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

Before
R.Q. WARD, G.G. GERDING, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSHUA F. SEYMOUR
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300125
SPECIAL COURT-MARTIAL

Sentence Adjudged: 2 November 2012.
Military Judge: CDR Anthony Johnson, JAGC, USN.
Convening Authority: Commanding General, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Maj J.N Nelson, USMC.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: Maj Paul Ervasti, USMC.

7 November 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:

We issued our original decision in this case on 24 September 2013 affirming the appellant's conviction for attempted possession of Percocet in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. However, pursuant to our authority under Article 66(c), Uniform Code of Military Justice, we set aside the adjudged bad-conduct discharge and affirmed the remainder of the approved sentence.

United States v. Seymour, No. 201300125, 2013 CCA LEXIS 774, per curiam (N.M.Ct.Crim.App. 24 Sep 2013).

On 10 October 2013, we *sua sponte* ordered reconsideration of our earlier opinion. Upon reconsideration, we withdraw our 24 September 2013 opinion and issue the following opinion in its place. We again affirm the appellant's guilty findings of violating Article 112a, UCMJ and again affirm only so much of the approved sentence as provides for confinement for 30 days and reduction to pay grade E-1.

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification of attempted possession of Percocet in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The military judge sentenced the appellant to 30 days of confinement, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement had no effect and the convening authority (CA) approved the sentence as adjudged.

The appellant raises two issues on appeal:[1] 1) that in taking his action, the CA improperly considered a prosecution exhibit that the military judge ruled was partially inadmissible during presentencing; and 2) that the bad-conduct discharge is inappropriately severe. After carefully considering the record of trial and the submissions of the parties, we are convinced 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 occurred. Art. 59(a), UCMJ. However, we continue to find that the approved sentence was inappropriately severe and therefore take corrective action in our decretal paragraph. Art. 66(c), UCMJ.

Background

During the providence inquiry, the appellant admitted to attempting to purchase 15 pills of Percocet from a civilian, Ms. W, in March 2010. As he explained to the military judge, when he arrived at the agreed upon location, local police arrested him before he ever met with Ms. W.

During presentencing, the Government sought to introduce Prosecution Exhibit 3, the appellant's complete, hand-written statement to law enforcement upon his arrest. Trial defense counsel objected to portions of the appellant's statement that

[1] Raised pursuant to *United States v. Grostefon*, 12 M.J. 432 (C.M.A. 1982).

referenced other misconduct to include the appellant's prior interaction with Ms. W. The military judge sustained the defense objection and indicated on the record which portions of the statement he would not consider. Record at 91-93. The military judge did not make redactions on the original Prosecution Exhibit 3 submitted by the Government, and the authenticated record of trial includes Prosecution Exhibit 3 in its entirety.

After trial, detailed defense counsel raised this matter to the CA's attention, arguing that the military judge may have improperly relied on inadmissible evidence in deliberating on sentence. Detailed Defense Counsel letter of 4 Mar 13 ("Clemency Letter") at 2-3. In an addendum to the staff judge advocate's (SJA) recommendation (SJAR), however, the SJA disagreed, instead noting that the military judge was presumed to have deliberated consistent with his ruling, and that including the unredacted exhibit in the record was not prejudicial error. *See* SJAR Addendum 5814 of 7 Mar 13 at 1-2. In taking action, the CA indicated that he considered "the record of trial, [the SJAR], [the Addendum SJAR], and the matters submitted by detailed defense counsel . . . ." General Court-Martial Order No. D13-13 of 21 Mar 13 at 3.

The CA's Consideration of the Appellant's Un-redacted Confession

The appellant contends that inclusion of the un-redacted exhibit in the record of trial was error because "[t]his Court should not conjecture as to what the convening authority might have done had he not reviewed the improper prejudicial statements ruled inadmissible by the Military Judge." Appellant's Brief of 3 Jun 2013 at 3. We disagree.

Courts of Criminal Appeals, in reviewing factual sufficiency and sentence appropriateness under Article 66(c), UCMJ, must limit their review to evidence properly admitted at trial. *United States v. Holt*, 58 M.J. 227, 232-33 (C.A.A.F. 2003). This precludes us from reviewing any "extra record matters when making determinations of guilt, innocence, and sentence appropriateness." *Id.* at 232 (citation and internal quotation marks omitted). However, a CA has no such restriction when determining whether to grant clemency. *See United States v. Harris*, 56 M.J. 480, 482 (C.A.A.F. 2002) ("[RULE FOR COURTS-MARTIAL] 1107(b)(3) provides the [CA] with broad discretion as to which matters to consider prior to acting on a case."); *United States v. Leal*, 44 M.J. 235, 237 (C.A.A.F 1996) ("A [CA] may consider adverse matters outside the record in deciding whether

to grant clemency, if the accused is given an opportunity to be heard regarding those matters.") (citation omitted); *United States v. Roland*, 5 M.J. 935, 937 (N.M.C.M.R. 1978) (holding that when determining whether to grant clemency, a CA may consider evidence inadmissible at trial).

