

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

**Before
F.D. MITCHELL, J.A. MAKSYM, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BOYD C. SMITH II
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900239
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 February 2009.

Military Judge: LtCol Robert Ward, USMC.

Convening Authority: Commanding Officer, 2d Marine
Regiment, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol W.G. Perez,
USMC.

For Appellant: CAPT Mary McCormick, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

17 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of unauthorized absence, one specification of missing the movement of his unit through design, one specification of failing to obey a lawful general order, four specifications of using marijuana, and one specification of possessing marijuana, in violation of Articles 86, 87, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, 892, and 912a. The appellant was sentenced to confinement for 10 months, forfeiture of \$923.00 pay per month for 10 months and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance with the pretrial

agreement, suspended all confinement in excess of 150 days for a period of twelve months from the date of trial, and all adjudged forfeitures for a period of six months from the date of the convening authority's action.

The appellant submitted the case to this court without specific assignment of error. Subsequently, we specified the issue of sentence appropriateness. After carefully considering the record of trial, and the submissions of the parties pertaining to the specified issue, we are convinced 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. Art. 59, UCMJ. However, we find that the approved sentence was inappropriately severe in light of the appellant's distinguished combat record and substantial evidence of Post-Traumatic Stress Disorder and brain trauma. We will take corrective action in our decretal paragraph.

Sentence Appropriateness

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 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 is a combat veteran who served in Ramadi, Iraq from March to October 2006. Defense Exhibit D; Record at 90. During that time, he participated in countless firefights, pulled friends from the battle field, and earned a Purple Heart when a vehicle-borne improvised explosive device exploded into his Humvee, knocking then Private First Class Smith, who was in the turret, unconscious and suffering wounds to his hand. DE C; Record at 91. Moreover, the record is replete with references to a significant onset of Post-Traumatic Stress Disorder triggered by exposure to and injury from multiple explosions. DE B. Indeed, this appellant self-referred for psychiatric treatment, reported suicidal ideation, was diagnosed with probable traumatic brain injury and prescribed neurological related medication. *Id.*

In addition to considering the nature and seriousness of the specific offenses committed by the appellant, we have carefully considered the individual characteristics of the offender. This includes this Marine's obvious and distinguished performance in combat, and his disciplinary record, which consists of a summary court-martial conviction and nonjudicial punishment imposed for

misconduct which occurred after his return from Iraq, at a time when he was suffering from what in a best medical light has been diagnosed as severe PTSD, or worse still, probable traumatic brain injury. Considering the entire record, we conclude that justice is done and the appellant gets the punishment he deserves by affirming only the approved confinement and forfeitures.

Conclusion

The findings are affirmed. So much of the approved sentence as provides for confinement for 10 months and forfeiture of \$923.00 pay per month for 10 months is affirmed. The bad-conduct discharge is set aside.

For the Court

R.H. TROIDL
Clerk of Court