

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

**Before  
J.A. MAKSYM, R.Q. WARD, G.G. GERDING  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JUSTIN R. MITCHELL  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100346  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 1 April 2011.

**Military Judge:** LtCol David Jones, USMC.

**Convening Authority:** Commanding officer, Marine Wing  
Support Squadron 172, Camp Foster, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** Col J.R. Woodworth,  
USMC.

**For Appellant:** CDR Christopher Geis, JAGC, USN.

**For Appellee:** Capt David Roberts, USMC.

**29 February 2012**

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**OPINION OF THE COURT**  
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**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 attempted possession of Spice and conspiracy to use Spice, in violation of Articles 80 and 81, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 881. On 1 April 2011, the appellant was sentenced to

confinement for 120 days, forfeiture of \$975.00 per month<sup>1</sup> for four months, and a bad-conduct discharge. On 14 June 2011, the convening authority (CA), pursuant to a pretrial agreement (PTA), disapproved all adjudged forfeitures, approved the remainder of the adjudged sentence, but suspended all confinement in excess of forty days.

The case was submitted without assignment of error. After reviewing the record of trial, we find that the military judge abused his discretion by allowing inadmissible hearsay into evidence during sentencing and that the appellant was illegally kept in confinement after the convening authority took his action. Following our corrective action, we find that no error materially prejudicial to the substantial rights of the appellant remains. Art. 59(a) and 66(c), UCMJ.

### **Sentencing Evidence**

The Government presented evidence in aggravation during presentencing through the testimony of Staff Sergeant (SSgt) Leyva. Upon questioning by trial counsel, SSgt Leyva testified the appellant had been to a summary court-martial. Record at 74. Defense counsel objected on hearsay grounds. *Id.* The military judge initially overruled the hearsay objection, but later sustained the appellant's objection under RULE FOR COURTS-MARTIAL 1001(b)(3)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), for lack of evidence of compliance with Article 64, UCMJ. Record at 77-82.

The Government then presented proof the appellant's summary court-martial conviction had been reviewed by a judge advocate pursuant to Article 64, UCMJ. Record at 95; Prosecution Exhibit 2. The military judge reversed himself and admitted SSgt Leyva's testimony as proof that the appellant had been convicted at a summary court-martial for theft and had served 30 days confinement as a result. Record at 95-96; 75. Unfortunately, the document illustrating that a review pursuant to Article 64 had been accomplished failed to reveal the offense for which the appellant was convicted or the adjudged sentence.

SSgt Leyva's testimony that the appellant had been convicted of theft at a summary court-martial was hearsay. Hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered

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<sup>1</sup> The military judge failed to say "pay" when he announced the sentence. The convening authority (CA) repeated the error in his action. However, the CA disapproved all adjudged forfeitures, thereby curing any error.

in evidence to prove the truth of the matter asserted." MILITARY RULE OF EVIDENCE 801, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). SSgt Leyva testified he "wasn't here for [the summary court-martial], but I did hear that he did." Record at 75. When asked if the appellant was found guilty, SSgt Leyva testified "I did hear he was found guilty." *Id.* The Government offered the out-of-court statement made to SSgt Leyva to prove the truth of the matter asserted: that the appellant had been convicted at a summary court-martial for theft and was awarded 30 days confinement.

Hearsay is generally inadmissible at a court-martial. MIL. R. EVID. 802. Although exceptions to the general rule exist, the Government did not establish that the hearsay in this case was admissible under any exception and we do not find any applicable exception.<sup>2</sup> Therefore, the military judge abused his discretion when he admitted SSgt Leyva's testimony as proof of a summary court-martial conviction.

Having found error, we must determine whether this error was materially prejudicial to the appellant's substantial rights. During discussions between the military judge and trial and defense counsel, the military judge stated "I'm going to give him a harsher sentence if he's been to a Summary Court-Martial." Record at 80. There could be no clearer evidence of material prejudice than the military judge's indication on the record of his intent to increase the appellant's sentence if the summary court-martial conviction was admitted. We will provide relief in our decretal paragraph.

