

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

**Before
L.T. BOOKER, B.G. FILBERT, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SEAN M. ROCHE
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800423
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 31 May 2007.

Military Judge: LtCol Tracy Daly, USMC.

Convening Authority: Commanding Officer, 7th Marine Regiment, 1st Marine Division (Rein), 1st Marine Expeditionary Force, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol M.R. Stahlman, USMC (16 Nov 07); **Addenda:** Maj R.J. Ashbacher, USMC (8 Sep 08 and 6 Oct 08).

For Appellant: Maj Anthony W. Burgos, USMC; Capt Michael D. Berry, USMC.

For Appellee: LCDR P.D. Bunge, JAGC, USN; Capt Mark V. Balfantz, USMC.

24 August 2010

OPINION OF THE COURT

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

FILBERT, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two unauthorized absences, false official statement, use of ecstasy, cocaine, and methamphetamine, and theft of a motorcycle valued at \$5,000.00 owned by a fellow Marine, in violation of Articles 86, 107, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C.

§§ 886, 907, 912a, and 921. On 31 May 2007, the appellant was sentenced to confinement for 180 days, forfeiture of \$750.00 pay per month for six months, reduction to the lowest enlisted pay grade, and a bad-conduct discharge.

The lengthy procedural history of this case leading up to our initial decision is set forth in our prior opinion. *United States v. Roche*, No. 200800423, 2009 CCA LEXIS 297, unpublished op. (N.M.Ct.Crim.App. 25 Aug 2009). In that decision, we found the appellant was entitled to five days of additional pretrial confinement credit for time spent in civilian jail. To afford him meaningful relief, we approved the findings, but only approved only so much of the sentence as provides for a bad-conduct discharge, 180 days confinement, reduction to pay grade E-1, and forfeiture of \$750.00 pay per month for five months.

The Court of Appeals for the Armed Forces affirmed our decision as to findings, but reversed as to sentence and remanded the case "to consider whether or not Appellant was provided meaningful relief, and if he was not provided meaningful relief, to order further appropriate relief unless any meaningful relief would be disproportionate to any harm Appellant may have suffered. See *United States v. Harris*, 66 M.J. 166, 169 (C.A.A.F. 2008)." *United States v. Roche*, ___ M.J. ___, No. 09-0817, 2010 CAAF LEXIS 363 (C.A.A.F. Apr. 29, 2010) (summary disposition). After carefully examining the record of trial, the appellant's brief and assignment of error on the assigned issue, the Government's answer, and the appellant's reply, we find that our ordered reduction of adjudged forfeitures from six to five months did not provide meaningful relief to the appellant.

Both sides agree that the reduction in adjudged forfeitures to five months had no effect on the appellant because he went into a no-pay status exactly five months after his sentence was adjudged. To provide the meaningful relief we intended by our initial decision, we will order in our decretal paragraph that forfeitures of pay be further reduced to \$750.00 pay per month for four months.¹ We will further order a reduction in approved confinement to 170 days. This reduction in confinement will ensure that the appellant may claim reimbursement for automatic forfeitures executed by operation of law.

The appellant argues we should set aside his bad-conduct discharge due to the post-trial delay in processing his case and because his trial defense counsel provided deficient

¹ The appellant claims that setting aside a portion of his adjudged forfeitures would not ensure he receives any money at his final accounting of pay. We find this argument to be speculative and unsupported. As a matter of law, the appellant is entitled to be paid any adjudged forfeitures that were executed and that are subsequently set aside. Art. 75(a), UCMJ. The fact the appellant may have deductions from his pay account which reduce the amount of pay he actually receives has no bearing on whether a reduction of adjudged forfeitures constitutes meaningful relief to the appellant.

representation by failing to seek five days of pretrial confinement credit. We note at the outset that we addressed these arguments in our previous decision and declined to grant relief on either basis. *Roche*, 2009 CCA LEXIS 297 at *4-*7. Additionally, it is evident, based on the military's scheme for providing confinement credit and prior decisions of the Court of Appeals of the Armed Forces, that the five days of pretrial confinement credit at issue in this case is not equivalent to a bad-conduct discharge. See RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) (limiting remedies for R.C.M. 305 violations to credits against confinement, hard labor without confinement, restriction, fine, and forfeiture of pay). See also *United States v. Spaustat*, 57 M.J. 256, 263 (C.A.A.F. 2002) (17 days of confinement credit at issue did not warrant setting aside the appellant's bad-conduct discharge); *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000) (appellant not entitled to have punitive discharge set aside as relief for 120 days of confinement; Court declined to create an equivalence between two such traditionally distinct types of punishment, particularly for such a "relatively short" period of confinement). Consequently, we find that setting aside the appellant's bad-conduct discharge would be disproportionate to any harm he may have suffered due to the failure to provide him five days of pretrial confinement credit. *Harris*, 66 M.J. at 169. We, therefore, decline to grant the appellant a windfall by setting aside his bad-conduct discharge.

Conclusion

We affirm only so much of the sentence as provides for a bad-conduct discharge, 170 days confinement, reduction to pay grade E-1, and forfeiture of \$750.00 pay per month for four months. We conclude that the sentence, as modified herein, is correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Senior Judge BOOKER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court