

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**William R. BOSSHART
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200602420

Decided 26 July 2007

Sentence adjudged 23 August 2005. Military Judge: P.J. Ware.
Staff Judge Advocate's Recommendation: Col C.J. Woods,
USMC. Review pursuant to Article 66(c), UCMJ, of General Court-
Martial convened by Commanding General, 3d Marine Aircraft Wing,
MARFORPAC, MCAS Miramar, San Diego, CA.

CAPT STEVEN L. COHN, JAGC, USN, Appellate Defense Counsel
LtCol JOHN F. KENNEDY, USMCR, Appellate Government Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of nine specifications of drug-related offenses to include attempting to wrongfully use marijuana while on watch as a sentinel, wrongful use of cocaine, marijuana, and methamphetamine, wrongful distribution of cocaine and marijuana, and wrongful introduction of cocaine and marijuana onboard a military installation, in violation of Articles 80 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 912a. The appellant was sentenced to confinement for three years, reduction in rate to E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, pursuant to the pretrial agreement, suspended all confinement in excess of two years and six months for a period of 12 months from the date of his action.

We have examined the record of trial, the appellant's two assignments of error,¹ and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. We will address the assignments of error in reverse order.

Omissions in the Military Judge's Findings

In his second assignment of error, the appellant asserts that the convening authority erroneously approved a finding of guilt for a specification to which the military judge did not enter a finding. He further questions whether this court can affirm the findings and sentence, as approved by the convening authority, in light of this error. In support of his argument, the appellant additionally avers that the staff judge advocate's recommendation is in error as it listed a finding that had not been adjudicated during trial. Appellant's Brief of 31 Jan 2007 at 11. We find these arguments unpersuasive.

The appellant was charged with nine specifications of violating Article 112a. Eight of the specifications were listed under the original Charge and the ninth was the sole specification of the Additional Charge. The appellant pled guilty to both charges and eight of the nine specifications.² Record at 8; Prosecution Exhibit 2. The record reflects that the military judge found the appellant guilty of, *inter alia*, the original Charge, and Specifications 1, 2, 3, 5, 7, and 8. The record does not contain the military judge's finding with regard to Specification 4. Record at 85. This omission was not discovered during the record authentication process. The appellant contends that because the military judge did not enter a finding pertaining to Specification 4 of the original Charge, there was no adjudged finding for the convening authority to approve, therefore, it should not be included in the

¹ I. WHETHER APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW OF HIS COURT-MARTIAL WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING.

II. WHETHER THE COURT CAN AFFIRM THE FINDINGS AND SENTENCE AS APPROVED BY THE CONVENING AUTHORITY WHERE THE MILITARY JUDGE DID NOT ENTER A FINDING OF GUILT AS TO SPECIFICATION 4 OF THE CHARGE.

² With regard to Specification 6, the appellant pled guilty by exceptions and substitutions to the lesser included offense (LIO) of attempting to use marijuana while on duty as a sentinel. The military judge found him guilty of the LIO in violation of Article 80, UCMJ.

specifications for which he has been found guilty. Appellant's Brief at 10.

The appellant cites as controlling authority our superior court's decision in *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994), which reversed and dismissed in part this court's decision. In *Diaz*, the convening authority approved the military judge's findings and sentence as reported in the staff judge advocate's recommendation (SJAR), which omitted findings of guilt as to two additional charges. There was no evidence the convening authority considered the record of trial and all indicators suggested he relied solely upon the SJAR. Upon discovering the error, five days later a "corrected copy" of the court-martial order was promulgated which sought to cure this oversight. The new order noted that "the convening authority's action was not affected" implying that the convening authority had planned to approve those findings in the original convening authority's action but failed to do so by oversight. *Diaz*, 40 M.J. at 343. The Court of Military Appeals set aside the findings as to the two additional charges concluding that this court had no statutory jurisdiction to review those findings. The court held "the convening authority was not aware of [the two additional charges] when he took his action, so we cannot infer that he tacitly approved them for purposes of vesting power in the Court of Military Review to review them." *Id.* at 345 (citing Article 66(c), UCMJ). Contrary to the appellant's contentions, the facts in the case *sub judice* are unlike those of *Diaz* and the appellant's reliance on it is misguided.

We are well aware of the requirement of a court-martial to announce its findings to the parties promptly after they have been determined.³ This statutory right of announcement of all findings in open court is a substantial right of the accused. *United States v. Dilday*, 47 C.M.R. 172, 174 (A.C.M.R. 1973). However, not all errors in the announcement of findings are prejudicial to this right. *Id.* at 173.

In *United States v. Perkins*, 56 M.J. 825 (Army Ct.Crim.App. 2001), the military judge inadvertently and mistakenly misspoke when announcing her findings of guilt.⁴ The SJAR correctly

³ RULE FOR COURTS-MARTIAL 922(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.)

⁴ In *Perkins*, the military judge announced a finding of guilty of Charge III, Specification 3, vice Charge II, Specification 3. She next announced a finding of guilty of Charge III and its sole specification. It was obvious that she intended to find the appellant guilty of Charge II, Specification 3. *Perkins*, 56 M.J. at 826. Like the case at bar, no finding was entered as to Charge II or Specification 3 of Charge II.

advised the convening authority of the charges and specifications to which the appellant actually pled guilty. Our sister court concluded it was "clear to us that the military judge misspoke" and that it was equally clear "the intent of the military judge, and the understanding of her intent by all parties at trial, was to find the appellant guilty of" the specifications and charge about which she misspoke. *Id.* at 827.

There are several factors in this case that lead us to conclude this was merely a misstatement by the military judge or scrivener's error in the transcription of the record of trial. First, the appellant signed a stipulation of fact detailing the misconduct charged in Specification 4. Prosecution Exhibit 2. Second, the appellant pled guilty to that specification as part of his pretrial agreement and further elaborated why he was guilty of that offense during the detailed providence inquiry. Record at 8, 27-31; Appellate Exhibit I. Finally, at the conclusion of the providence inquiry and discussion regarding Part I of the pretrial agreement, the military judge accepted appellant's pleas finding "that [the appellant's] pleas are made voluntarily and with a factual basis." Record at 84. Of further note is the fact that the SJAR correctly reflected the plea and finding of guilty to Specification 4. The trial defense counsel's response to the SJAR does not raise the military judge's omission as error.

Similar to our sister court's holding in *Perkins*, and consistent with our decision in *United States v. Smith*, No. 9900547, 2001 CCA LEXIS 242, unpublished op. (N.M.Ct.Crim.App. 2001) it is clear to us that the military judge intended to find the appellant guilty of Specification 4 and that this omission was unintentional. Moreover, the appellant has not demonstrated any prejudice from this omission and we find it harmless beyond a reasonable doubt. Accordingly, we find this assignment of error to be without merit.

Post-Trial Delay

In his initial assignment of error, the appellant claims his right to speedy post-trial review was materially prejudiced by unreasonable delay in post-trial processing and that the 465-day delay from the date of sentencing until this case was docketed with this court was facially unreasonable and warrants relief under Article 66(c).

In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F.

2006), we assume without deciding that the appellant was denied his due process right to speedy post-trial review and appeal. We conclude however, that any error in that regard was harmless beyond a reasonable doubt. We additionally find the delay does not affect the findings and sentence that should be approved in this case. *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*).

Accordingly, the findings and sentence are affirmed.

Senior Judge GEISER and Judge BARTOLOTTA, concur.

For the Court

R.H. TROIDL
Clerk of Court