

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

**Before
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SHAWN D. RUBY
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100430
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 April 2011.

Military Judge: LtCol Stephen F. Keane, USMC.

Convening Authority: Commanding General, 1st Marine
Division (Rein), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin,
USMC.

For Appellant: LCDR Ronald Hocevar, JAGC, USN.

For Appellee: LT Benjamin J. Voce-Gardner, JAGC, USN.

10 January 2012

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 general court-martial, composed of a military judge, convicted the appellant, pursuant to his pleas, of one specification of attempting to wrongfully distribute a controlled substance, one specification of conspiring to wrongfully distribute a controlled substance, three specifications of wrongfully distributing a controlled substance, one specification of wrongfully possessing a controlled substance, and one specification of wrongfully

impeding an investigation, violations of Articles 80, 81, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 912a, and 934. The military judge sentenced the appellant to be confined for 54 months, forfeit all pay and allowances, and to be discharged with a dishonorable discharge. The convening authority approved the findings and adjudged sentence.

The appellant alleges the following assignments of error: (1) that that the specification alleging impeding an investigation fails to state an offense due to omission of the terminal element; and (2) the military judge improperly increased his announced sentence from a bad-conduct discharge to a dishonorable discharge.

We have carefully examined the record of trial, the appellant's assignments of error, and the pleadings. 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.

Failure to State an Offense

The appellant entered an unconditional guilty plea to the Article 134 offense and now challenges it for the first time on appeal. For the reasons cited in *United States v. Hackler*, ___ M.J. ___, No. 201100323, 2011 CCA LEXIS 371 (N.M.Ct.Crim.App. 22 Dec 2011), we find no prejudice.

Announced Sentence

In announcing the adjudged sentence, the military judge stated, among other lawful punishments, he was awarding the appellant a bad-conduct discharge. Immediately after the announcement of sentence, the military judge reviewed part two of the pretrial agreement (PTA). In reviewing the sentence limitation portion of the PTA the military judge stated:

All right. Private Ruby, I'm going to go over part two of your pretrial agreement with you at this time. Paragraph 1 addresses a punitive discharge. That may be approved as adjudged. You were sentenced to a dishonorable discharge, so that may be approved as adjudged.

Record at 123-24. After completing his review of the sentence limitation portion of the PTA and asking whether both counsel concurred, the following colloquy took place:

TC: Sir, I just want to get some clarification. You initially said you would be adjudging a bad-conduct discharge and then --

MJ: Dishonorable discharge is what I adjudged. Did I announce bad-conduct discharge?

TC: Yes, sir. Initially you did.

MJ: I apologize. It was a dishonorable discharge what [sic] the court adjudged.

Id. at 125.

The appellant characterizes these events as a change of sentence occurring after the military judge viewed what the convening authority was willing to approve in the sentence limitation portion of the PTA. The appellant contends the military judge increased the sentence as a result of being influenced by the PTA. The appellant argues increasing the severity of the adjudged discharge was manifestly unjust and raised the specter of undue command influence. We disagree with the appellant's characterization of events and find no command influence or manifest injustice occurred.

Courts possess the inherent power to correct their records of clerical errors or mistakes or to ensure their records accurately reflect events. *United States v. Baker*, 32 M.J. 290, 293 (C.M.A. 1991). An announced sentence containing an error may be corrected by a subsequent announcement made prior to adjournment. RULE FOR COURTS-MARTIAL 1007(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Ambiguous sentences can be corrected post adjournment in special sessions called by the military judge. R.C.M. 1109(c)(1). However, after the trial has been adjourned, limitations are placed on the ability to correct errors in announced sentences. *United States v. Jones*, 34 M.J. 270, 271 (C.M.A. 1992). After adjournment, sentences can no longer be corrected upwardly even if the error was clear. *Id.* This limitation exists to prevent even the appearance of undue command influence. *Baker*, 32 M.J. at 293.

Here, the military judge made a comment that demonstrated an ambiguity as to the punitive discharge awarded. The

ambiguity was brought to the attention of the military judge by the alert trial counsel and it was immediately rectified. The military judge expressly acknowledged that he misspoke and clarified his intention as to the punitive discharge awarded. As the trial was never adjourned, the military judge acted well within his authority to correct an erroneously announced sentence and, there was not opportunity for anyone outside the courtroom to influence his decision. There is nothing to support the appellant's claim that the military judge reviewed the PTA, paused, reflected, and then concocted a scheme by which he would increase the punishment awarded. In fact, the military judge awarded a period of confinement less than that provided for in the PTA. Under these circumstances, we are convinced that the viewing of the sentence limitation portion played no role in the military judge's corrective action.

In light of the fact that the correction was made prior to adjournment, we are satisfied that the corrective action did not negatively affect the integrity of the military justice system. See *Baker*, 32 M.J. at 293 (explaining prohibition on correcting sentences upwardly post adjournment exists to ensure integrity of military justice system from undue command influence). As the trial was never adjourned, there was no opportunity for actual undue command influence to creep in. Moreover, because the ambiguity was resolved so swiftly after its discovery, there was not even an opportunity for the appearance of impropriety to creep into the proceedings.

Conclusion

The findings and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court