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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

MATHEW D. BAIR
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201300002
GENERAL COURT-MARTIAL

Sentence Adjudged: 29 August 2012.
Military Judge: LtCol Nicole Hudspeth, USMC.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejuene, NC.
Staff Judge Advocate's Recommendation: Maj J.N. Nelson, USMC.
For Appellant: CAPT Bree Ermentrout, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

30 April 2013

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 general court-martial, convicted the appellant, pursuant to his pleas, of one specification of sale of military property, and one specification of larceny of military property, in violation of Articles 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 908 and 921. The military judge sentenced the appellant to confinement for 22 months, reduction to pay grade

E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and ordered it executed.[1]

The appellant asserts two assignments of error in this case: that the record of trial is incomplete because it is missing the military judge's ruling on a discovery motion; and that the CA's failure to identify the start date for a suspension of confinement period requires a new or corrected action. The first assignment of error was rendered moot when the Government, with the appellant's consent, filed a pleading containing an e-mail from the military judge wherein he provided both parties his ruling on the subject motion. We find merit in the appellant's second assignment of error, and will take corrective action in our decretal paragraph. Otherwise, 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.

Background

In November of 2011, while deployed to Arta, Djibouti, the appellant stole a pair of night vision goggles from a fellow Marine. Subsequently, charges were preferred against the appellant at Camp Lejeune, North Carolina. Those charges were eventually referred to a general court-martial.

After charges were referred, the appellant requested the CA fund a site visit for him and his trial defense counsel to visit Djibouti. The appellant asserted that viewing the scene of the alleged crime was vitally important in order for the defense team to understand the "topography, the proximity and characteristics of manmade structures, and atmospherics . . . ." Appellate Exhibit II at 2. The appellant also asserted that the visit was necessary to collect other information required to cross-examine Government witnesses. The CA denied the appellant's request. The appellant then filed a pretrial motion to compel the Government to pay for the site visit. AE II.

On 23 July 2012, an Article 39(a), UCMJ, session was held wherein the motion to compel was litigated.[2] After hearing both

[1] To the extent that the CA'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).

[2] Colonel G. W. Riggs, USMC, was the military judge that presided over the appellant's arraignment and the motion session discussed in this opinion.

evidence and argument, the military judge indicated that he was going to do some additional research before issuing a ruling the following day. Record at 23. The court was then adjourned until 7 August 2012, whereupon the military judge was properly relieved by a new military judge. No mention of the motion to compel, or the first military judge's ruling on that motion, was ever made by either party or the two subsequent military judges that presided over the case.

The appellant subsequently entered into a pretrial agreement wherein he agreed to plead guilty to both charges and specifications. In exchange for the appellant's pleas, the CA agreed to suspend all confinement in excess of 365 days "for a period of six (6) months, at which time, unless sooner vacated, [the suspended confinement] will be remitted without further action." AE XII at 1. No mention was made in the agreement as to when the suspension period would start.

After pronouncing sentence, the military judge examined the sentence limitation portion of the pretrial agreement and explained its effect to the appellant. Specifically, the military judge told the appellant that 10 months of adjudged confinement would "be suspended for a period of 6 months" and that the suspension period would start that day. Record at 142. The military judge then asked counsel for both parties if they agreed with her explanation of the provision of the pretrial agreement and its effect on the sentence – to which both parties said "Yes, ma'am." *Id.* at 143.

A staff judge advocate's recommendation (SJAR) was prepared in this case in which the CA was advised that "the military judge erred in her explanation of the terms of suspension of confinement" and that the suspension period would not begin to run until the action was signed. Subsequently, the CA's action stated that the "suspension period shall begin on the date of this action and continue for six (6) months."

Starting Date of the Suspension Period

This court has long held that in the absence of an agreement or evidence to the contrary, the period of suspension begins running as of the date of the CA's action. *United States v. Elliott*, 10 M.J. 740, 741 (N.M.C.M.R. 1981). While we have cautioned military judges against unilaterally imposing "an interpretation upon the parties which is contrary to the law

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LtCol N. K. Hudspeth, USMC, conducted the providence inquiry and adjudged the sentence.

concerning suspended sentences," we have also recognized the military judge's duty and authority to clarify ambiguities to ensure that the parties share a common understanding of the pretrial agreement. *Id*. (holding that the military judge acted within his discretion by resolving an ambiguity in favor of the accused by starting the suspension period on the date of trial); s*ee also United States v. Felder*, 59 M.J. 444, 445 (C.A.A.F. 2004); *United States v. Green*, 1 M.J. 453, 455-56 (C.M.A. 1976); RULE FOR COURTS-MARTIAL 910(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

In this case, the pretrial agreement was silent as to when the suspension period would begin to run. When the military judge discussed the meaning and effect of the pretrial agreement with the appellant, the judge said that the suspension period would start "today" – meaning the date of trial. Record at 142. Both the appellant and the Government agreed with that interpretation. *Id*. at 143. Having so agreed, the Government cannot unilaterally change the effective date of the suspension period to the date of the CA's action – thus increasing the suspension period by several months. Rather than remand for the promulgation of a new CA's action in conformance with the military judge's ruling, we shall correct the error in our decretal paragraph.

Conclusion

The findings and the sentence as approved are affirmed. The supplementary court-martial order shall reflect that the period for suspension of confinement commenced on the date of trial.

For the Court

R.H. TROIDL
Clerk of Court