STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2016 AP 398

IN THE GENERAL COURT-MARTIAL CASE OF
SERGEANT FIRST CLASS JESSE T. RIEMER,
WISCONSIN ARMY NATIONAL GUARD,
RECRUITING AND RETENTION BATTALION,
MADISON, WISCONSIN:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE T. RIEMER,

Defendant-Appellant.

ON REVIEW OF SENTENCING SUBSEQUENT TO DEFENDANT-APPELLANT'S PLEA OF GUILTY ON JULY 30, 2015, MILITARY JUDGE DAVID KLAUSER PRESIDING IN A COURT-MARTIAL CONVENED PURSUANT TO THE WISCONSIN CODE OF MILITARY JUSTICE.

SUPPLEMENT OF DEFENDANT-APPELLANT

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QUESTIONS PRESENTED

1. During a sentencing hearing being conducted pursuant to the UCMJ, may a military judge look to evidence presented at an Article 32 hearing to find support for a sentence?

2. On review of a sentence imposed at a court-martial conducted pursuant to the UCMJ, may the Army Court of Criminal Appeals look to evidence presented at an Article 32 hearing to find support for a sentence imposed by a trial court judge?

3. On review of a sentence imposed following a guilty plea at a court-martial conducted pursuant to the UCMJ, may the Army Court of Criminal Appeals reduce the sentence imposed?

PROCEDURAL POSTURE

This supplement comes at the request of Judge Blanchard, Judge Kloppenburg and Judge Lundsten who heard arguments on behalf of the appellant and respondent on April 24, 2017. In addition to the above questions presented, clarification regarding preservation of issues at the trial court level will be addressed as the panel demonstrated significant interest in that topic.

DISCUSSION

I. The military judge could not have relied on the evidence presented at the Article 32 hearing to support the sentence imposed.

During a sentencing hearing being conducted pursuant to the Uniform Code of Military Justice ("UCMJ"), a military judge in a trial by court-martial has wide latitude and can consider any evidence properly introduced on the merits before findings. RCM 1002 (f). To accomplish this goal, the rules of evidence at a sentencing hearing are relaxed so as to allow for all available evidence to be introduced. RCM 1001 (c)(3).

However, in spite of the wide latitude granted to the prosecution to introduce evidence that would not normally be admitted, the government counsel in this case did not present any portion of the Article 32 hearing transcript, preferring instead to agree to an oral stipulation of fact that SFC Riemer provided at trial. Government's Exhibit 1.

Since it was not properly before the court, the military judge could not have considered any portion of the Article 32 hearing when deciding the sentence in this case.

II. Military appellate courts limit review of the record to what was properly before the military judge at the court-martial.

Article 66 of the UCMJ provides in relevant part that an appellate authority: 1) is afforded the benefit of the record of the trial by court-martial where, as here, a bad-conduct discharge is imposed; and 2) "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866 (b)(1); 10 U.S.C. § 866 (c).

With reference to what is meant by the term "entire record," military appellate case law has provided the following definition: "the evidence presented by the parties and the findings of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Further guidance is found in *United States v. Leal*, which held that not everything submitted to the court of appeals is part of the record. *United States v. Leal*, 44 M.J. 235, 236 (C.A.A.F. 1996). The *Leal* court elaborated that:

> On the other hand, "exhibits...which were marked for and referred to on the record but not received in evidence" must "be attached to the record" but are not part of the record...To hold otherwise would permit counsel to make clearly inadmissible evidence part of "the record" merely by offering it, knowing full well that it would be rejected. Rejected exhibits are attached to the record to facilitate appellate review of any subsequent attack on the ruling rejecting them. Thus, the [evidence in question] was not part of "the record," even though it was included "between the 'blue covers.'"

Leal, 44 M.J. at 236. Since neither the prosecution nor the defense moved to introduce any of the Article 32 testimony at the trial by court-martial, and since even if trial counsel had moved to introduce it admission would not have been guaranteed, it cannot be considered now to support the sentence imposed.

III. A plea of guilty does not result in a waiver of an accused's Article 66 right to a review of his sentence for sufficiency.

As discussed above, any accused who is sentenced to a bad conduct discharge is entitled to appellate review pursuant to 10 U.S.C. § 866 (b)(1). At that level, only so much of a sentence that is supported by the record may be upheld. 10 U.S.C. § 866 (c). Article 66 does not differentiate between whether an accused is sentenced following a contested court-martial or a guilty plea.

As a rule, "an unconditional guilty plea [which is what SFC Riemer entered in this case] generally waives all defects which are neither jurisdictional nor a deprivation of due process of law." *United States v. Schweitzer*, 68 M.J. 133, 136 (C.A.A.F. 2009) citing *United States v. Rehorn*, 9 U.S.C.M.A. 487 (C.M.A. July 25, 1958).

However, Article 66 (c) on its face raises a jurisdictional issue. *See*, 10 U.S.C. § 866 (c) "TJAG *shall* refer to a Court of Criminal Appeals the record in each case of trial by court-martial (1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge..." (emphasis added). As such, an Article 66 (c) review of a sentence cannot be waived by a plea of guilty.

Further proof that this right is available to an accused who has pled guilty to an offense is made clear by the multitude of cases discussing sentence appropriateness following a plea of guilty (*See, e.g.*, *United States v. Nerad*, 69 M.J. 138, 140 (C.A.A.F. 2010)).

IV. Objections to the sentence were properly raised.

A trial by court-martial is convened by a military officer who does not preside over the proceeding but rather refers a charge for court-martial and then accepts or rejects the results of the proceeding. RCM 601; RCM 1107.

As such, following the imposition of a sentence pursuant to a trial by court-martial, an accused customarily exercises his or her right to "submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence." RCM 1105 (b)(1). It is important to note that any oral objections made at trial regarding the sentence would have no effect as "[t]he convening authority is only required to consider written submissions." *Id*.

Thus, defense counsel properly and effectively preserved their objections to the sentence imposed based on their post-trial submission (Appendix G).

CONCLUSION

To reiterate, we urge this Court to extend to SFC Riemer the protections afforded to all of his active duty, reserve and similarly situated National Guard counterparts by granting him; 1) *de novo* review of his sentence imposed at the trial by court-martial; and 2) a reduction in his sentence as insufficient evidence was presented to support the military judge's findings.

Dated this 16th day of May, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this supplement meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the supplement is 1,159 words.

Dated this 16th day of May, 2017.

Signed:

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I have submitted an electronic copy of this supplement, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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A copy of this certificate has been served with the paper copies of this supplement filed with the court and served on all opposing parties.

Dated this 16th day of May, 2017.

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