

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

**Before
L.T. BOOKER, J.K. CARBERRY, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CLIFTON M. DAVIS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000619
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 July 2010.

Military Judge: Maj Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Recruit Depot, Parris Island, SC.

Staff Judge Advocate's Recommendation: LtCol E.R. Kleis, USMC.

For Appellant: Maj Rolando R. Sanchez, USMCR.

For Appellee: Maj Elizabeth A. Harvey, USMC.

22 March 2011

OPINION OF THE COURT

**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, pursuant to his pleas, of two specifications of failure to obey a lawful order and two specifications of failing to obey a lawful general order by possessing spice, in violation of Articles 91 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 891 and 892. Nonjudicial punishment (NJP) had previously been imposed upon the appellant

for one of the two general order violations.¹ The military judge sentenced the appellant to 90 days confinement, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for a period of 90 days, and a bad-conduct discharge.

After the announcement of sentence, the military judge asked the appellant and trial defense counsel if they wanted him to address the required *Pierce*² credit, or if they wanted to raise the matter with the convening authority (CA). Trial defense counsel stated that he would address the issue with the CA. Record at 99. The military judge then explained to the appellant his right to *Pierce* credit and specifically noted that due to the amount of pretrial confinement and the good time credit he would receive, the appellant would be released from confinement in less than 30 days and thus had to act quickly if he wanted relief on the sentence from the CA.³ *Id.* at 101. Furthermore, in discussing the options available to the appellant relative to *Pierce* credit, the military judge stated:

. . . if your goal was to direct that at perhaps getting the bad-conduct discharge suspended or disapproved, then he may want to serve the 30 days in exchange, for, I guess, the only thing the convening authority can do at that point would be to give him back his money or some of his rank or to suspend or disapprove the bad-conduct discharge. And I assume you were thinking of that because there is a waiver provision in part one of the pretrial agreement. . . .

The appellant's defense counsel replied in the affirmative and shortly after, the appellant acknowledged that he understood the conversation occurring between the defense counsel and military judge.

On 3 September 2010, after the appellant had been released from confinement, the appellant's counsel submitted a clemency request to the CA asking that the *Pierce* credit be applied to either disapproving or suspending the adjudged bad-conduct discharge. The CA denied the request noting the nature of the offenses, the service record of the appellant, and the effect that suspending the bad-conduct discharge would have on good order and discipline. In taking his action, however, the CA applied *Pierce* credit by disapproving the guilty finding to

¹ At the NJP proceeding, the appellant was awarded 45 days restriction, 45 days extra duties, reduction in rank from E-3 to E-2 and \$811.00 in forfeitures for two months with one month suspended. Prosecution Exhibit 1, at 6-7.

² *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

³ The appellant served 46 days of pretrial confinement and with credit for good time, would serve 29 more days.

Specification 1 of Charge II,⁴ disapproving forfeitures of \$964.00 pay per month for three months, and by disapproving the adjudged reduction in rank from E-2 to E-1. The CA approved the remaining findings and sentence.

In his sole assignment of error, the appellant alleges that "the convening authority's action did not articulate how the day-for-day and stripe-for-stripe credit required by *Pierce* was applied in Appellant's case, and did not apply complete credit" Appellant's Brief of 14 Jan 2011 at 3. We disagree and find that no error materially prejudicial to the appellant's substantial rights was committed.

Discussion

Although an accused may be tried for a serious offense after a prior NJP for the same offense, the UCMJ provides protection against double punishment. As was noted in *United States v. Gammons*, 51 M.J. 169, 180 (C.A.A.F. 1999), "[t]he purpose of Article 15(f) is to prevent the accused from being punished twice for the same offense as a matter of statutory law even though such successive punishment is otherwise permissible as a matter of constitutional law." In *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), the court provided a mechanism for appropriately crediting the appellant for a prior NJP. The court in *Pierce* held that an accused who is convicted at court-martial for the same offense for which NJP previously was imposed may request credit "for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Id.* at 369

The credit, however, is not automatic. As discussed in *Gammons*, the appellant is "the gatekeeper on the question as to whether an NJP for a serious offense will be brought to the attention of the sentencing authority." *Gammons*, 51 M.J. at 180. As the gatekeeper, the appellant may choose whether to introduce the record of a prior NJP for the same offense covered by a court-martial finding and may also choose the forum for making such a presentation. The appellant may: (1) introduce the record of the prior NJP for consideration by the court-martial during sentencing; (2) introduce the record of the prior NJP during an Article 39(a), UCMJ, session for purposes of adjudicating credit to be applied against the adjudged sentence; (3) defer introduction of the record of the prior NJP during trial and present it to the CA prior to action on the sentence; or (4) choose not to bring the record of the prior NJP to the attention of any sentencing authority. *Id.* at 183.

In this case, the appellant elected to wait until after he had served his confinement to request *Pierce* credit and made the suspension or disapproval of his bad-conduct discharge the thrust of his request. His decision to wait until he was released from confinement was, in essence, an all or nothing maneuver, i.e.,

⁴ The offense for which nonjudicial punishment had been imposed.

try to get the bad-conduct discharge suspended or disapproved but risk losing the day-for-day *Pierce* credit as the delay made it impossible for the CA to award day-for day credit for the period of restriction with extra duties. We are not compelled to grant the appellant a windfall in the form of setting aside his punitive discharge because he chose a strategy that proved unsuccessful. Moreover, it is clear that the CA went to great lengths to ensure that the appellant wasn't punished twice for the same offense. We conclude that the CA was most generous in his application of *Pierce* credit. Contrary to the appellant's assertion that the CA's application of *Pierce* credit is vague, it is clear to us that the CA applied dollar-for-dollar⁵ and stripe-for-stripe credit and because it was impossible to award day-for-day credit, he disapproved the guilty finding for the offense for which NJP was imposed. We thus conclude that the appellant was not twice punished for the same offense.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court

⁵ In fact, the CA disapproved more forfeitures than were imposed as NJP.