UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class EARL J. MINOR JR.
United States Air Force

ACM S30801

20 July 2006

Sentence adjudged 23 September 2004 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Ronald A. Gregory and Lance B. Sigmon.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $795.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major James M. Winner, Captain Christopher S. Morgan, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of writing four bad checks and failing to pay a just debt, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Contrary to his pleas, the appellant was found guilty by officer members sitting as a special court-martial, of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced the appellant to a bad-conduct discharge,

[1] The appellant was originally charged with writing the bad checks in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. The prosecution did not attempt to prove this greater offense, and thus, the appellant was found guilty of the lesser-included offense under Article 134, UCMJ.

confinement for 6 months, forfeiture of two-thirds pay per month for 6 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

This case was originally submitted to this Court on its merits. On 21 March 2006, the Court specified two issues for briefing.[2]

The appellant contends the military judge committed reversible error as to Charge I and its Specification alleging the appellant wrongfully used cocaine, when he held an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, to discuss the findings instructions and worksheet without the appellant being present.

Background

After both parties presented their case on the contested Charge and Specification of wrongful use of cocaine, the military judge announced to the members that he needed to discuss findings instructions with the parties and excused the members for lunch. At 1137 hours, he recessed the court-martial until 1300 hours. The military judge, trial counsel, and trial defense counsel then came on the record for an Article 39(a) session at 1245 hours. The trial defense counsel noted his client was not present, but told the military judge he was prepared to go forward and talk about instructions. The military judge said, "[a]llright. He's probably still at lunch." The parties discussed the findings instructions and findings worksheet without the appellant being present. The Article 39(a) session concluded at 1250 hours. When the court opened at 1300, all parties, including the appellant and the members, were present. The remainder of the record of trial contains no mention of the session that was held without the appellant's presence.

Article 39(a) Session
Held Without Presence of the Appellant

Article 39(b), UCMJ, 10 U.S.C. § 839(b), requires that all proceedings, except deliberations and voting of members, be conducted in the accused's presence. The accused is required to be present at each session of the trial, including sessions held to

[2] I. WHETHER THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR AS TO CHARGE I AND IT'S SPECIFICATION, WHEN HE HELD AN ARTICLE 39(a), UCMJ, 10 U.S.C. § 839(a), SESSION TO DISCUSS THE FINDINGS INSTRUCTIONS AND FINDINGS WORKSHEET WITHOUT THE PRESENCE OF THE ACCUSED. *See* Record of Trial at pgs. 300-302; Rule for Courts-Martial (R.C.M.) 804.
II. WHETHER THIS COURT SHOULD RETURN THE RECORD OF TRIAL TO THE JUDGE ADVOCATE GENERAL FOR REMAND TO THE CONVENING AUTHORITY TO WITHDRAW THE ERRONEOUS ACTION AND SUBSTITUTE A CORRECTED ACTION AND PROMULGATING ORDER BECAUSE THE CONVENING AUTHORITY APPROVED FORFEITURES OF TWO-THIRD'S PAY PER MONTH FOR SIX MONTHS, RATHER THAN SETTING FORTH THE EXACT AMOUNT OF THE FORFEITURES IN WHOLE DOLLARS TO BE FORFEITED AND THE NUMBER OF MONTHS THE FORFEITURES WERE TO LAST. *See* R.C.M. 1003(b)(2).

discuss findings instructions and the findings worksheet. *See* Rule for Courts-Martial (R.C.M.) 804(a). The progress of a trial is not prevented by the absence of the accused if that absence is voluntary. R.C.M. 804(b)(1). An accused has a statutory, Article 39, UCMJ, 10 U.S.C. § 839, and a constitutional Sixth Amendment, right to be present during the course of the trial. *United States v. Cook*, 43 C.M.R. 344, 346 (C.M.A. 1971).

The government concedes the military judge erred by holding this Article 39(a) session without the appellant being present. We agree and find that Judge Ronald Gregory erred when he proceeded without the appellant being present. We also hold that the trial defense counsel's acquiescence in proceeding without the appellant, did not waive his statutory and constitutional right to be present at this Article 39(a) session.

Having found error, we must test this error for prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a). Since the error was of a constitutional dimension, the test is whether the reviewing court is "able to declare a belief that it was harmless beyond a reasonable doubt." *United States v. Bins*, 43 M.J. 79, 86 (C.A.A.F. 1995) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

After testing for prejudice we find none. First, the session lasted for five minutes. Second, the proposed instructions were the normal instructions one would expect for a litigated specification of wrongful use of cocaine. Third, neither the trial nor defense counsel voiced any objection to the proposed instructions or requested additional instructions. Fourth, neither the trial or defense counsel had any objection to the proposed findings worksheet nor did they request additions to the worksheet. Fifth, the proposed findings worksheet contained one charge with one specification and no lesser-included offenses. Sixth, when the military judge read the findings instructions to the members, provided those instructions in writing, and gave them the findings worksheet, the appellant was present. The appellant voiced no objection through his counsel regarding the instructions or the worksheet. Seventh, even now the appellant does not claim he would have requested additional instructions, that the instructions given were erroneous, or the findings worksheet was objectionable.

We agree with government appellate counsel that under the circumstances of this case, no substantive difference would have been made if the appellant had been present at this Article 39(a) session.

We hold that the failure to delay the trial until the appellant returned from lunch to attend the Article 39(a) session, was harmless beyond a reasonable doubt.[3]

[3] While we do not find reversible error in this case, we remind military judges of their responsibility to ensure the accused is present at all proceedings of the court-martial in accordance with Article 39(b), UCMJ. The failure of this experienced and learned military judge to wait until the appellant returned from lunch is difficult to understand.

Approved Forfeitures

The adjudged sentence included forfeiture of two-thirds of the appellant's pay per month for six months. Apparently, neither side nor the military judge noticed that this portion of the appellant's sentence did not comply with R.C.M. 1003(b)(2). That provision requires adjudged forfeitures to be expressed in whole dollar amounts unless total forfeitures are adjudged. The appellant contends this Court should return the record of trial to the convening authority for a corrected action and promulgating order.

The staff judge advocate advised the convening authority that the court members had not properly announced that portion of the sentence relating to forfeitures, and told the convening authority the forfeitures had been correctly calculated to be $795.00 pay per month for six months. When the convening authority approved the sentence, he did not specifically correct the error regarding the statement of the forfeitures in the action.

However, we believe it is clear that he intended to approve forfeitures of $795.00 pay per month for six months because the promulgating order reflects forfeitures of $795.00 pay per month for six months.[4] To ensure appellant is not prejudiced, we reassess appellant's sentence and find appropriate only so much of the appellant's sentence as includes a bad-conduct discharge, confinement for 6 months, forfeiture of $795.00 pay per month for 6 months, and reduction to E-1.

Conclusion

The findings and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[4] The amount of forfeitures reflected was two-thirds of the appellant's pay in the grade of E-1 at the time of trial.