Leal is instructive to the case at hand. In that case, the SJA commented on a letter of reprimand offered but not admitted into evidence at trial. The Court of Appeals for the Armed Forces held that such evidence constituted "new matter" within the meaning of R.C.M. 1106(f)(7) requiring service and another opportunity to comment. *Leal*, 44 M.J. at 236. Although appropriate for the CA's consideration, such an exhibit was only attached to the record of trial and therefore "matter from outside the record of trial." *Id.* (citation and internal quotation marks omitted). Consequently, exhibits such as the un-redacted PE 3 containing evidence excluded at trial may be considered by the CA as "new matter" under R.C.M. 1107(b)(3)(B), so long as notice and an opportunity to be heard is provided.

Here we find that the appellant received constructive notice that this matter was available for the CA's consideration. First, the detailed defense counsel raised this very matter to the CA's attention, although in a slightly different context.[2] Second, the SJA disagreed with the detailed defense counsel's allegation of legal error in his addendum – and a served a copy of that addendum on detailed defense counsel. Nowhere in the addendum does the SJA explain that the CA must refrain from considering this matter. Therefore, while portions of PE 3 may qualify as "new matter", we conclude that the appellant received sufficient notice of the entire contents of PE 3, and the CA committed no error in considering the un-redacted exhibit prior to taking action.[3]

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[2] In alleging legal error, detailed defense counsel focused on the potential error by the military judge in considering inadmissible evidence when deliberating on sentence. At no point did detailed defense counsel allege that this inadmissible evidence at trial was improper for the CA's consideration. Clemency Letter of 4 Mar 2013.

[3] "To intelligently perform his statutory duty to affirm so much of the sentence as he deems appropriate, the convening authority should know his subject well, and if the accused has a record of misconduct that should not be concealed." *Roland*, 5 M.J. at 937.

Sentence Appropriateness

The appellant contends that a bad-conduct discharge is inappropriately severe under the circumstances of his case. We agree.

In accordance with Article 66(c), UCMJ, a military appellate court "may affirm only such findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'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, 180-81 (C.M.A. 1959)).

The appellant enlisted in the Marine Corps in July 2007. He deployed to Iraq in 2009, where he participated in combat operations in the Al-Anbar province. After returning from Iraq, he soon began workups for another combat deployment to Afghanistan. It was during this predeployment training that he severely injured his shoulder. That injury, in addition to other service-connected injuries, later resulted in a Physical Evaluation Board (PEB) determination that he was unfit for continued service and should be separated with a proposed 80% permanent disability rating.[4]

From his enlistment in 2007 until the instant offense in March 2010, a period of over two years, the appellant's record of service reflects that he performed well. Upon his arrest, the appellant immediately accepted responsibility and gave a full statement to law enforcement. Despite his cooperation, the appellant was not charged until January 2012, nearly two years after the offense and one month after his end of active service

[4] At trial, defense counsel offered and the military judge admitted the appellant's Disability Evaluation System (DES) package dated 14 May 2012. The DES proposed rating listed is 80%. Attached to the DES package is a forwarding endorsement dated 13 August 2012 from the PEB liaison officer to the appellant's commanding officer. This endorsement advises that the appellant's disability determination has been finalized through the DES and the appellant will be involuntarily separated by Headquarters Marine Corps within 30 to 90 days. Defense Exhibit A. The appellant was sentenced on 2 November 2012.

(EAS) date. Throughout this time, he continued to serve without incident. Statements from his noncommissioned and staff noncommissioned officers describe how he served productively and was a positive influence on his unit despite this prolonged time awaiting trial. He ultimately pleaded guilty to the offense, admitting that he exercised poor judgment and apologizing for his misconduct. Three months prior to trial, he received approval for medical separation with a proposed disability rating of 80%. However, his subsequent punitive discharge in this case precludes any related benefits he would otherwise be eligible to receive.[5] Coupled with the appellant's performance both before and after his offense, as well as the nature of his offense as limited by the military judge's evidentiary ruling, these circumstances convince us that the appellant's sentence to a bad-conduct discharge is inappropriately severe.

Conclusion

The findings are affirmed. So much of the approved sentence as provides for confinement for 30 days and reduction to pay grade E-1 is affirmed.

For the Court

R.H. TROIDL
Clerk of Court

[5] *See* Title 38 U.S.C. §101(2) (defining eligible veteran to be a person who served in the active military and who was discharged under conditions other than dishonorable); 38 C.F.R. §3.12(c)(2) (precluding benefits where former service member was discharged by reason of the sentence of a general court-martial).