

**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.

**DREW A. SIX
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100016
GENERAL COURT-MARTIAL**

Sentence Adjudged: 28 September 2010.

Military Judge: Maj Eric L. Emerich, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

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

For Appellant: CDR Luis P. Leme, JAGC, USN.

For Appellee: CAPT James B. Melton, JAGC, USN; Maj William
C. Kirby, USMC.

18 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 general court-martial convicted the appellant, pursuant to his pleas, of nine specifications of selling military property, in violation of the Uniform Code of Military Justice, Article 108, 10 U.S.C. § 908. The convening authority (CA) approved the adjudged sentence of confinement for twenty-eight months, reduction to pay grade E-1, a \$5,000 fine, and a bad-conduct discharge from the Marine Corps.

Here, the appellant alleges that he was unlawfully placed and kept in pretrial confinement by his commanding officer (CO)

and initial review officer (IRO), and that the military judge erred in denying his motion requesting additional pretrial confinement credit.¹

After thoroughly examining the record of trial and the pleadings of the parties, we find that there was an abuse of discretion by both the IRO and military judge because they failed to use the correct standard of proof in determining whether the appellant's continued pretrial confinement was warranted. We find, however, that the error was harmless since we are convinced that the requirements for confinement under RULE FOR COURTS-MARTIAL 305, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) were established by a preponderance of the evidence. We conclude that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Factual Background

From approximately 28 April 2009 to 26 August 2009, the appellant, an armory custodian, sold numerous military owned rifle grips for personal profit. After a Criminal Investigation Division (CID) investigation into the sales, the appellant's CO placed him in pretrial confinement on 23 April 2010.

In accordance with R.C.M. 305, the appellant's CO issued a 72-hour letter. As the rationale for continued pretrial confinement, the CO cited, among other things: the seriousness and volume of the appellant's alleged offenses; the appellant's disregard for authority; the inadequacy of lesser forms of restraint; and the fact that confinement would ensure the appellant's presence at trial. Furthermore, the CO articulated his concern that if released from pretrial confinement, the appellant would engage in further serious criminal misconduct.

On 29 April 2010, an IRO reviewed the pretrial confinement data sheet, the command letter, and the CID investigation into the appellant's misconduct and approved continued confinement. The IRO memorialized his decision by indicating on the pretrial hearing record that he had probable cause to believe that the appellant committed certain offenses, that he was subject to court-martial jurisdiction, that lesser forms of restraint were inadequate, and that continued pretrial confinement was necessary to ensure the appellant's presence at trial because the appellant was accused of a crime for which lengthy confinement may be awarded. See Appellate Exhibit III.

At arraignment, before entering pleas, the appellant moved for an additional two days of credit for each day of pretrial confinement he served. The appellant claimed both his CO and the IRO unlawfully confined him because no probable cause existed

¹ The appellant's petition is brought before this court pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

under R.C.M. 305. In denying the appellant's motion, the military judge found that:

[T]he IRO had considered the sheer volume of offenses committed by the [appellant] and the related maximum punishment associated with them as delineated by the draft non-preferred charge sheet which was provided to the IRO at that hearing . . . that the IRO considered the [appellant's] efforts to influence the testimony of a witness in this case as outlined in the CID investigation [a]nd that in light of the very significant amount of time, both the [CO] and the IRO believed [the appellant] was facing . . . justified [the appellant's] confinement.

Record at 32. Furthermore, while not articulated in the military judge's findings of fact, the IRO reviewed the CID investigation detailing the appellant's agreement to sell additional military property just weeks before his eventual confinement.

Unlawful Pretrial Confinement

The appellant contends that since no probable cause for his pretrial confinement existed, both his CO and the IRO unlawfully confined him. Additionally, the appellant contends that the military judge erred by denying his motion requesting additional pretrial confinement credit. We agree that the IRO and military judge erred, but for reasons other than those asserted by the appellant.

CO's Order to Confine

Upon reviewing the record, we are satisfied that the CO had probable cause to believe that the appellant committed an offense triable by court-martial, that his confinement was necessary because it was foreseeable that the appellant would engage in serious criminal misconduct, and that lesser forms of restraint were inadequate. The record supports the CO's conclusions that the appellant would engage in further serious misconduct if not confined was supported by the number of appellant's criminal offenses, his attempts to influence witness testimony, his lack of concern for authority, and his agreement to sell more military property just weeks before his confinement. Thus, the CO's decision to confine the appellant is supported by the record and it complied with R.C.M. 305.

IRO's Approval of Continued Confinement

We now review the IRO's decision to continue the appellant's pretrial confinement. Within seven days of initial confinement, an IRO must find that the requirements for confinement are established by a preponderance of the evidence. R.C.M. 305(i)(2)(A)(iii); *see also United States v. Fisher*, 37 M.J. 812, 817 (N.M.C.C.M.R. 1993). Because the appellant questions

the legality of pretrial confinement he already served, we, like the trial judge, review the IRO's decision for an abuse of discretion. *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996). We find the IRO failed to use the correct standard of proof in approving appellant's continued pretrial confinement.

The IRO found by probable cause, vice preponderance of the evidence, that the appellant committed certain offenses triable by court-martial, that continued pretrial confinement was necessary to ensure the presence of the appellant at trial because the appellant was accused of crimes for which lengthy confinement may be awarded, and that lesser forms of restraint were inadequate. The record is devoid of any indication that the IRO employed the required preponderance of evidence standard during the IRO hearing. Consequently, the IRO abused his discretion. However, we are convinced that the confinement requirements under R.C.M. 305(h)(2)(B) were established by a preponderance of the evidence, regardless of the IRO's failure to employ the correct standard. The CID investigation, non-preferred charge sheet, and command letter that were submitted to the IRO were ample evidence that the appellant was facing substantial punishment for a number of serious charges involving numerous illegal sales and thefts of military property, false official statements, and influencing witness testimony. Additionally, the IRO received information that the appellant, less than a month before he was confined, was recorded on an oral intercept agreeing to commit additional misconduct - selling military property. Accordingly, we find that, despite the IRO's use of the incorrect standard of proof, the requirements of R.C.M. 305 for pretrial confinement were met by a preponderance of the evidence.

Military Judge's Review

Finally, the appellant contends that the military judge erred in denying his motion for additional pretrial confinement credit for what he claims was his unlawful confinement. We review a military judge's ruling on the legality of pretrial confinement for an abuse of discretion. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003) (citing *Gaither*, 45 M.J. at 351-52). An abuse of discretion occurs if a finding of fact is clearly erroneous (i.e., unsupported by the record) or, if a decision is based on an erroneous view of the law. *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997); *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

In this instance, the military judge erred in finding the IRO did not abuse his discretion since the IRO did not use the correct standard, i.e., preponderance of evidence at the IRO hearing. At trial, the military judge held the IRO properly found the appellant's continued confinement justified after considering the number of offenses appellant committed, the

maximum punishment he faced, and the appellant's attempts to influence the testimony of a witness.

After reviewing the record using the correct standard, we find that pretrial confinement was justified. Notwithstanding the errors of the IRO and military judge, we are convinced that the errors were harmless as the record amply demonstrates that pretrial confinement was warranted under R.C.M. 305.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court