

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MULLIGAN, FEBBO, and WOLFE
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 MICHAEL L. HAYNES, JR.
United States Army, Appellant

ARMY 20160817

Headquarters, 7th Infantry Division
Lanny Acosta, Military Judge
Colonel Russell N. Parson, Staff Judge Advocate

For Appellant: Colonel Mary J. Bradley, JA; Major Brendan R. Cronin, JA; Captain Cody Cheek, JA (on brief); Major Brendan R. Cronin, JA; Captain Cody Cheek, JA (on reply brief).

For Appellee: Lieutenant Colonel Eric K. Stafford, JA; Captain KJ Harris, JA (on brief).

21 May 2018

OPINION OF THE COURT

FEBBO, Judge:

Appellant alleges he did not receive appropriate sentencing credit, pursuant to *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989), for nonjudicial punishment (NJP) he served under Article 15, UCMJ, 10 U.S.C. § 815 (2012)[UCMJ], for the same offense for which he was punished at court-martial. As such, appellant requests the court provide him with 73 days confinement credit. We disagree.¹

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of failing to report to his place of duty, three specifications of willful disobedience of a superior commissioned officer, one specification of willful disobedience of a noncommissioned officer, one specification of making a false official statement, two specifications of wrongful use of a controlled substance, one specification of abusive sexual contact, and one specification of assault consummated by battery, in violation of Articles 86, 90, 91, 107, 112a, 120, and 128, UCMJ.

¹ Appellant's remaining assignment of error does not warrant discussion or relief.

The military judge sentenced appellant to a bad-conduct discharge and confinement for thirteen months. Pursuant to a pretrial agreement (PTA), the convening authority (CA) approved only so much of the sentence as provided for a bad-conduct discharge and confinement for six months, and credited appellant with 107 days for his pretrial confinement.

BACKGROUND

Appellant enlisted in the U.S. Army in 2013. In April 2016, he sexually abused a fellow soldier by pulling down her pants while she was asleep and rubbing her buttocks. Afterward, appellant committed multiple additional offenses. Appellant lied to military authorities, defied military authority, and assaulted another peer.

Tempted by easy access to local recreational marijuana dispensaries, he also smoked marijuana. According to appellant, he smoked marijuana almost daily with the specific purpose of being expelled from the Army. Between April and August 2016, appellant tested positive for marijuana six different times.²

The Court-Martial Charges

Based on the first four drug tests, appellant was charged with two specifications of wrongful use of marijuana. Specification 1 of Charge III alleged a wrongful use between on or about 8 March 2016 and on or about 8 April 2016. Specification 2 of Charge III alleged a wrongful use between on or about 7 May 2016 and on or about 24 June 2016.

The Article 15

After the preferral of charges, appellant tested positive for a fifth time. Rather than prefer an additional charge, appellant received NJP under Article 15, UCMJ. The Article 15 alleged a wrongful use of marijuana between on or about 14 June 2016 and on or about 14 July 2016.

The Overlap

As the diagram below indicates, there was an overlap between one of the charged specifications and the Article 15. This eleven-day overlap, from 14 June to 24 June 2016, is the basis for appellant's *Pierce* credit claim.

² Appellant was not charged, and did not receive NJP under Article 15, UCMJ, for the sixth positive test.

Appellant is the “gatekeeper” on “whether to introduce the record of a prior NJP for the same act or omission covered by a court-martial finding and may also choose the forum” for presenting such evidence. *United States v. Gammons*, 51 M.J. 169, 183 (C.A.A.F. 1999); *see also United States v. Mead*, 72 M.J. 515, 518 (Army Ct. Crim. App. 2013), *aff’d* 72 M.J. 479 (C.A.A.F. 2013).

Before reaching the merits of appellant’s claim, we first address whether appellant waived any claim to *Pierce* credit. We determine he has.

