

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN R. ZINCK
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000425
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 29 April 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, Marine Aviation Logistics Squadron 16, Marine Aircraft Group 16, 3d MAW MarForPac, San Diego, CA.

Staff Judge Advocate's Recommendation: Maj A.L. Schuller, USMC.

For Appellant: LT Brian Whitaker, JAGC, USN; LT Jentso Hwang, JAGC, USN.

For Appellee: CDR C.L. Van Brackel, JAGC, USN; Capt Mark V. Balfantz, USMC.

15 February 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 wrongful distribution of a controlled substance (ecstasy) and two specifications of wrongful use of a controlled substance (ecstasy), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to ten months confinement, reduction to pay grade E-1,

and a bad-conduct discharge. The convening authority approved the sentence as adjudged and ordered it executed.

The appellant has submitted two assignments of error: (1) that the convening authority's action purports to execute the bad-conduct discharge; and, (2) that his sentence is inappropriately severe.¹ We have carefully reviewed the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Errors in the Convening Authority's Action

In the appellant's first assignment of error he asserts the convening authority's action fails to comply with RULE FOR COURTS-MARTIAL 1113(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), as it purports to order executed the bad-conduct discharge. After first approving the sentence as adjudged, the convening authority 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). Thus, no remedial action is required.

Sentence Severity

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets what he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After reviewing the entire record, we find the sentence appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268.

¹ This assignment of error is submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Accordingly, we affirm the findings of guilty and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court