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

Before
C.L. REISMEIER, F.D. MITCHELL, B.L. PAYTON-O'BRIEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KENNETH L. GLOWNER JR.
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 201100013
SPECIAL COURT-MARTIAL

Sentence Adjudged: 22 October 2010.
Military Judge: Col Michael B. Richardson, USMC.
Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol A.M. Ray, USMC.
For Appellant: LCDR Edward V. Hartman, JAGC, USN.
For Appellee: Capt M. Paul Ervasti, USMC.

26 July 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 three specifications of unauthorized absence (UA) (the second terminated by apprehension), in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for 90 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and, in accordance with the pretrial agreement, suspended confinement in excess of time served.

The appellant has raised two summary assignments of error: (1) that the CA erred in taking his action when he stated the appellant's suspension began on the day of trial and lasted fifty days; and (2) that the CA erred in taking his action when he ordered the approved sentence, including the bad-conduct discharge, executed in violation of Article 71, UCMJ.[1] In addition to the assigned errors, we note that the military judge did not make the appropriate inquiry to determine whether the appellant understood the consequences of his "request" for a bad-conduct discharge.

We have carefully examined the record of trial and the pleadings of the parties and conclude that the findings and sentence are correct in law and fact and that no error prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

PTA Provision

The appellant was sentenced to confinement for 90 days, with credit for 45 days of pretrial confinement. The pretrial agreement (PTA) states that "all confinement in excess of time served will be suspended for the period of confinement served plus 5 days thereafter . . . ."[2] The appellant asserts that the suspension began on the date of trial and is only 5 days in length.[3] The Government argues us that the suspension should last as long as the period of time served (45 days) and an additional 5 days thereafter, resulting in a 50-day suspension period, exactly what the court-martial order states. While the suspension term of the agreement is susceptible to more than one reasonable interpretation, since the period of suspension under either interpretation expired no later than 16 February 2011, three weeks before the appellant raised this assignment of error with the court, we find that if there was an error it was harmless.

Execution of the BCD

In his second assignment of error, the appellant avers the CA erred in taking his action when he ordered the approved sentence, including the bad-conduct discharge, executed in violation of Article 71, UCMJ. We note that when the convening authority approved the entire sentence, he stated, "In accordance with the Uniform Code of Military Justice, the Manual for Courts-Martial, applicable regulations, and this action, the sentence is ordered executed. Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment." Under Article

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[1] Appellant's Brief of 10 Mar 2011 at 1.

[2] Appellate Exhibit II at 1.

[3] Paragraph 1 of AE II seems to suggest that the suspension period was only to be 5 days, based upon the requirement for the appellant to submit a written request to be placed on voluntary appellate leave.

71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity that does not require correction. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Additionally, the language of the court-martial order in this case closely resembles language found to be a "legal nullity" in *United States v. Bryant*, No. 201000689, unpublished op. (N.M.Ct.Crim.App. 12 May 2011)(per curiam). To the extent that the language, "Pursuant to Article 71, UCMJ, the punitive discharge will be executed after final judgment," purports to direct anything, it is also a legal nullity. Article 71 is restrictive in its wording (a discharge "may not be" executed until after final action). It is not directive ("will be executed"), as the determination as to whether a discharge "will be" executed cannot be made until after judgment as to the legality of the proceedings, and, in case of death or dismissal, approval under Article 71(a) or (b). If reference to execution after finality is desired, the better practice would be to mirror the language of the statute (although that construct would add nothing legally to the action), or to follow the recommended forms for action in Appendix 16 of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

BCD Striker

Although not assigned as error, we now turn to the issue of whether the military judge properly determined that the appellant understood the consequences of, and desired a bad-conduct discharge (BCD). During his unsworn statement, the appellant stated "The BCD: I just want to get home and straighten out my life and get my daughter back, sir."[4] In his subsequent sentencing argument, trial defense counsel stated "PFC Glowner has requested a bad-conduct discharge, and that is because he is ready to be done with the Marine Corps."[5] The military judge made no inquiry after either statement concerning whether the appellant understood the consequences of a BCD and if the appellant truly desired a BCD. Finding that, under a totality of the circumstances, the military judge was not required in this case to inquire further into whether the appellant understood and desired a BCD, we find no error.

