United States Navy-Marine Corps Court of Criminal Appeals

UNITED STATES
Appellee

v.

Anthony T. STROMER, Jr.
Corporal (E-4), U.S. Marine Corps
Appellant

No. 201800320

Appeal from the United States Navy-Marine Corps Trial Judiciary.

Decided: 26 March 2019.

Military Judge:
Lieutenant Colonel John P. Norman, USMC.

Sentence adjudged 27 August 2018 by a special court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence approved by convening authority: reduction to E-1, confinement for 8 months, and a bad-conduct discharge.

For Appellant:
Captain Scott F. Hallauer, JAGC, USN.

For Appellee:
Brian K. Keller, Esq.

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Appellate Procedure 30.2.

Before WOODARD, FULTON, and ATTANASIO,
Appellate Military Judges.

PER CURIAM:

Pursuant to a pretrial agreement with the convening authority, the appellant pleaded guilty to one specification of larceny of property of a value of more than $500, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. A military judge sitting alone accepted the appellant's plea and sentenced him to reduction to E-1, confinement for 8 months, and a bad-conduct discharge.

On appeal, the appellant submitted his case without assignment of error. After careful consideration of the record, we are unable to determine whether the convening authority fully complied with the terms of the pretrial agreement. Accordingly, we set aside the convening authority's action and remand the case for new post-trial processing.

I. BACKGROUND

Starting in September 2017, the appellant roomed for approximately one month with a more junior, E-3, Marine in the inbound barracks aboard Camp Pendleton, California. During that time, the appellant obtained his roommate's debit card information and, over the next several months, used the information more than 130 times to purchase various goods and services, including food delivery, airline tickets, internet pornography, and online gaming subscriptions. In total, the appellant's purchases totaled more than $4,000.

The appellant pleaded guilty to the larceny. In sentencing, other than a brief oral unsworn statement, the appellant offered no matters to be considered in extenuation or mitigation. After being served with the record of trial and the Staff Judge Advocate's Recommendation (SJAR), the appellant waived his right to respond to the SJAR or to submit any matters in clemency.

The appellant's pretrial agreement included the following sentence limitations:

> 1. **Punitive Discharge:** May be approved as adjudged. However, *if I voluntarily waive my right to an administrative separation proceeding, the punitive discharge will be suspended until the administrative separation process is completed, and I have been discharged, at which time, unless sooner vacated, the suspended punitive discharge will be remitted* without further action.
>
> 2. **Confinement:** May be approved as adjudged; however *all confinement in excess of sixty (60) days will be suspended for the period of confinement adjudged plus three months thereafter, at*

> *which time, unless sooner vacated, the suspended portion will be remitted* without further action. *This Agreement constitutes my request for, and the convening authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement*. The period of deferment will run from the date of sentence of the court-martial until the date the convening authority acts on the sentence.
>
> 3. **Forfeiture or Fine:** May be approved as adjudged.
>
> 4. **Reduction:** May be approved as adjudged.
>
> 5. **Other lawful punishments:** May be approved as adjudged.

Appellate Exhibit II (emphasis added).

The SJAR included the following language:

> 3. **Pretrial Agreement.** Enclosure (2) is a copy of the pretrial agreement. A review of the record of trial indicates that the accused has complied with the terms of the agreement and is entitled to the agreed upon benefit. Accordingly, you are required to *suspend all confinement in excess of 60 days plus three months thereafter and suspend the punitive discharge until the administrative separation process is complete, if the accused waives [sic] right to administrative separations proceeding*.
>
> . . . .
>
> 8. **Requests for Deferment.** *There have been no requests to defer any part of the sentence*, either as adjudged or as mandated under the UCMJ.
>
> . . . .
>
> 14. **Recommendation.** Having reviewed the record of trial, pursuant to the pretrial agreement, I recommend that you *suspend all confinement in excess of 60 days plus three months thereafter and suspend the punitive discharge until the administrative separation process is complete, if the accused waives [sic] right to administrative separations proceeding* and, except for the punitive discharge, order the sentence executed in accordance with the UCMJ, the MCM, and applicable regulations. The adjudged punitive discharge cannot be ordered executed until the case is deemed final on appeal.

(Emphasis added.)

The convening authority's promulgating Court-Martial Order (CMO), including the Convening Authority's Action, contained, *inter alia,* the following language:

> **SENTENCE**
>
> Sentence adjudged on 27 August 2018: To be reduced to paygrade E-1, to be confined for a period of 8 months, and to be discharged from the Marine Corps with a bad-conduct discharge.
>
> **APPROVAL**
>
> Special Court-Martial case of United States v. Corporal Anthony T. Stromer . . . USMC, the sentence as adjudged is approved.
>
> **ACTION**
>
> Pursuant to the pretrial agreement, execution of confinement in excess of 60 days plus three months thereafter and a punitive discharge until the administrative separation process is complete if the accused waived his right to administrative separations proceedings is suspended. At that time, unless vacated, the suspended part of the confinement sentence will be automatically remitted.
>
> . . . .
>
> **DEFERMENT**
>
> There have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ.
>
> . . . .
>
> **MATTERS CONSIDERED**
>
> Prior to taking action in the case, I considered . . . all matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106.

II. DISCUSSION

This case is yet another striking example of excessive reliance on templates, a lack of appreciation of the importance of the post-trial process in the military justice system, and a failure to pay attention to detail.

