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

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DARYL D. TURNER, JR.
BOATSWAIN'S MATE SEAMAN (E-3), U.S. NAVY

NMCCA 200401570
SPECIAL COURT-MARTIAL

Sentence Adjudged: 24 August 2001.
Military Judge: CAPT David Wagner, JAGC, USN.
Convening Authority: Commanding Officer, USS KAUFFMAN (FFG 59).
For Appellant: Capt Michael Berry, USMC.
For Appellee: Maj Elizabeth A. Harvey, USMC; LCDR Frank L. Gatto, JAGC, USN.

22 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of attempted larceny, conspiracy to commit larceny, willful dereliction of duty, larceny, forgery, and housebreaking, violations, respectively, of Articles 80, 81, 92, 121, 123, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 892, 921, 923, and 930. On 24 August 2001, the military judge announced a sentence of 135 days' confinement, reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Navy.

The convening authority (CA) made several attempts at acting on the record and finally, in an action dated 11 November 2008,

approved the adjudged sentence. The CA's initial action, dated 7 January 2002, was withdrawn without explanation in an action dated 4 November 2004, perhaps because the January 2002 action failed to suspend a portion of the adjudged confinement as required by a pretrial agreement. The November 2004 action additionally granted clemency, not required by the pretrial agreement, with respect to automatic forfeitures. We set aside the November 2004 action as well as an action dated 18 June 2005 (which also waived automatic forfeitures) because of ambiguities in both those actions regarding the adjudged punitive discharge. The November 2008 action is silent with respect to automatic forfeitures. Three different names appear in the signature blocks of the four CA's actions.

In early filings, the appellant alleged that this court did not have jurisdiction to review his case, as the CA had not approved the punitive discharge in the 2004 or 2005 actions. That assignment of error has been mooted by our orders regarding those actions and the issuance of the operative action of 11 November 2008.

In his most recent filing, the appellant alleges two errors: first, that the lengthy post-trial delay has denied him due process; and second, that the military judge erred when he failed to award the appellant relief for what the appellant characterized as illegal pretrial punishment. We agree with the appellant that he was subjected to illegal pretrial punishment and select the extraordinary remedy of setting aside his bad-conduct discharge. We affirm the findings and the remaining aspects of punishment.

Pretrial Punishment

The appellant was part of the deck force of a frigate in 2001. During one of his watch periods, the appellant entered the stateroom of an ensign on watch and stole that officer's wallet; the wallet contained a credit card that the appellant then used to purchase items from various merchants in the local area. When his offenses came to light, he was placed in pretrial confinement ashore while the ship was underway. When the ship returned from its brief underway period, the appellant was brought from the pretrial confinement facility to appear before the Captain and crew at a public mast ("mast" is frequently understood to mean nonjudicial punishment proceedings, but it also includes award ceremonies and individual meetings held at a service member's request). After the Captain informed the appellant and the crew that the charges were being referred for trial, the appellant returned to pretrial confinement. At his court-martial, the appellant complained about this procedure and its effects upon him. Record at 57.

After the court-martial adjourned, and before he authenticated the record of trial, the military judge ordered a post-trial session to inquire further into the potential issue of

illegal pretrial punishment. Record at 66. Because this case was concluded before the decision issued in *United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2004), we find that it is controlled by *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1994), and that the issue of illegal pretrial punishment was not waived because it was not raised before the appellant entered his pleas. At the conclusion of this hearing, the military judge found no illegal pretrial punishment. Record at 113. While we are, and should be, reluctant to disturb a trial judge's ruling on such a matter, we believe that the military judge in this case abused his discretion in not finding a violation of Article 13.

The Captain acknowledged before the military judge that it was his intention to refer the charges for trial by court-martial, Record at 94, so the appearance of the appellant before the assembled crew, ostensibly for nonjudicial punishment, can be interpreted only as an attempt to humiliate the appellant, the Captain's testimony notwithstanding.[1] We note also the testimony of the ship's master-at-arms, in which he stated that the Captain told him that the purpose of the mast "was to notify the accused of the charges that were being preferred [sic] to the court-martial." *Id.* at 105. The Captain continued with his plan even when the master-at-arms passed along advice from judge advocates that "it probably was a good idea not to do it . . . because of the issue of unlawful command influence . . . ." *Id.*

The record reveals that the appellant was in irons during his brief appearance before the commanding officer. *Id.* at 75. We note as well that the appellant was transported from the brig to the ship without his counsel present. *Id.* at 104.[2] We agree, finally, with the military judge's finding, based on evidence presented at the hearing, that the Captain's actions were "founded on poor judgment [and left] the CA vulnerable to allegations of interfering with the accused's ability to prepare for trial and holding the accused up to public humiliation and scorn in violation of the Article 13 prohibition on pretrial punishment."[3] *Id.* at 113.