The right of convicted military personnel to make an unsworn statement is a longstanding military custom. *United States v. Adame*, 57 M.J. 812, 814 (N.M.Ct.Crim.App. 2003). The primary benefit of this privilege is that an accused may not be cross-

[4] Record at 58.

[5] *Id.* at 60.

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examined on his statement. *Id.* The appellant's unsworn statement may reasonably be interpreted as requesting a BCD because it suggests that he wishes to be separated from the Marine Corps. This contention is supported by his repeated, affirmative statements during the providence inquiry that his UA periods were undertaken in an effort to be discharged from the Marines.[6] The unsworn statement's meaning is similarly supported by the subsequent argument of trial defense counsel that "PFC Glowner has requested a bad-conduct discharge."[7] For these reasons, we find that the record supports that the appellant requested a BCD.

It has been recognized that "if trial defense counsel argues that a punitive discharge is appropriate, the military judge must question the accused *if* it appears that this concession does not comport with the accused's desires or the accused does not understand the ramifications of it." *United States v. Evans*, 35 M.J. 754, 758 (N.M.C.M.R. 1992). It has further been recognized, that a military judge may inquire into an accused's understanding of and desire for a BCD during an unsworn statement. *Adame*, 57 M.J. at 814. Although it is generally preferable for a military judge to conduct a brief inquiry if there is a request for a BCD, this court has recognized that the inquiry is not required for certain cases, such as "[if] the award of a punitive discharge is virtually certain and it appears that defense counsel's concession in argument is patently reasonable . . . even if the accused has not affirmatively stated his desire for a punitive discharge." *Id.* (quoting *Evans*, 35 M.J. at 758-59). However, the failure to conduct this inquiry will result in the sentence being set aside only if "1) there is some evidence in the record which fairly indicate that the accused desires to be retained in the service despite his conviction, and 2) the defense counsel has[s] argued that a punitive discharge [i]s appropriate punishment for the accused." *United States v. Volmar*, 15 M.J. 339, 341 (C.M.A. 1983).

The facts of this case do not satisfy the first prong of the *Volmar* test. The record is replete with statements by the appellant that he wished to be separated from the Marine Corps.[8] *Adame* was a similar case, in which the accused pled guilty to a UA of eight months and had one nonjudicial punishment for a one-month UA. 57 M.J. at 813-15. In affirming a bad-conduct discharge in that case, this court stated, "we are convinced that the military judge would have adjudged, and the convening authority would have approved, a bad-conduct discharge in this case . . . ." *Id.* at 815. Given the likelihood of a BCD on the current facts, the appellant's stated wish to be separated and the fact that the military judge can only achieve a separation by a BCD, the trial defense counsel's argument for a BCD was

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[6] *Id.* at 17, 18, 20, 22, 23, 26, 35.

[7] *Id.* at 60.

[8] Record at 17, 18, 20, 22, 23, 26, 35

patently reasonable. Moreover, there is no evidence in the record that suggests that the appellant desired to remain in the service. Therefore, while it may have been preferable for the military judge to conduct a minimal inquiry into the appellant's desire for a BCD, the absence of this inquiry is not prejudicial error in this case.

This result is further supported by the absence of an assignment of error based on trial defense counsel's argument that the appellant requested a BCD. Appellate defense counsel is presumed to determine from his client whether a BCD was desired. *United States v. Blunk*, 37 C.M.R. 422, 425 (C.M.A. 1967). Further, "[d]efense counsel is presumed in the absence of evidence to the contrary to have fulfilled his duty to fully advise his client regarding all important aspects of the trial." *Evans*, 35 M.J. at 759 (citing *Strickland v. Washington*, 466 U.S. 668 (1984))(string cite omitted).

We note there is no assertion that the military judge awarded the BCD solely based on the appellant's request for a BCD. An accused's request for a punitive discharge is only a "factor to be considered . . . before the sentencing authority." *Evans*, 35 M.J. at 761. There is no evidence in this record that the military judge here relied solely on the appellant's request for a BCD.

We find that the military judge acted appropriately under the circumstances because the appellant actually desired a BCD; a BCD would have been awarded even if not requested, and there is no allegation by the appellant that the request for a BCD was error.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court