Although the government introduced the Article 15 during sentencing as part of the stipulation of fact, the defense never requested that the military judge award *Pierce* credit. After the military judge addressed the amount of PTC credit and denied a defense motion for Article 13 credit, appellant agreed with the military judge that the total confinement credit was 107 days. Neither party argued that the military judge should consider the Article 15 during sentencing. Appellant also never requested that the CA award sentencing credit when taking action.

In *Gammons*, our superior court addressed the issue of whether an appellant had waived *Pierce* credit:

Absent a collateral issue, such as ineffective assistance of counsel, failure to raise the issue of mitigation based upon the record of a previous NJP for the same offense prior to action by the convening authority *waives* an allegation that the court-martial or convening authority erred by failing to consider the record of the prior NJP.

51 M.J. at 183 (emphasis added). Thus, in *Gammons*, our superior court appears to have determined that an accused waives the issue of *Pierce* credit when it is raised for the first time on appeal.

However, appellant points to other language in *Gammons* where our superior court offered guidance in resolving future *Pierce* claims:

[W]e offer the following guidance to assist reviewing authorities in determining whether appropriate credit has been provided.

...

If the accused chooses to raise the issue of credit for prior punishment during an Article 39(a) session rather than on the merits during sentencing, the military judge will adjudicate the specific credit to be applied by the convening authority against the adjudged sentence in a

manner similar to adjudication of credit for illegal pretrial confinement. If the accused chooses to raise the issue of credit for prior punishment before the convening authority, the convening authority will identify any credit against the sentence provided on the basis of the prior NJP punishment. *Likewise, if the issue is raised before the Court of Criminal Appeals, that court will identify any such credit.*

51 M.J. at 184 (emphasis added). Appellant argues this language means that waiver does not apply, and that he is free to raise issues of *Pierce* credit for the first time on appeal. One of our sister courts agrees with appellant. *See United States v. Globke*, 59 M.J. 878, 882 (N.M. Ct. Crim. App. 2004) (“the accused can wait, and raise the issue post-trial before . . . the appellate court . . .”).

We are not so convinced. Reading *Gammons* as a whole, it appears to us that the Court of Appeals for the Armed Forces (CAAF) is addressing two different legal issues. First, there is the question of whether a court was required, as a matter of law, to award *Pierce* credit. Second, there is the question of whether the Court of Criminal Appeals, using its authority under Article 66(c) “to do justice” could notice the waived issue and grant the appellant relief irrespective of the waiver.³ The lower court in *Gammons* had elected to notice the waived issue. The CAAF summarized the issue as follows:

The court below also stated that it would not find waiver in light of the comment in [*Claxton*, 32 M.J. at 162] that the Courts of Criminal Appeals possess plenary review authority “to do justice.” [*United States v. Gammons*, 48 M.J. 762, 765 (C.G. Ct. Crim. App. 1999)]. *Claxton*, however, did not relieve the Courts of Criminal Appeals of the responsibility to follow Article 59(a), which provides that a “sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.” *See* [*United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998)].

³ Our superior court has chosen several colorful appellations for this court’s Article 66(c) powers. It is a “*carte blanche*” to do justice. *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991). It is the “proverbial 800-pound appellate gorilla when it comes to [this court’s] ability to protect an accused.” *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). It is an “awesome, plenary, *de novo*” form of appellate review. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

51 M.J. at 181. Thus, we read *Gammons* as requiring an accused to raise the issue of *Pierce* credit to either the court-martial or to the CA to avoid waiver as a matter of law.⁴ If waived, no relief can be obtained as a matter of law from this court. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (explaining that a valid waiver of an issue at trial extinguishes the alleged error on appeal).

Here, appellant waived any entitlement to *Pierce* credit when he affirmatively told the military judge that he was not entitled to any additional confinement credit and stipulated (see below) that the Article 15 addressed post-preferral misconduct.⁵ As cited in *Gammons*, this is also consistent with R.C.M. 1001(b)(2) (for personnel records of an accused introduced during sentencing, “[o]bjections not asserted are waived”).