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[1] In this regard, we also note the well-established customs of the service regarding nonjudicial punishment and the rendering of honors: typically, the Sailor who faces nonjudicial punishment is brought before the commanding officer and renders a hand salute, which is returned by the commanding officer; one in irons is physically unable to exchange this sign of respect.

[2] We acknowledge that the appellant, because he was attached to a vessel, would not have been able to refuse nonjudicial punishment, and we understand that no accused member is entitled to the assistance of counsel at nonjudicial punishment proceedings.

[3] Our impression of the events described in the post-trial Article 39(a) session causes us to question whether the CA in this case should have been disqualified from taking post-trial action because of potential animus toward the appellant and his offenses.

Article 13 prohibits subjecting anyone to "punishment or penalty other than arrest or confinement upon the charges pending against him . . . ." This prohibition has been interpreted to encompass such acts as public denunciation. *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987). While the appellant was not subjected to the same sort of treatment as Sergeant Cruz or other members of the "peyote platoon," nonetheless the circumstances of his appearance, in irons, before his shipmates leads us to question whether he suffered a loss of the presumption of innocence before potential court-martial members. *See generally United States v. Gentile*, 1 M.J. 69 (C.M.A. 1975)(per curiam)(citing *Way v. United States*, 285 F.2d 253 (10th Cir. 1960)(appearance freed from restraints fundamental to a fair trial); *United States v. Blocker*, 30 M.J. 1152, 1154 (A.C.M.R. 1990)(right to appear in court in the proper uniform), *aff'd in part and set aside in part on other grounds*, 33 M.J. 349 (C.M.A. 1991). Such concerns are concededly diminished in a case such as the one at bar, where the appellant pleaded guilty. But for the appellant's own statements relative to his sentencing case, Record at 58, we would question further whether he may have suffered in the extenuation and mitigation or post-trial clemency aspects of his trial.

In the case before us, moreover, the Captain addressed his assembled ship's company immediately before the appellant was brought into their midst and admitted that he had "failed to protect the crew, something to that effect," noting that "[w]hen men are being robbed on the ship, I felt that way." Record at 89. This is even more evidence that, whatever his subjective belief, the Captain's manifest actions undermined the appellant's presumption of innocence.

As did the court in *Davis*, we recognize the Captain's "responsibility to maintain good order and discipline in a military organization," and we understand that when discharging that duty the Captain "need not appear indifferent to crime." *United States v. Davis*, 58 M.J. 100, 103 (C.A.A.F. 2003). As in *Davis*, however, we are concerned about the effect of the Captain's actions on due process, and perhaps even more important on the confidence that an observing public may have in the court-martial process. Because of the passage of time and the partial corrective actions by successive CA's, we offer as a remedy the only action now available to us, disapproval of the punitive discharge.

Post-Trial Delay

We turn briefly to the appellant's first assignment of error. Notwithstanding that this case was tried prior to *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006), we nonetheless find, consistent with that case, that the delays in this case are facially unreasonable. Given the lengthy delay evident from the record, we will assume a due process violation and consider whether the Government has met its burden of showing

the violation was harmless beyond a reasonable doubt. *United States v. Allende*, 66 M.J. 142, 145 (C.A.A.F. 2008); *United States v. Allison,* 63 M.J. 365, 370 (C.A.A.F. 2006). We consider whether constitutional error is harmless beyond a reasonable doubt *de novo* based on the totality of the circumstances. *United States v. Bush*, 68 M.J. 96, 102-03 (C.A.A.F. 2009).

We have considered the totality of the circumstances, among them the military judge's erroneous ruling on the pretrial punishment motion. Even if this case had moved with a minimum of delay, it is unlikely that we would have received it, fully briefed, before the appellant was released from confinement, given his adjudged and approved sentence and the amount of time he spent in pretrial confinement. We are satisfied that the post-trial delay was harmless beyond a reasonable doubt.

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in light of *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004), *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602, 607 (N.M. Ct. Crim. App. 2005)(en banc). Having done so, we find the delay does not affect findings or the sentence that should be approved in this case of a Sailor who, while conducting a soundings and security watch, stole from an officer assigned to his ship, who used a stolen credit card to steal from area merchants, and who involved his spouse in his larcenous activities.

We return, in conclusion, to our resolution of the second assignment of error and state that, while the post-trial delay aspect of this case does not require any sort of relief with respect to findings or sentence, we do find that the illegal pretrial punishment has an effect on the sentence that we will affirm. Accordingly, the findings and only so much of the sentence as provides for confinement for 135 days and reduction to pay grade E-1 are affirmed.

Chief Judge GEISER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court