

Thursday, 10 March 2016 (1000)

United States v. Brown

**Before the Court, Panel 2: Senior Judge Fischer
Judge Campbell
Judge Rugh**

For Appellant: Capt Daniel R. Douglass, USMC

**For Appellee: LT Robert J. Miller, JAGC, USN
Capt Cory A. Carver, USMC**

Appellant's case is before this Court for a second time. On 5 October 2012, a panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of making a false official statement, assault consummated by battery, communicating a threat, and two specifications of wrongfully possessing a firearm, in violation of Articles 107, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 928, and 934 (2012). The members sentenced Appellant to fifteen years' confinement, reduction to pay grade E-1, total forfeiture of pay and allowances for twelve months, and a dishonorable discharge. The Convening Authority (CA) approved the sentence as adjudged and, except for the dishonorable discharge, ordered the sentence executed.

On 30 June 2014, this Court set aside and dismissed with prejudice the false official statement conviction based on legal insufficiency. The Court set aside the remaining findings and sentence and authorized a rehearing on the remaining charges. The Convening Authority (CA) ordered a rehearing.

A military judge sitting as a general court-martial on 31 March 2015 convicted Appellant, pursuant to his pleas, of assault consummated by battery and two specifications of wrongfully possessing a firearm, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. §§ 928 and 934 (2012). The military judge sentenced Appellant to confinement for two years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge. The CA approved the adjudged sentence, applied the awarded pretrial confinement credit, and, except for the bad-conduct discharge, ordered the sentence executed.

The Court granted oral argument on two of Appellant's Assignments of Error:

I

A MILITARY JUDGE HAS AUTHORITY TO MAKE ORDERS AND ABATE PROCEEDINGS IF HIS ORDERS ARE NOT COMPLIED WITH. THE MILITARY JUDGE HELD HE COULD NOT ORDER THE UNITED STATES GOVERNMENT TO PAY SGT BROWN HIS RIGHTFUL PAY IN ORDER TO CURE AN ARTICLE 13, UCMJ, VIOLATION, WHICH RESULTED IN A SIXTH AMENDMENT RIGHT TO CHOICE OF COUNSEL VIOLATION. DID THE MILITARY JUDGE ABUSE HIS DISCRETION BY ERRONEOUSLY PROVIDING ONLY CONFINEMENT CREDIT AND NOT ORDERING PAYMENT OR ABATING THE PROCEEDINGS?

II

A PLEA IS IMPROVIDENT WHERE THE FACTS ARE INSUFFICIENT TO FULFILL THE ELEMENTS OF THE SPECIFICATION CHARGED. APPELLANT'S 2011 CONVICTION IS NOT A "QUALIFYING OFFENSE" UNDER 18 U.S.C. §§ 922 - WHICH IS AN ELEMENT OF THE ARTICLE 134 CHARGE ALLEGED IN SPECIFICATIONS TWO AND THREE OF CHARGE V - BECAUSE SGT BROWN NEVER KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO JURY TRIAL. THEREFORE, IS SGT BROWN'S PLEA OF GUILTY TO SPECIFICATIONS TWO AND THREE OF CHARGE V IMPROVIDENT?