).