A. Ambiguities Abound

In our attempts to decipher the SJAR and CMO passages at issue, we find them to be nonsensical. In nearly identical language, both documents merge the confinement limitation, the period of confinement suspension, and the condition-precedent for the suspension of the bad-conduct discharge into a single run-on sentence. By doing so, the convening authority, contrary to the pretrial agreement, appears to suspend only that amount of the adjudged confinement "in excess of 60 days plus three months thereafter," resulting in an unsuspended period of confinement of roughly *150 days*, more than twice the limitation in the pretrial agreement. The language can also be read to indicate that the *confinement* suspension is predicated on the appellant waiving his right to administrative separations proceedings,[1] a condition to which the parties did not agree. In accordance with the PTA, the appellant's waiver of administrative separation proceedings was a condition precedent that applied only to the suspension of the punitive discharge.

B. Template Traps

Templates are extremely helpful to military justice practitioners, especially those responsible for post-trial processing. A good template acts like a checklist, aiding the practitioner to ensure consideration of all required matters. However, unlike a checklist, a template must be tailored to correspond to the specific facts and law applicable to the individual case. This requires judgment and careful attention by the document's preparer and signer—two factors glaringly lacking in this case. Once completed, the document, whether it originates from a template or a blank sheet of paper, stands on its own.

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[1] Even the term "administrative separation proceeding," which is recited verbatim from the pretrial agreement is not as clear as this term should be in an important legal document implicating a servicemember's rights. Did the appellant waive only his right to an administrative separation board hearing to which he would otherwise be entitled if the government sought to separate him Under Other Than Honorable Conditions—or did he waive all administrative due process rights, including the right to be notified of and respond to the separation action, including the characterization of his service? If the parties intended the waiver to mean that, in exchange for the convening authority suspending and remitting the adjudged bad-conduct discharge, the appellant would waive his right to an administrative separation *board hearing* and would *accept an Under Other Than Honorable Conditions administrative separation without an opportunity to further respond,* then the pretrial agreement would have been far more understandable.

Both SJARs and CMOs are typically drafted from templates.[2] As official documents, SJARs and CMOs are entitled to the presumption of regularity if they appear regular on their face. *See United States v. Mark*, 47 M.J. 99, 101 (C.A.A.F. 1997) (SJAR); *United States v. Ayers*, 54 M.J. 85, 91 (C.A.A.F. 2000) (Convening Authority Action). By being able to rely upon the presumption of regularity, courts and commands are freed from requiring every convening authority and staff judge advocate to prepare an affidavit or declaration each time an assignment of error alleges that a convening authority did not consider the matters required by RULE FOR COURTS-MARTIAL (R.C.M.) 1107(b)(3)(A)[3] or the staff judge advocate did not provide the convening authority with the matters required by R.C.M. 1106(d)(3).[4] However, when an SJAR or CMO contain erroneous information irrelevant to the case at hand (likely because it was in the template from which the document was created), in addition to being embarrassing to the person who signed at the bottom, it undermines the presumption of regularity. The courts' continued recognition of this presumption of regularity is predicated upon careful preparation of these documents by military justice practitioners. Over-reliance on templates and other digital aids could eventually destroy the presumption entirely, with serious negative consequences resulting to the efficiency of military justice and command prerogatives.

In this case the SJAR and the CMO incorrectly state, in identical language: "There have been no requests to defer any part of the sentence, either as adjudged or as mandated under the UCMJ." Yet, the pretrial agreement states: "This Agreement constitutes my request for, and the convening authority's approval of, deferment of all confinement suspended pursuant to the terms of this Agreement." The CMO also states that the convening authority "considered . . . all matters submitted by the defense and the accused in accordance with R.C.M. 1105 and 1106." Yet, neither the appellant nor his counsel submitted *any* matters to the convening authority.

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[2] Some military services employ service-wide templates for such documents. Based on our review of various Navy and Marine Corps courts-martial, it appears that templates in the Navy and Marine Corps are more or less unique to each command.

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES (MCM) (2016 ed.). The corresponding rule in the 2019 Manual is R.C.M. 1109(d)(3), MCM (2019 ed.).

[4] MCM (2016 ed.). The 2019 Manual requires the convening authority to consult with the staff judge advocate or legal advisor prior to determining whether to take or decline to take action, but does not require that it be in written form. *See* R.C.M. 1109(d)(2), MCM (2019 ed.).

While R.C.M. 1106(d)(6) provides that "[i]n case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority," the Court of Appeals for the Armed Forces has held that "failure to return the case to the convening authority for action on the basis of a properly prepared recommendation deprives both '[t]he accused and the convening authority' of the 'well-written and carefully considered post-trial recommendation' to which they are entitled." *United States v. Hill*, 27 M.J. 293, 296 (C.M.A. 1988) (citations omitted). This is so unless this Court is "convinced that, under the particular circumstances, a properly prepared recommendation would have [had] no effect on the convening authority's discretion." *Id*. Here, we are not so convinced. Furthermore, R.C.M. 1107(g) states "[w]hen the action of the convening authority . . . is incomplete or ambiguous or contains error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed . . . to withdraw the original action and substitute a corrected action."

III. CONCLUSION

The CMO dated 12 October 2018 is **SET ASIDE** and the record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority for new post-trial processing, and then return to this Court for completion of appellate review.

FOR THE COURT:

RODGER A. DREW, JR.
Clerk of Court