

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

Charles Wm. DORMAN

C.J. VILLEMEZ

R.C. HARRIS

UNITED STATES

v.

**Louis V. TRICARICO III
Private (E-1), U.S. Marine Corps**

NMCCA 200300679

Decided 29 April 2004

Sentence adjudged 20 June 2002. Military Judge: D.K. Margolin. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters and Support Battalion, School of Infantry, Training Command, Camp Pendleton, CA.

LCDR ERIC J. MCDONALD, JAGC, USN, Appellate Defense Counsel
LtCol CALVIN F. BOLES IV, USMCR, Appellate Defense Counsel
LtCol MICHAEL SHIRING, USMCR, Appellate Government Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

In accordance with his pleas, the appellant was convicted of an unauthorized absence, terminated by apprehension, and the use of controlled substances, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge, sitting as a special court-martial, sentenced the appellant to confinement for 4 months, forfeiture of \$737.00 pay per month for 4 months, and a bad-conduct discharge. Upon taking action, the convening authority suspended that portion of confinement in excess of 55 days for a period of 12 months from the date of trial. This suspension was required by the terms of the appellant's pretrial agreement.

We have examined the record of trial, and have considered the appellant's assignment of error, as well as the Government's response. We conclude 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 was committed. Arts. 59(a) and 66(c), UCMJ.

The appellant alleges error in the staff judge advocate's recommendation (SJAR). He claims that it was error for the SJA to mention a nonjudicial punishment in the SJAR when the military judge had refused to consider it at the appellant's court-martial. We find no error, and furthermore, even if there was error, it was not prejudicial.

RULE FOR COURTS-MARTIAL 1106(d)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) directs that the SJA provide certain information in the SJAR. Included in the information that is *required* to be included in the SJAR are "any records of nonjudicial punishment and previous convictions[.]" R.C.M. 1106(d)(3)(C). This Rule carries with it no caveat that the SJA is to hide the information from the convening authority if the military judge excluded the evidence at trial. "Justice" is frequently depicted as being blind, but we have never seen her depicted as the appellant would have her painted -- with her head buried in the sand.

The appellant cites no binding case authority or Rule for Courts-Martial to support his position. Rather, he relies upon a summary disposition by our superior court in the case of *United States v. Redhouse*, 53 M.J. 246 (C.A.A.F. 2000).¹ While we remain today as puzzled by the summary disposition in that case as when we received it, we also find that it is not controlling for the disposition of the case before us. It does not address the required content of the SJAR. Furthermore, in reviewing the appropriateness of the sentence, we are authorized to consider the matters considered by the convening authority. *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002).

Even if it was error for the SJA to have advised the convening authority of the appellant's nonjudicial punishment of 8 February 2002 in the SJAR, where the military judge properly refused to consider it in the absence of the warnings mandated by *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), the error was harmless. First, we would apply waiver. R.C.M. 1106(f)(6); *see also United States v. Drayton*, 40 M.J. 447, 448 (C.M.A. 1994) and *United States v. Kittle*, 56 M.J. 835, 836 (A.F.Ct.Crim.App. 2002). Second, the appellant asserts that the SJAR's mention of the excluded nonjudicial punishment "unfairly prejudiced" his ability to obtain clemency from the convening authority. Appellant's Brief of 31 Oct 2003 at 3. The appellant, however, made no attempt to obtain clemency from the convening authority. He did not submit any R.C.M. 1105 materials, and he did not submit any comments in response to the SJAR. Third, the appellant twice addressed the underlying misconduct on the record that was the subject of the excluded nonjudicial punishment. *See Record at 14, 31.* Fourth, the appellant's ongoing misconduct was

¹ We note the appellant's failure to include a citation for this case in his brief.

committed for the express purpose of getting "kicked out" of the Marine Corps. Record 18-19, 31. His efforts were successful. We find no prejudicial error in this case.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge VILLEMEZ concurs.

For the Court

R.H. TROIDL
Clerk of Court

Judge HARRIS did not participate in the decision of this case.