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

Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ROBERT D. NOLEN
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800487
SPECIAL COURT-MARTIAL

Sentence Adjudged: 29 April 2008.
Military Judge: CDR John A. Maksym, JAGC, USN.
Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol J.G. Baker, USMC.
For Appellant: CDR Dale O. Harris, JAGC, USN.
For Appellee: Capt Mark V. Balfantz, USMC.

9 April 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of unauthorized absence, a second unauthorized absence terminated by apprehension, and missing movement by design, in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The approved sentence was confinement for 10 months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raises a single assignment of error alleging that the first twelve pages of the record of trial were not properly authenticated by a person authorized to do so. We have

examined the record of trial and the pleadings of the parties. We find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Authentication of the Record of Trial

The appellant's trial was conducted before two separate military judges and included participation by two separate trial counsel. The initial arraignment covering the first twelve pages of the record was conducted before a military judge, Commander (CDR) C.M. Glaser-Allen, JAGC, USN. The remainder of the trial was conducted before another military judge, CDR J. Maksym, JAGC, USN. The trial counsel at the first session was Captain (Capt) P. Houtz, USMC. At the second session before CDR Maksym, the Government was represented by Capt R.M. Cloninger, USMC. At issue is the fact that, in the absence of CDR Glaser-Allen,[1] the first twelve pages of the record of trial purported to be authenticated by Capt Cloninger who, the parties agree, was not present during that session of court.

It is well-established that when two or more military judges preside over a trial, each judge is required to authenticate that portion of the record covering the sessions over which he or she presided. *United States v. Robinson*, 24 M.J. 649, 654 (N.M.C.M.R. 1987). If a military judge is unavailable to authenticate a record, it may be authenticated by the trial counsel present during that portion of the proceedings. RULE FOR COURTS-MARTIAL 1104(a)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). As the parties agree that Capt Cloninger was not present during the initial Article 39(a), UCMJ, session conducted before CDR Glaser-Allen, we agree that the first twelve pages of the appellant's record of trial were not properly authenticated. A failure to properly authenticate the initial Article 39(a) session of a trial constitutes error under R.C.M. 1104(a)(2).

While proper authentication should have been accomplished, we find the appellant was not prejudiced by this error. The initial Article 39(a) session before CDR Glaser-Allen included discussion of the detailing and qualifications of the detailed trial counsel, the detailed defense counsel, a civilian counsel employed by the appellant, the military judge, and the court reporter. The accused acknowledged his identity and it was confirmed that he was in the proper uniform. The military judge advised the appellant of his counsel rights. The appellant elected to be represented by his detailed counsel and his civilian counsel only. There was no *voir dire* of the military judge. The appellant was then advised that he was entitled to a three-day delay between service of charges and trial. The appellant elected to proceed. The appellant then reserved

[1] Between the two sessions of court, CDR Glaser-Allen received individual augmentation orders, the execution of which made her unavailable to authenticate the record of trial.

election of forum, motions, and pleas. The appellant was advised pursuant to R.C.M. 804 and the Article 39(a) session was terminated.

The next session of court presided over by CDR Maksym was properly authenticated. CDR Maksym asked if the appellant recalled being advised of his counsel rights by CDR Glaser-Allen. The accused recalled the previous advisement and declined CDR Maksym's offer to repeat those rights. Record at 14. The appellant again elected to proceed to trial with his detailed defense counsel and his civilian counsel. CDR Maksym then asked the appellant if he recalled the prior military judge's advice as to forum. The appellant again indicated that he recalled the rights and did not need them repeated. The appellant then elected trial by military judge alone. CDR Maksym declared the court assembled and proceeded with the providence inquiry.

The appellant asserts on appeal that a failure to authenticate any portion of a record of trial is an error which requires no showing of prejudice to obtain relief. We disagree. The requirement for a showing of specific prejudice in such cases is well-established and long-standing.[2]

The appellant's citation to *United States v. Allende,* 66 M.J. 142, 145 (C.A.A.F. 2008) is misplaced. In *Allende*, the Court of Appeals for the Armed Forces actually required a specific showing of prejudice in a case involving improper authentication.[3] The appellant places undue weight on that court's dicta which simply left open the question of whether the court would always require evidence of specific prejudice under all circumstances.[4] We find under the circumstances of this case that a presumption of per-se prejudice is not required. Each important element that was covered in the initial twelve pages of record was covered again by CDR Maksym during his portion of the trial. We find that the lack of proper authentication complained of by the appellant was error but harmless beyond a reasonable doubt.

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[2] *See United States v. Merz*, 50 M.J. 850, 854 (N.M.Ct.Crim.App. 1999); *United States v. Wesley*, No. 9601651, 1997 CCA LEXIS 222, at 3-4 , unpublished op.(N.M.Ct.Crim.App. 9 Jun 1997); and *United States v. Robinson*, 24 M.J. 649, 654 (N.M.C.M.R. 1987). *See also United States v. Hasting*, 461 U.S. 499 (1983)(it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations); *United States v. Remai*, 19 M.J. 229 (C.M.A. 1985)(rejected *per se* prejudice analysis of 5th Amendment violations); *United States v. Skaar*, 20 M.J. 836 (N.M.C.M.R. 1985)(failure of CA to delay action must be assessed for specific prejudice where no fundamental constitutional right is involved).

[3] *Allende* involved substitute authentication by a trial counsel without proper evidence that the military judge was, in fact, unavailable as defined in the rule.

[4] The court noted that "we do not have before us a question of authentication by a person outside the ambit of persons authorized to act as substitutes under Article 54(a) . . . ." *Allende*, 66 M.J. at 145.

Conclusion

The findings and the approved sentence are affirmed.

Judge KELLY and Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court