

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

**Before
C.L. REISMEIER, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JONATHAN T. CLENDENIN
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000097
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 3 November 2009.
Military Judge: LtCol Thomas Sanzi, USMC.
Convening Authority: Commanding Officer, 3d Combat Engineer Battalion, 1st Marine Division (REIN), Marine Corps Air Ground Combat Center, Twentynine Palms, CA.
Staff Judge Advocate's Recommendation: LtCol R.J. Ashbacher, USMC.
For Appellant: CAPT Salvador Dominguez, JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

29 June 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of four specifications of wrongful use of marijuana and methamphetamine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge sentenced the appellant to confinement for 90 days, reduction to pay grade E-1, forfeiture of \$900.00 pay per month for three months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, in accordance with the pretrial agreement,

suspended confinement in excess of 60 days for time served plus six months thereafter.

The appellant raises two assignments of error, claiming that "the military judge erred by admitting and considering offense conduct that occurred more than two years prior to the offenses alleged on the charge sheet," and that a sentence including a bad-conduct discharge is inappropriately severe. For the reasons below, we disagree.

The appellant was convicted, based upon his pleas, of wrongful use of methamphetamine between about 20 and 27 May 2009 and again between about 3 and 10 August 2009, and wrongful use of marijuana between about 13 and 27 May 2009 and again between 10 July and 10 August 2009. During presentencing, the trial counsel offered Prosecution Exhibit 1, which included a "page-11", Administrative Remark (1070) page that referred to a suspended but approved separation from the service by reason of misconduct due to drug abuse with an other than honorable characterization of service on 1 August 2006. The separation was suspended for a period of 12 months. The defense counsel made a timely objection, noting that the service record entry was "[j]ust a round about way to try to get in a stale NJP [nonjudicial punishment]. . . ." Record at 37. The trial counsel responded by arguing that the document was offered to show prior drug use, but that there was no indication on the document itself that there had ever been imposition of non-judicial punishment related to the drug abuse. *Id.* The military judge overruled the objection. *Id.* at 38.

A military judge's ruling on the admissibility of evidence, including evidence admitted during presentencing, is tested for an abuse of discretion. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). RULE FOR COURTS-MARTIAL 1001(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) provides that under regulations of the Secretary concerned, trial counsel may introduce from the personnel records of the accused evidence of the accused's character of prior service. Service regulations provide that records of nonjudicial punishment may not be entered into evidence if they relate to offenses committed more than two years prior to the commission of any offense of which the accused stands convicted. Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7E § 0141 (Ch-2, 16 Sep 2008). The prohibition against admitting records of NJPs has been applied to any record used as a means authorized by departmental regulations to properly reflect imposition of NJP. *United States v. Wrenn*, 36 M.J. 1188, 1192 (N.M.C.M.R. 1993).

The document at issue, page 12 of PE-1, makes no reference to NJP. In fact, but for the document attached to the record before this court at the request of appellate defense counsel, there would be no way to determine on the face of the exhibit that the contested Administrative Remarks page referred to a prior NJP. Instead, the page 11 refers to a determination by

authorities to suspend an administrative separation due to drug abuse. The record is not a record of nonjudicial punishment. It is a record indicating a suspension of an administrative separation for conduct that happened to also be the basis for punishment. Similarly, the prohibition at issue is not, as the appellant suggests, against admitting "offense conduct that occurred more than two years prior to the offenses alleged on the charge sheet" but rather, against admission of NJP records reflecting such conduct. We conclude that the military judge did not abuse his discretion in admitting the document.

Regarding the appellant's second assignment of error, "a court-martial is free to impose any legal sentence that it determines to be appropriate." *United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001) (citations omitted). "When a sentence is before us for review, we 'may affirm . . . the sentence or such part or amount of the sentence, as [we] find[] correct in law and fact and determine[], on the bases of the entire record, should be approved.'" *Id.* (quoting Article 66(c), UCMJ). "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)).

We have carefully considered the appellant's length of service, age, background and performance. After reviewing the entire record, we find that the adjudged sentence is appropriate for this offender and his offense. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting sentence relief in this regard would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

However, this case presents a separate basis for sentence relief. Although the appellant has alleged no error in this regard, we note that he served 64 days of pretrial confinement. His pretrial agreement required the Government to suspend all confinement in excess of 60 days. The convening authority signed the pretrial agreement on 2 November (more than one month after the appellant and trial defense counsel signed the offer), the day before trial. The appellant was then on day 63 of pretrial confinement. In other words, at the date of acceptance of this agreement, it was already impossible for the appellant to receive the benefit of the agreement regarding confinement.

Neither counsel nor military judge made any mention of this fact on the record. The military judge verified with counsel that the appellant served 64 days of pretrial confinement, announced his sentence, and then read the sentence limitation portion of the pretrial agreement. In accordance with the

pretrial agreement and based upon the recommendation of the staff judge advocate, the convening authority approved the 90 days of confinement adjudged, and likewise suspended all confinement in excess of 60 days for the period of confinement served plus 6 months thereafter, despite the 4 additional days the appellant served in confinement.

The record is silent as to why the appellant served more time in pretrial confinement than required by the pretrial agreement, why the pretrial agreement was accepted by the convening authority after it was already impossible to fulfill relative to the confinement provision, or how the military judge could have accepted a provision of a pretrial agreement that was already overcome by events. Nevertheless, the appellant is entitled to relief for the additional confinement served. We therefore affirm the findings and only so much of the sentence as includes a bad-conduct discharge and confinement for 64 days. The findings and sentence, as modified, are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. See Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court