

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

**Before
F.D. MITCHELL, K.J. BRUBAKER, M.C. HOLIFIELD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARVIN C. DIAS
LOGISTICS SPECIALIST SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201500177
GENERAL COURT-MARTIAL**

Sentence Adjudged: 19 February 2015.

Military Judge: CAPT R.E. Blazewick, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR N.O. Evans,
JAGC, USN.

For Appellant: LT Doug Ottenwess, JAGC, USN.

For Appellee: CDR Serajul F. Ali, JAGC, USN; Capt Cory A.
Carver, USMC.

30 November 2015

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 military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of: one specification each of conspiracy to steal and sell military property, disrespect toward a commissioned officer, willful disobedience of a commissioned officer, disobeying a noncommissioned officer; two specifications of violation of a

lawful general order; and one specification each of sale of military property and theft of military property, in violation of Articles 81, 89, 90, 91, 92, 108, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 889, 890, 891, 892, 908, and 921. The military judge also convicted the appellant, contrary to his pleas, of: two specifications of violation of a lawful general order; one specification of sexual assault; two specifications of abusive sexual contact; two specifications of assault consummated by a battery; and one specification of indecent language, in violation of Articles 92, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 920, 928, and 934. The military judge sentenced the appellant to reduction to pay grade E-1, forfeiture of all pay and allowances, confinement for fifty months, and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.¹

Although not raised by the appellant, we find error in both the staff judge advocate's recommendation (SJAR) and the CA's action. Because we find it necessary to remand for a new SJAR and CA's action, we defer our resolution of the appellant's assignments of error.

Background

The appellant's trial was complicated by mixed pleas and multiple sets of charges—the first preferred on 30 September 2013, the second preferred on 22 July 2014, and the Additional Charges preferred on 8 August 2014. During the course of the trial, the military judge: conditionally dismissed Specification 5 of Charge I (of 22 July 2014),² Charge VII (of 22 July 2014) and its specification,³ and Additional Charge I and its specification;⁴ consolidated Specifications 1 and 2 under

¹ As a matter of clemency, prior to taking his action the CA deferred automatic forfeitures and then in his action suspended automatic forfeitures for six months for the benefit of the appellant's dependents.

² The military judge conditionally dismissed this specification after initially finding the appellant not guilty of abusive sexual contact, but guilty of the lesser included offense of assault consummated by a battery.

³ The military judge conditionally dismissed this charge and specification after initially finding the appellant guilty as charged of assault consummated by a battery.

⁴ The military judge conditionally dismissed this charge and specification after initially finding the appellant not guilty of attempted abusive sexual contact, but guilty of the lesser included offense of assault consummated by a battery.

Charge I (of 30 September 13)⁵ and Specifications 3 and 4 under Charge I (of 22 July 2014);⁶ and merged, for sentencing purposes, Specifications 1-4 of Charge X (of 22 July 2014).⁷

Incorporating the inaccurate Results of Trial prepared by trial counsel, the SJAR failed to identify these conditional dismissals, consolidations,⁸ and merger. The appellant's trial defense counsel failed to object to these omissions when served with a copy of the SJAR. Accordingly, neither the SJAR nor its addendum accurately advised the CA as to the actual findings and how they were considered by the military judge for sentencing. Despite the CA stating that, in taking his action, he considered the record of trial in addition to the results of trial and SJAR, the CA's action mirrors the SJAR in its omissions.

Discussion

"Failure of counsel for the accused to comment on any matter in the recommendation . . . in a timely manner shall waive later claim of error with regard to such matter in the absence of plain error." RULE FOR COURTS-MARTIAL 1106(f)(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.); see also *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Where there is error in this processing and "some colorable showing of possible prejudice" thereby, this court must either provide meaningful relief or remand for new post-trial processing. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (citation and internal quotation marks omitted).

Plain error exists when: "(1) there was an error; (2) it was plain, clear or obvious; and (3) the error resulted in material prejudice to an appellant's substantial rights." *United States v. Parker*, 71 M.J. 594, 612 (N.M.Ct.Crim.App. 2012) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)). Factors to consider in determining whether an error in the SJAR is plain error include: "(1) whether the error

⁵ The military judge found that the appellant had engaged in one conspiracy to both steal and sell military property, rather than two separate conspiracies.

⁶ The military judge found that the appellant placing one hand in a victim's pants and the other up her shirt were two parts of a single act.

⁷ The military judge did not explain his reasons for merging these four separate incidents of sexual harassment for sentencing.

⁸ The SJAR merely states that the second specification was merged with the first, without providing the consolidated language announced by the military judge.

is an omission or an affirmative misstatement; (2) whether the matter is material and substantial; and (3) whether there is a reasonable likelihood that the convening authority was misled by the error." *United States v. Lowry*, 33 M.J. 1035, 1038 (N.M.C.M.R. 1991).

Here, the error involves both omissions—failing to advise the CA that the military judge consolidated four specifications and merged four others for sentencing purposes—and affirmative misstatements—telling the CA that the appellant had been convicted of (and sentenced on) several specifications under three separate charges when the military judge had conditionally dismissed them. Although the affected specifications are less serious than the other offenses for which the appellant was convicted and sentenced, the scope of the error is substantial and material to the CA's decision on what action to take on the case. Given that the error in the SJAR was replicated in the CA's action, there is no doubt the CA was misled by the error. For these reasons, we find the error to be plain.

As this issue was not raised as an assignment of error, the appellant has made no showing of possible prejudice. But, given the nature and scope of the error, and that "the threshold for showing post-trial prejudice is low[,] "*United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999), we are convinced such a possibility of prejudice exists and that remand is required.

Conclusion

The CA's action is set aside. The record of trial is returned to the Judge Advocate General for remand to an appropriate CA for new post-trial processing. The record shall then be returned to this court for review under Article 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court

