

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

**Before
C.L. REISMEIER, J.K. CARBERRY, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

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

**NMCCA 201100077
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 November 2010.

Military Judge: LtCol G.W. Riggs, USMC.

Convening Authority: Commanding Officer, Marine Heavy Helicopter Squadron 366, Marine Aircraft Group 29, 2d Marine Aircraft Wing, U.S. Marine Corps Forces Command, Cherry Point, NC.

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

For Appellant: Capt Peter Griesch, USMCR.

For Appellee: Mr. Brian K. Keller, Esq.

30 June 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 destruction of military property, one specification of destruction of non-military property, one specification of larceny of military property, one specification of impeding an investigation, and one specification of communicating a threat, in violation of Articles 108, 109, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 908, 909, 921, and 934. On 9 November 2010, the military judge sentenced

appellant to confinement for four months, reduction to E-1, forfeiture of \$964.00 pay per month for four months, and a bad-conduct discharge. On 28 January 2011, the convening authority (CA) approved the sentence as adjudged.

This case was submitted without assignment of error. We note, however, the CA's action fails to reduce "his sentence to confinement to one hundred (100) days" which the CA indicated he would do as an act of clemency. We will take corrective action in our decretal paragraph.

On 6 December 2010, the appellant requested the CA suspend confinement in excess of 100 days and suspend the bad-conduct discharge. In a letter from the CA to trial defense counsel of 17 December 2010, the CA stated "I grant [appellant's] request for early release by reducing his sentence to confinement to one hundred (100) days." Commanding Officer's First Endorsement of 17 Dec 2010. The CA denied the appellant's request to suspend the bad-conduct discharge. *Id.*

The staff judge advocate's recommendation (SJAR) was provided on 27 January 2011. The SJAR reminded the CA that he had granted the appellant's clemency request "by reducing" the appellant's sentence of confinement to 100 days. The SJAR recommended the CA "approve the sentence by signing the enclosed action."

In an action dated 28 January 2011 the CA approved the sentence as adjudged and suspended confinement in excess of 150 days. This was error as the adjudged sentence was only four months. The CA also erred in failing to "reduce" confinement in excess of 100 days as he indicated he would do in his letter of 17 December 2010.

Although the appellant has not complained he was confined more than 100 days, in order to avoid the possibility of any prejudice to the appellant, we will do that which the CA had agreed to do.

Therefore, we affirm the findings and only so much of the sentence as extends to confinement for 100 days, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for four months, and a bad-conduct discharge.

For the Court

R.H. TROIDL
Clerk of Court