

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DENNIS E. MEYER
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 201100567
GENERAL COURT-MARTIAL**

Sentence Adjudged: 8 April 2011.

Military Judge: LtCol Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, Marine Corps Air Station, Beaufort, SC.

Staff Judge Advocate's Recommendation: Maj V.C. Danyluk, USMC.

For Appellant: Maj Jeffrey R. Liebenguth, USMC; LT Kevin Quencer, JAGC, USN.

For Appellee: Capt David N. Roberts, USMC.

29 August 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A general court-martial composed of officers with enlisted representation convicted the appellant, contrary to his pleas of breach of the peace, three specifications of aggravated assault, and carrying a concealed weapon, in violation of Articles 116, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 916, 928, and 934. The members sentenced him to two years of confinement, reduction to pay grade E-1, and forfeiture of all

pay and allowances. The convening authority approved the sentence as adjudged and, pursuant to the terms of a post-trial agreement, suspended all confinement in excess of 18 months and suspended both the adjudged and automatic reduction below pay grade E-3.

The appellant submits two assignments of error:

(1) that the evidence presented at trial was legally and factually insufficient to convict the appellant of carrying a concealed weapon; and, (2) that the military judge committed error by providing the members with a copy of the South Carolina concealed carry statute during their deliberations.

After carefully considering the record of trial including the pleadings of the parties, we find the military judge committed prejudicial error when he provided the members with a copy of the South Carolina statute. Accordingly, we set aside the finding of guilty as to this offense and, after reassessing the sentence, find that no error materially prejudicial to the substantial rights of the appellant remains.¹ Arts. 59(a) and 66(c), UCMJ.

Background

At approximately 0200 on 23 July 2010, Lance Corporal (LCpl) TF and Corporal (Cpl) SP exited a bar in Beaufort, South Carolina with two women they had met earlier that evening. As they walked down the street, a group of people including the appellant approached them from behind. The appellant drew a .45 caliber loaded handgun from a shoulder holster underneath the black motorcycle vest he was wearing and proceeded to strike LCpl TF in the face below the left eye with the butt of the weapon. The appellant then struck LCpl TF with the muzzle of the weapon above his left eye. The appellant then pointed the loaded weapon at LCpl TF. Cpl SP intervened in an attempt to defuse the situation and the appellant turned the loaded weapon on him. LCpl TF and Cpl SP backed away from the appellant. Beaufort City police responded to the scene and took the appellant into custody. At the time of the offenses, the

¹ On 3 August 2012 we issued an order for the Government to produce various exhibits or portions of exhibits missing from the record. The Government has complied, with the exception of Prosecution Exhibit 13, which ostensibly was a photograph of the ammunition from the weapon at issue in this case. We do not find the failure to produce PE 13 to be a substantial omission which would inhibit our review.

appellant was a military policeman assigned to Marine Corps Air Station Beaufort, South Carolina.

With regard to Charge III, alleging a violation of Article 134 for carrying a concealed weapon, the military judge instructed the members that the elements were as follows:

One, that at or near Beaufort, South Carolina, on or about 23 July 2010, the accused carried a concealed weapon - the accused carried, concealed, on or about his person, a loaded Taurus 45 caliber handgun. The second element is that the carrying was unlawful. The third element is that the Taurus 45 caliber handgun was a dangerous weapon. And the fourth element is that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit upon the armed forces.

Record at 554. The military judge provided definitions of several terms and phrases from the elements, but did not provide any explanation or definition regarding the word "unlawful" contained in the second element.²

Before beginning deliberations, the president of the panel asked the military judge a question regarding the authority of an off-duty military policeman to carry a concealed weapon.³ The military judge responded that once deliberations began the panel could return to the courtroom and ask questions and request additional evidence if they so desired. After the panel retired to deliberate, the military judge and counsel discussed how to handle the question from the president should the panel again pose the question. The Government proposed that the military

² Neither the Government nor the Defense submitted written proposed instructions to the military judge or objected to the proposed instruction regarding Charge III. The military judge followed the standard instruction from the Benchbook for the offense; however, for reasons that are unclear, he did not instruct the panel on the permissive inference for unlawfulness. Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-112-1d, Note 1 (1 Jan 2010); see also *United States v. Lyons*, 33 M.J. 88, 89-90 (C.M.A. 1991).

³ The question was as follows, "I would like to be able to see the rules and regulations regarding an off duty military police officer and his ability to carry a firearm, concealed, off duty in civilian clothing and what he isn't allowed to do with that. I don't see how we can make a judgment on this based on the evidence that we have been presented without knowing the law." Record at 595.

judge take judicial notice of a South Carolina statute pertaining to carrying concealed weapons. The defense objected to taking judicial notice of the statute. Shortly after beginning their deliberations the panel returned and asked the following three questions:

One, is an MP considered a federal agent? Two, is an MP qualified by virtue of his billet to carry a concealed weapon in public? And, do South Carolina concealed carry laws permit such carriage in an environment where alcohol consumption is the primary activity?

Record at 603; Appellate Exhibit XXV. The military judge initially declined to answer the questions posed or to provide any state law to the members, reiterating that the Government shouldered the burden of proof on the elements of the charged offenses. The president persisted, stating that he was familiar with the concealed weapon law in Florida as he had a Florida concealed carry permit, but he was not familiar with the law in South Carolina. The military judge then reconsidered and, over defense objection, provided the panel with a copy of a South Carolina statute, 17 pages in length, regarding carrying concealed weapons. AE XXIV. However, he did not provide any substantive instructions on the statute.

