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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JASON M. MCCRARY
ELECTRONICS TECHNICIAN SECOND CLASS (E-5), U.S. NAVY

NMCCA 201300135
GENERAL COURT-MARTIAL

Sentence Adjudged: 11 February 2013.
Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.
Convening Authority: Commander, Navy Region Northwest, Silverdale, WA.
Staff Judge Advocate's Recommendation: LCDR D.E. Rieke, JAGC, USN.
For Appellant: LtCol Richard D. Belliss, USMCR.
For Appellee: Maj David N. Roberts, USMC; LT Philip S. Reutlinger, JAGC, USN.

30 September 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.

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of failing to obey a lawful general regulation and one specification of wrongfully possessing child pornography in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The military judge sentenced the appellant to 45 months confinement, reduction to pay grade

E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended all confinement in excess of 24 months for the period of confinement served plus 12 months.

The appellant asserts that the military judge erred by failing to specifically award sentence credit pursuant to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989) for the appellant's prior nonjudicial punishment (NJP) for the Article 92 offense. After carefully considering the record of trial, the appellant's assignment of error, and the pleadings of the parties, we conclude that the findings and sentence are correct in law and fact, but that the appellant is entitled to relief on sentence. We order corrective action in our decretal paragraph.

Background

Between January 2010 and July 2011, the appellant, a first class petty officer with over twenty years of service in the U.S. Navy, accessed pornographic material, including child pornography, on a government computer while working on board the USS NEVADA (SSBN 733). The appellant received NJP on 6 March 2012 for violating Article 92, UCMJ "by wrongfully accessing *pornographic material* using government information systems."[1] He was awarded 30 days extra duty, forfeiture of $1,000.00 pay per month for two months, and reduction to pay grade E-5.[2] Prosecution Exhibit 2.

In May 2012, at his personal residence, the appellant was found in possession of 4 hard drives and 1 memory stick which contained images and videos of child pornography. PE 1. In addition to standing trial for one specification of wrongfully possessing child pornography in violation of Article 134, UCMJ, the appellant was charged with failing to obey the same general

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[1] The NJP specification for the Article 92 violation read as follows:

> In that Electronics Technician First Class (Submarines) Jason Michael McCrary, USN...did, on board USS NEVADA (SSBN 733), on diverse [sic] occasions between *31 January 2010 and 4 July 2011*, fail to obey a lawful general order, to wit: DoD 5500.07-R, by wrongfully accessing *pornographic material* using government information systems.

(Emphasis added.)

[2] The reduction to pay grade E-5 was suspended for a period of 6 months; however it appears the suspension was vacated prior to the court-martial as the appellant appeared at trial in the pay grade E-5.

regulation for which he had previously received NJP for "wrongfully using a government computer for unauthorized purposes, to wit: to view *child pornography*."[3]

On 6 July 2012, consistent with the terms of the pretrial agreement, the appellant entered guilty pleas to both charges. During sentencing, the Government moved to admit the appellant's NJP from 6 March 2012 and the following exchange between the parties took place:

> MJ: Any objection, [defense counsel], to 2 for identification?
>
> DC: Yes, sir, the objection being that the — improper evidence in aggravation as it doesn't stem directly from the incident in question here. Actually, I withdraw that objection, sir; it appears that the dates on there for the Article 92 are identical. Objection withdrawn.
>
> MJ: Very well. I think you'd be arguing for Pierce credit at this point[.] [Trial counsel], do you have something else?
>
> TC: Yes, sir, the government does recognize—and—and one of the reasons we actually brought this forward was that—first off, we do believe it's a proper record of nonjudicial punishment under JAGMAN 0141, but we did recognize the nature, there's some Pierce concerns by the court. The government's position is that this is a separate act in that it—he was charged—the accused was charged with under the Specification under Charge I with viewing child pornography, whereas the NJP was actually for viewing pornography, which would

[3] The charge at trial for the violation of Article 92 read as follows:

> In that Electronics Technician Second Class Petty Officer Jason M. McCrary, U.S. Navy, Naval Submarine Support Center, Bangor, on active duty, did, on board USS NEVADA (SSBN 733), located at or near Silverdale, Washington, on or about *April 2011*, violate a lawful general regulation, to wit: Paragraph 2-301, Department of Defense 5500.7-R Joint Ethics Regulation as implemented by Department of Defense Directive 5500.07 dated 29 November 2007, by wrongfully using a government computer for unauthorized purposes, to wit: to view *child pornography*.

(Emphasis added.)

> be separate and distinct misconduct. However, we have no objection for the court taking appropriate consideration of the punishment received by the accused in March 2012.
>
> MJ: Very well, 2 for identification is admitted; the words "for identification" are deleted, and I will consider it on sentencing.

Record at 79-80.

After deliberating, but prior to announcing the appellant's sentence, the military judge stated the following:

> I also took into account the nonjudicial punishment awarded onboard USS NEVADA. The government does make an argument, a reasonable one, that it was for different conduct from that which was encompassed in the Specification under Charge I, but I have made the appropriate adjustment in my own mind under United States against Pierce. I should also note that the General Article offense of possessing child pornography is five times more serious in terms of confinement exposure than the order violation is, but I have made the appropriate adjustment in accordance with United States against Pierce.

Record at 94. The military judge went on to announce the appellant's sentence, which included 45 months confinement.[4]

Discussion

The appellant makes three assertions in relation to his one assignment of error: (1) that the Article 92 offense at the NJP proceeding is the same as the Article 92 offense before the general court-martial; (2) that the NJP was sufficiently raised by the appellant for consideration; and (3) that the military judge erred by failing to state the credit awarded for the NJP. We address each of these assertions below.

