

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

BEFORE

C.A. PRICE

E.B. HEALEY

R.C. HARRIS

UNITED STATES

v.

**David R. CURRY
Corporal (E-4), U.S. Marine Corps**

NMCCA 200401422

Decided 17 December 2004

Sentence adjudged 10 May 2004. Military Judge: J.P. Colwell.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commanding General, 2d Marine Division, Camp Lejeune,
NC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT FRANK TEZAK, JAGC, USNR, Appellate Defense Counsel
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HEALEY, Judge:

A general court-martial composed of a military judge sitting alone, convicted the appellant, pursuant to his pleas, of marijuana use and two specifications of larceny, in violation of Articles 112a and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 921. The appellant was sentenced to confinement for 30 months, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, pursuant to the terms of a pretrial agreement, suspended all confinement in excess of 12 months.

We have examined the record of trial, submitted without assignment of error. We conclude that the military judge erred when he entered findings of guilty to Charge I and its sole specification without further inquiry into the appellant's mental responsibility at the time of the offense. We shall take corrective action in our decretal paragraph.

The record of trial contains a report of examination of mental responsibility and capacity as pertains to the appellant. Appellate Exhibit IV and Defense Exhibit A. The report specifically says that the appellant, "DID NOT have a severe mental disease or defect," at the time of the theft, and "WAS ABLE to appreciate the nature and quality or wrongfulness of his conduct." However, the report says the appellant "DID have a severe mental disease or defect" and "WAS UNABLE to appreciate the nature and quality of his conduct" during an incident in which he threatened to kill himself with C-4, in the presence of his wife. The later incident occurred on 1 November 2003. Charges stemming from the later incident were withdrawn and dismissed by the government. Based upon the providence inquiry, the use of marijuana occurred 31 October 2004, just one day prior to the date he was determined to have a severe mental disease and was unable to appreciate the nature and quality of his conduct. Record at 24-28.

Although an accused bears the burden of introducing evidence to establish lack of mental responsibility, RULE FOR COURTS-MARTIAL 706 (a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) provides:

If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

As there was evidence before the court that the appellant was not responsible for his actions the day immediately following his marijuana use, and since the report from the psychiatrist specifically addressed mental responsibility at the time the appellant committed two other offenses but omitted addressing the appellant's mental responsibility during his use of marijuana, further inquiry concerning the appellant's mental responsibility was warranted. Although this inquiry may, and perhaps should have come from defense counsel, the Rules for Courts-Martial are clear. Mental competence and responsibility

are the duty of all trial principals. *United States v. Collins*, 60 M.J. 261 (C.A.A.F. 2004). In the courtroom, however, the military judge is ultimately responsible for ensuring that R.C.M. 706 is followed. *Id.* at 263. Therefore, we conclude the military judge abused his discretion by not ordering further inquiry into the appellant's mental responsibility before accepting his pleas of guilty to wrongful use of marijuana.

We, therefore, set aside the finding of guilty to Charge I and its sole specification. We affirm the remaining findings. We reassess the sentence and find that the sentence received by the appellant is clearly appropriate and that he would not have received any lighter sentence. See *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We therefore affirm the adjudged sentence. We further order that the supplemental promulgating order accurately report the modified findings of the appellant's court-martial.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court