

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

**Before  
C.L. REISMEIER, F.D. MITCHELL, D.O. VOLLENWEIDER  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**ROBERT GUTENMAKHER  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000420  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 12 May 2010.

**Military Judge:** LtCol Thomas Sanzi, USMC.

**Convening Authority:** Commanding Officer, 3d Light Armored  
Reconnaissance Battalion, 1st Marine Division, MAGTF-TC,  
Twentynine Palms, CA.

**Staff Judge Advocate's Recommendation:** Maj J.V. Munoz,  
USMC.

**For Appellant:** CAPT Bill Pinamont, JAGC, USN.

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

**15 February 2011**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A special court-martial, judge alone, convicted the appellant, pursuant to his pleas, of underage drinking in violation of a lawful general order, use of cocaine and 3,4-Methylenedioxymethamphetamine (Ecstasy), three specifications of assault consummated by a battery, and drunk and disorderly conduct, in violation of Articles 92, 112a, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, 928, and 934. The trial judge sentenced the appellant to confinement for 5 months, to forfeit \$900.00 per month for 5 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening

authority approved the sentence as adjudged, but suspended confinement greater than time already served.

The appellant's case was submitted to this court without assignment of error. Upon review, we find that corrective action is necessary. Following our corrective action, we conclude that findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

#### **Additional Charge IV - Drunk and Disorderly Conduct**

During the providence inquiry, the trial counsel informed the court that the disorderly conduct alleged in Additional Charge IV, was the same as the conduct as that described by the specifications of assault under Additional Charge III. It was also the same conduct that was the basis of Additional Charge I, underage drinking. We find that the number of charges and specifications misrepresent or exaggerate the appellant's criminality. Under the circumstances of this case, we believe that Additional Charge IV represents an unreasonable multiplication of offenses, and must therefore be dismissed. See *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

The charge must also be dismissed due to the failure of the trial judge to conduct a complete providence inquiry. Before accepting a guilty plea, the trial judge must find that there is a sufficient factual basis to satisfy each and every element of pled offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). In the instant case, the trial judge made no inquiry as to whether the accused's conduct under Additional Charge IV was either service discrediting or prejudicial to good order and discipline. Consequently, the providence inquiry to Additional Charge IV does not establish a factual basis for the terminal element of this Article 134 offense. Therefore, the charge must be dismissed.

#### **Additional Charge III, Specifications 1 and 2**

Under Specifications 1 and 2 of Additional Charge III, the appellant pled guilty to applying a "blood choke" and hitting the same victim in the face with his fist. During sentencing, the victim described the offenses as follows: "[H]e came up behind me and went to do a blood choke . . . As soon as I started feeling the pressure, I jumped - it surprised me, and I jumped straight up; and we both went to the ground . . . I held him down, sir. . . I was asking him why - why he was doing that, and then hit me . . . closed fist . . . Right here by the lip and nose . . . ." Record at 50-51. Although the trial judge considered the two specifications as one, he did not consolidate them and found the appellant guilty of both. As an unreasonable multiplication of charges, we will order consolidation of the specifications in our decretal paragraph.

### **Sentence Reassessment**

Having dismissed one of the Charges and specifications to which the appellant pled guilty, and having consolidated two assault specifications into one, we reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1988) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the sentencing landscape has not changed significantly, and that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. We find the adjudged sentence continues to be fair and appropriate for the appellant's offenses.

### **Conclusion**

The findings of guilty of Additional Charge IV and its specification are set aside and that Charge and its specification are dismissed. The supplemental court-martial order will consolidate Specifications 1 and 2 under Additional Charge III into a single specification for findings to read as follows: In that [the appellant], U.S. Marine Corps, while on active duty, did, at Marine Corps Air Ground Combat Center, Twentynine Palms, California, on or about 9 March 2010, commit and assault upon Corporal [T], U.S. Marine Corps, by unlawfully applying a blood choke to Corporal [T's] neck and striking Corporal [T] in the face with his fist. The remaining guilty findings, as modified herein, are affirmed.

Having reassessed the sentence, the sentence is affirmed.

For the Court

R.H. TROIDL  
Clerk of Court