Even assuming that appellant merely forfeited the *Pierce* credit issue, we do not find any plain error. We next turn to the question of whether we should notice appellant’s waiver.⁶

Should this court notice the waived Pierce-credit issue?

Having reviewed the entire record, we determine that this is not appropriate case to notice any waived *Pierce* credit. Although we consider many factors in reaching this decision, we discuss a few below.

First, most importantly, our reading of the stipulation of fact indicates the Article 15 and the charged offense addressed separate misconduct. The Article 15 was imposed after the preferral of charges. In the stipulation, appellant agreed that the Article 15 addressed “*misconduct* subsequent to preferral.” (emphasis added).

⁴ Although we have not always been as clear as we might desire, this court should try to follow the guidance in *Gammons* and separate (both in our reasoning and our opinions) instances where we decide a case based on questions of law, and when we decide issues under our broader mandate under Article 66(c) “to do justice.” When we fail to speak clearly and muddle the two issues, we deprive the parties and our superior court of our reasoning, and create indecipherable case law.

⁵ We also note that the military judge did not err, plainly or otherwise, by failing to address specifically the *Pierce* credit issue. As the CAAF made clear in *Gammons*, it is the accused who is the gatekeeper on whether *Pierce* credit issues are raised with the military judge or the CA.

⁶ When presented with a case of waiver or plausible waiver, this court has encouraged the parties directly address whether this court should exercise our Article 66(c) authority to notice waived issues.

This misconduct included the fifth positive test for marijuana that was punished by the NJP and the uncharged sixth positive test.⁷ At the time of preferral, the government had not even received the lab report that was the basis for the NJP.

Second, during his *Care*⁸ inquiry, appellant told the military judge that he was using marijuana on a near daily basis. Thus, even without the stipulation, a possible and reasonable reading of the record is that the Article 15 and the charged offense address different misconduct.

Third, viewed as a whole, it is a fair read of the record that the parties were well aware of the Article 15 and the fifth positive test and chose to negotiate around the issue. Part of the PTA included terms prohibiting the government from charging additional misconduct that occurred after preferral. The PTA specifically stated that the CA agreed not to prefer any additional charges “based on the information included in the stipulation of fact.”

Fourth, even assuming the Article 15 and the charged offense both addressed the same conduct, it is not clear to us that appellant was, in fact, doubly punished. It appears that appellant was placed in PTC (for which he did receive credit) before he could have completed the Article 15 punishment.⁹ If so, receiving *Pierce* credit for punishment never actually served would be a windfall.

Finally, to the extent that these factual issues are debatable (and the parties do spend forty-one pages of briefs debating the facts), it is because questions of *Pierce* credit are best resolved at the trial court. *Bracey*, 56 M.J. at 389 (“If appellant wanted to introduce facts and obtain a ruling that the NJP and the court-martial conviction were for the same offense, the time to do so was at trial, not on appeal.”)

⁷ Disputed factual issues are best addressed at trial. However, since the record already includes a stipulation of fact, there is no need for the court to send the *Pierce* credit issue back for an evidentiary hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), or a sentencing rehearing. The parties agreed that the stipulation of fact could be considered on appeal to determine an appropriate sentence.

⁸ *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969).

⁹ Appellant’s punishment for the Article 15 started on 11 August 2016. He was placed into PTC on 31 August 2016. Between these dates, appellant failed to show or was absent from extra duty multiple times. Based again on an overlap of dates, part of the extra duty and restriction would have been executed while he was already in PTC. Again, we do not decide these issues, but these factual questions weigh against noticing a waived issue.

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We are cautious about incentivizing raising *Pierce* credit issues for the first time on appeal.

Accordingly, this is not a case where we choose to exercise our discretion and notice the waiver.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and sentence are AFFIRMED.

Senior Judge MULLIGAN and Judge WOLFE concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.
Clerk of Court