### **Illegal Post-Trial Confinement**

Although not assigned as an error, we have determined that the appellant served more confinement than was permitted under the terms of the CA's action.

Pursuant to the terms of his PTA, the appellant was released from confinement the day of his court-martial. Shortly thereafter, he violated an order related to his liberty risk status and commenced a period of unauthorized absence. Results of Vacation Hearing of 17 May 2011; Request for Clemency of 27 May 2011 at 2. The appellant was placed back in confinement on 4 May 2011, where he remained until the CA held a hearing pursuant to R.C.M. 1109. The CA held the hearing on 17 May

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<sup>2</sup> In his PTA, the appellant agreed "not to object to service record documents in sentencing on the basis of hearsay or authenticity." He did not waive objections to hearsay offered through the testimony of witnesses.

2011, at which time he determined the appellant had engaged in misconduct, thereby violating the terms of his pretrial agreement. The convening authority decided to "vacate the suspended portion of [the appellant's] sentence." Results of Vacation Hearing of 17 May 2011. The appellant then remained in confinement until his release on 15 July 2011. Appellee's Response to Court Order to Produce Dates of Appellant's Confinement of 8 Dec 2011.

The CA took action on the appellant's court-martial on 14 June 2011. In his action, the CA acted in accord with the PTA; he disapproved adjudged forfeitures and suspended all confinement in excess of forty days. He noted the military judge's award of forty days credit for time served in confinement prior to the appellant's court-martial.

The appellant's pretrial agreement stated that if he committed misconduct after his court-martial but before the CA's action, the CA could withdraw from the sentence limitation portion of the pretrial agreement after complying with the hearing requirements of R.C.M. 1109. This provision is consistent with the requirements of R.C.M. 705(c)(2)(D). The appellant's misconduct occurred after his court-martial but before the CA's action.

Although the CA erred in how he labeled the result of the 17 May 2011 hearing -- vacation of suspension vice withdrawal from the PTA -- the result was permitted by the PTA: that the appellant could be returned to confinement prior to the CA taking action, the CA was not bound by the PTA's sentence limitations, and the appellant could be required to serve up to the 120 days confinement adjudged by the military judge.

The CA then took his action on 14 June 2011. For no reason set out in the record, the CA acted in accord with the PTA; he disapproved adjudged forfeitures and suspended all confinement in excess of forty days. In his action he made no mention of the 17 May 2011 hearing or his desire to withdraw from the PTA or to execute the suspended confinement. At this point the appellant should have been released from confinement, as he had already served more than the forty days that were not suspended by the CA's action.

Instead, the appellant remained in the brig until 15 July 2011, completing his entire 120 day sentence to confinement.<sup>3</sup>

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<sup>3</sup> Nothing in the record indicates why the appellant remained in confinement. The CA's action indicated at the bottom of page two that it was distributed

This amounted to the appellant serving confinement in excess of that ordered executed by the CA's action. We will provide meaningful relief in our decretal paragraph.

### Conclusion

Accordingly, we affirm the findings and only so much of the approved sentence as provides for confinement for ten days and a bad-conduct discharge.<sup>4</sup> Automatic forfeitures imposed during confinement shall be returned to the appellant. Art. 58b(c), UCMJ. The supplemental court-martial promulgating order shall accurately state the affirmed findings and sentence.<sup>5</sup>

For the Court

R.H. TROIDL  
Clerk of Court

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to the brig. It is very likely that the vacation proceedings were overlooked when the staff judge advocate's recommendation and the CA's action were drafted. This apparent oversight is even more unfortunate as the SJAR included the trial defense counsel's clemency request wherein the trial defense counsel alludes to the vacation hearing in specific detail. Regardless, where the plain language of the action is clear and unambiguous, it must be given effect and "attendant circumstances preceding the action may not be utilized to undermine it." *United States v. Burch*, 67 M.J. 32, 33-34 (C.A.A.F. 2008).

<sup>4</sup> To extent the CA's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App.2011).

<sup>5</sup> The appellant's promulgating order shall also correctly reflect his rank as Private.