The president of the panel and the military judge then discussed the evidence admitted during trial and counsel's argument concerning the element of unlawfulness. Record at 606. The president requested a witness, such as the base provost marshal, to explain to the panel whether the appellant's status as a military policeman authorized him to carry a concealed weapon off-duty, or in the alternative, whether the appellant possessed a South Carolina concealed weapon permit. *Id.* at 618. The military judge denied the president's request for an additional witness and instructed the panel that the only applicable law to determine whether the carrying is unlawful is the law of South Carolina. *Id.* at 618-19. Following this explanation, the military judge gave counsel an opportunity to argue again based on the state statute being provided to the members. The Government declined, but the defense availed itself of the opportunity. The members then returned to their deliberations, armed with a copy of the South Carolina statute, and subsequently returned findings of guilty to all charges and specifications.

The appellant now argues that the guilty finding for this offense is legally and factually insufficient. Further, he contends that the military judge committed prejudicial error when he provided the panel with a copy of the South Carolina statute but refused to provide any substantive instructions on the law as it applied to the case at bar.

Instructions to the Members

We begin by noting that the military judge failed to explain the permissive inference that applies to the element of unlawfulness. This explanation may have avoided the unnecessary continuing dialogue in open court between the military judge and the president whereby each theorizes on the applicable federal or state law governing carrying a concealed weapon, what evidence was presented on the matter, and how counsel characterized the evidence during argument. Second, we find the military judge erred by simply providing the panel with a copy of a state statute without either first taking judicial notice of the statute, as the Government had repeatedly requested, or providing a means for authenticating the exhibit. Last, we find that the military judge erred when he denied the president's request for a witness to testify as to the applicability of the statute or the potential effect of the appellant's status as a military policeman.

The military judge bears primary responsibility for assuring that the members are properly instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law. *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008). Whether a panel was properly instructed is a question of law we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). Failure to provide correct and complete instructions to the members can amount to a denial of due process. See *United States v. Jackson*, 6 M.J. 116, 117 (C.M.A. 1979).

As noted above, this issue may have been avoided had the military judge simply advised the panel that they could infer unlawfulness in the absence of evidence to the contrary. While this instruction may normally favor the Government,⁴ here the members were provided with a copy of the South Carolina statute, 17 pages in length, without any instructions on how to apply it. In doing so, the military judge mischaracterized the element as

⁴ See *United States v. Lyons*, 33 M.J. at 88, 90-91 (C.M.A. 1991).

one governed solely by South Carolina law.⁵ The panel desired clarification of this element and further requested evidence to explain the state statute's application. But the military judge gave no explanation why he would not take judicial notice of the statute or how it applied to the case. Instead, he left the panel to interpret the statute and its applicability, despite repeated questions as to its legal effect. By mischaracterizing the element as one of state law, refusing to take judicial notice of the statute or any of its applicable provisions, and refusing to allow the panel to seek additional evidence on this element, we find that the military judge erred as his instructions on this element were ultimately incorrect, incomplete and confusing.

When instructional error as to the elements of a crime is found, the error must be tested for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008) (citing *Neder v. United States*, 527 U.S. 1, 13-15 (1999)). "The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Wolford*, 62 M.J. 418, 420 (C.A.A.F. 2006) (internal quotation marks and citations omitted).

Members are presumed to follow the instructions provided by the military judge. *United States v. Tyndale*, 56 M.J. 209, 216 (C.A.A.F. 2001). Here, the military judge provided the South Carolina statute to the members and informed them it was the relevant and applicable law. Record at 619. Accordingly, we presume that the members read, interpreted, and applied their own understanding of the South Carolina statute to the charged offense. While the statute has potential relevance to this element, we cannot conclude with any degree of certainty that the members did not rely on a mistaken understanding of the statute or its applicability in reaching their verdict. Therefore, we conclude this error was not harmless beyond a reasonable doubt.

Sentence Reassessment

⁵ In denying the panel's request for an additional witness to explain any effect of the appellant's status as an off-duty military policeman, the military judge explained: "but the second element . . . is that the carrying was unlawful. The [UCMJ] does not define whether carrying a weapon under these conditions, you know, with his status is illegal under those circumstances. It simply says "unlawful". And so the [UCMJ] doesn't specifically address Beaufort, South Carolina. So the only law that would be [sic] the state statute. That is why I gave it to you." Record at 618-19.

Having set aside the carrying a concealed weapon offense of which the appellant was convicted, we must now "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). Remand for a rehearing on sentencing is unnecessary in this case.

Dismissal of Charge III and its specification would not have drastically reduced the sentencing landscape the appellant faced. See *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Dismissal would only have reduced the maximum confinement penalty from 17 years to 16 years, with all other categories of punishment unchanged. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 112e. The two years of confinement awarded to the appellant is still well-below the maximum authorized confinement based upon the offenses of which he was properly found guilty.

Here, the gravamen of the offense was not where the weapon was drawn from, that it was concealed or not, but rather what the appellant did with the weapon. Namely, that he twice struck LCpl TF in the face with it and proceeded to point the loaded weapon at both LCpl TF and Cpl SP, offenses for which he was properly convicted. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after reconsidering the entire record, we are satisfied beyond a reasonable doubt that, even if the carrying a concealed weapon charge had been dismissed at trial, the members would have adjudged a sentence no less than that actually adjudged and approved by the convening authority in this case.

Conclusion

The findings of guilty of Charge III and its sole specification are set aside and Charge III and its specification are dismissed. Accordingly there is no need to address the appellant's initial assignment of error challenging the legal and factual sufficiency of the finding of guilt on that Charge

and specification. The remaining findings and the reconsidered sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court