

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

**Before
J.A. MAKSYM, F.D. MITCHELL, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRANDON F. SHOPE
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100130
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 17 November 2010.

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

Convening Authority: Commanding Officer, 10th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol J.W. Hitesman, USMC.

For Appellant: CDR Howard Liberman, JAGC, USN.

For Appellee: CAPT Martin A. Grover, JAGC, USN.

16 August 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 two specifications of violating a lawful general order in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The appellant was sentenced to confinement for ten months, reduction to pay grade E-1, forfeiture of \$964.00 of pay per month for ten months, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of 45 days pursuant to the pretrial agreement.

In his sole assignment of error, the appellant avers that the promulgating order incorrectly stated that there were no companion cases associated with his case. The appellant requests that this court direct the convening authority "to withdraw the original action and substitute a corrected action to properly reflect the companion cases and their dispositions." Appellant's Brief of 23 Mar 2011 at 3. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

The administrative requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E § 0151a(5) (Ch-2 16 Sep 2008). Failure to comply with this administrative requirement, however, does not render a CA's action fatally defective. *United States v. Bruce*, 60 M.J. 636, 642 (N.M.Ct.Crim.App. 2004). Assuming, *arguendo*, that the CA did err by not referencing the co-actors' cases in his action, the appellant has not alleged, nor do we find, that he was prejudiced by this omission. See *United States v. Swan*, 43 M.J. 788, 792 (N.M.Ct.Crim.App. 1995). Accordingly, the appellant is not entitled to relief.

Although not assigned as error, we also note that the CA approved the sentence, which included a bad-conduct discharge, and then 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." Under Article 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. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Finally, we found that the record contained what appeared to be a privileged communication by way of a memorandum addressed to the detailed defense counsel, Captain Wentte, signed by the appellant, waiving his right to submit matters in clemency. This court requested an affidavit from detailed defense counsel so as to discern why this correspondence somehow found its way to the convening authority. In his affidavit, Captain Wentte indicates that the correspondence was supplied antecedent to a conversation with his client, during which the appellant determined not to submit matters in clemency or have his counsel do so on his behalf and authorized Captain Wentte to disclose these wishes to the convening authority. We accept Captain Wentte's explanation, tendered as an officer of this court, that this disclosure of otherwise privileged correspondence was made with the express permission of his client. We view with grave concern the continuing tendency of detailed defense counsel to unnecessarily submit these otherwise privileged communications to the convening authority. Merely reflecting on the acknowledgment of receipt portion of the staff judge advocate's recommendation

that the appellant declines to submit matters in clemency would have achieved the appellant's desires in this case. To be clear, there is no need to supply any third party with privileged correspondence unless and until the attorney's ethical or substantive performance has been attacked by his/her client. The clearly better practice is for counsel, upon establishing that a client does not wish to submit matters in clemency, to maintain correspondence authenticating that appropriate advice has been given in his/her case file, to be deployed only if his/her professional performance is tested by the client at a future date.

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

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge MITCHELL participated in the decision of this case prior to detaching from the court.