The question that this case poses is whether the appellant received complete credit, pursuant to *Pierce*, for a prior NJP for the same offense for which he was punished at court-martial. The standard of review is *de novo*.

[4] The Government asked the military judge to sentence the appellant to 42 months confinement. Record at 87, 90.

Where a service member is court-martialed for an offense for which he has already been punished under *Article 15,* UCMJ, complete credit must be given "for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe." *Pierce*, 27 M.J. at 369. The appellant is the "gatekeeper" in determining when credit will be afforded for the prior punishment. *United States v. Gammons*, 51 M.J. 169, 179 (C.A.A.F. 1990). *Gammons* established the framework concerning when and how an appellant is to be afforded credit. Among other options, the appellant may introduce the record of the prior NJP for consideration by the court-martial during sentencing. *Id.* at 184. As we recognized in *United States v. Globke*, 59 M.J. 878, 882 (N.M.Ct.Crim.App. 2004), "the accused can wait, and raise the issue post-trial before . . . the appellate courts [.]"

First, we must look at whether the appellant received NJP for the same conduct for which he pled guilty at general court-martial. We find that he was. The date in the specification before the general court-martial falls within the dates asserted in the specification at NJP. While the appellant was punished at NJP for wrongfully using a Government computer to access "pornographic material" from 31 January 2010 to 4 July 2011, he admitted during the providence inquiry that in April 2011 he accessed "child pornography." Record at 33. The appellant also stipulated as fact that some of the pornography he viewed while on the submarine involved people under the age of 18 years old. PE 1 at ¶ 3. At his general court-martial, the appellant was apparently punished for some of the same acts pursuant to the same general regulation for wrongfully using a government computer to access "child pornography." We find that the "pornographic material" charged at the NJP includes the child pornography charged before the general court-martial.

Second, we must determine whether the appellant, as gatekeeper, properly raised the issue. We find that he did. Although the NJP was introduced by the Government, and not the appellant, it was properly before the military judge for consideration on sentencing. The trial defense counsel did not object to its admission, and the military judge informed the trial defense counsel that he should "be arguing for <u>Pierce</u> credit[.]" Record at 80. Furthermore, the military judge allowed the Government to argue against applying *Pierce* credit. After deliberations, but prior to announcing sentence, the military judge acknowledged the

Government's argument, but found that *Pierce* credit did apply. In addition, the appellant properly raised the issue with this court for our consideration. Thus, we conclude that the appellant sufficiently raised the issue for the military judge to consider and make findings as to the applicability of *Pierce* credit.

Finally, we must determine the credit the appellant received towards his sentence by the general court-martial. Similar to *Pierce*, the military judge, in assessing the sentence, indicated that he made the appropriate adjustment pursuant to *Pierce*; however, he failed to articulate on the record his calculation of *Pierce* credit and we cannot otherwise presume that he applied the credit correctly. *See Gammons*, 51 M.J. at 184 ("[i]n a judge-alone trial . . . the military judge will state on the record the specific credit awarded for the prior punishment"). Therefore, we will order appropriate corrective action to ensure the appellant receives credit for the prior NJP.[5] *Pierce*, 27 M.J. at 369; *see also United States v. Velez*, No. 201100456, 2012 CCA LEXIS 353, unpublished op. (N.M.Ct.Crim.App. 12 Sep 2012). While the appellant requests 100 days confinement credit,[6] we have reassessed the sentence and conclude the appropriate confinement credit is 37 days.[7]

[5] We recognize that the appellant should not receive an unjustified windfall in *Pierce* credit. However, the Government charged an offense which included less than one-month of conduct that was an apparent subset of more than 17 months of conduct previously subject to NJP, presented evidence of that NJP, then argued the conduct subject of the NJP demonstrated the appellant's "actions [we]re not just a one-time mistake," and the military judge concluded that the award of *Pierce* credit was appropriate without specifying the credit applicable. Record at 79-80; *see also Gammons*, 51 M.J. at 180. Under these circumstances, award of complete *Pierce* credit ensures that the appellant's sentencing interests are fully protected and eradicates any potential material prejudice to his substantial rights. Arts. 59(a) and 66(c), UCMJ.

[6] The appellant calculates 100 days confinement credit from the "Table of Equivalent Punishments" provided in ¶ 127*c*, Manual for Courts-Martial, United States, 1969 (Revised edition). The Court of Military Appeals in *Pierce* recommended that using "a 'Table of Equivalent Punishments,' similar to that provided in paragraphs 127*c* (2) or 131*d*, Manual for Courts-Martial, United States, 1969 (Revised edition), would be helpful." 27 M.J. at 369 (footnote omitted).

[7] We calculate 37 days of confinement credit as follows: 30 days extra duty = 20 confinement days; $1,000.00 pay per month for 2 months = 17 confinement days. The credit provided for the forfeiture of pay is calculated by taking the total forfeitures ($1,000.00 x 2 months) divided by the appellant's base pay at the time of the nonjudicial punishment ($3,589.80 x 2 months) which equals 27.86%. Therefore, we give .2786 days' confinement credit for every day the appellant was subject to forfeiture of pay. We then multiply .2786 by

Conclusion

We affirm the findings and the sentence but order 37 days confinement credit be applied against the confinement ordered executed by the CA.

For the Court

R.H. TROIDL
Clerk of Court

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the amount of days subject to the forfeiture of pay, and after rounding up; we calculate 17 days confinement credit. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9, Table 2-6 (1 Jan 2010); MCM, 1969 (Revised ed.), ¶ 127c(2).