

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

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTIAN P. MOLY
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201200316
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 April 2012.

Military Judge: LtCol Chris Thielemann, USMC.

Convening Authority: Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol P.A. Tafoya, USMC.

For Appellant: CAPT Brent Filbert, JAGC, USN.

For Appellee: LT Philip Reutlinger, JAGC, USN.

20 December 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 military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of unauthorized absence, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant was sentenced to confinement for six months, a fine of \$1,000.00, and a bad-conduct discharge. As there was no pretrial agreement, the convening approved the sentence as adjudged.

The appellant asserts that the fine awarded by the military judge was inappropriately severe and unjust. We disagree. After careful consideration of the record of trial and the pleadings of the parties, we conclude that the findings and 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.

Factual Background

The appellant is no stranger to military justice. During his brief two-year career in the Marine Corps, and prior to the present case, he had received nonjudicial punishment for an 18-day unauthorized absence (UA), a summary court-martial for a seven-and-a-half month UA, and a special court-martial for orders violations (wrongful possession of Spice and drug paraphernalia). Prosecution Exhibits 3, 5, and 7. The appellant's first special court-martial of 14 November 2011 resulted in a punishment of, *inter alia*, a bad-conduct discharge. After that court-martial, while pending his transfer to appellate leave status, rather than wait for his command to prepare the proper paperwork to authorize his departure on appellate leave, the appellant commenced yet another UA period. On 19 December 2011, the appellant left his command, returned to his family's home in Texas and remained in a UA status for 31 days. After he terminated his absence by returning to Camp Pendleton, the appellant's command placed him in pretrial confinement.

During his second special court-martial, the prosecution offered evidence that the appellant commenced his unauthorized absence because he needed money. PE 6 at 3-4. Apparently, the first court-martial created financial straits for the appellant and he wanted to continue his military pay for as long as possible. He decided to go UA again so that he would be given another court-martial and not placed on appellate leave. The Government's evidence was derived from the monitored telephone calls the appellant made to his mother and father while in pretrial confinement.¹ The common themes throughout the appellant's brig conversations with his parents are that he went UA so as to extend his time on active duty in a pay status, and then to delay the court-martial in order to continue receiving pay.²

¹ PE1 and 6.

² *Id.*

Sentence Appropriateness

In his sole assigned error, the appellant characterizes his \$1,000.00 fine as inappropriately severe and unjust, as he asserts it was improperly based upon his receipt of pay to which he was lawfully entitled. We are unpersuaded by the appellant's argument.

It is well-settled that a court-martial is free to impose any lawful sentence that it determines appropriate. *United States v. Turner*, 34 C.M.R. 215, 217 (C.M.A. 1964). This court reviews the appropriateness of the sentence *de novo*. *United States v. Roach*, 66 M.J. 410, 413 (C.A.A.F. 2008). We engage in a review that gives "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the 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, 180-181 (C.M.A. 1959)). Here, the appellant, after having just been court-martialed and while awaiting appellate leave, departed on yet another period of unauthorized absence so that he could continue to extend his active duty and receipt of pay upon his return to military control.

As noted previously, the appellant's history with the Marine Corps was fraught with criminal conduct. It is evident based on the record before us that the appellant committed his latest UA in an attempt to manipulate the system so as to continue his pay status. While pending court-martial for this misconduct, the appellant was on active duty, and under these circumstances was lawfully entitled to receive pay. These facts we do not dispute. However, the appellant's motive for this period of UA was to draw out his receipt of pay. Rather than depart on his agreed-upon voluntary unpaid appellate leave,³ the appellant commenced yet another UA so that he could continue a pay status upon his return. The adjudged fine was clearly not excessive, and was related to the appellant's continued receipt of pay, which was motive for going UA in the first place.

We find the fine and the entire sentence adjudged appropriate under the circumstances of this case. To grant relief at this point would be engaging in clemency, a prerogative reserved for the convening authority, and we decline to do so. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A.

³ PE 7 at 2,

1988). We are convinced that justice was done and that the appellant received the punishment he deserved. *Id.* at 395.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court