

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

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Jared A. BREWSTER
Private (E-1), U.S. Marine Corps**

NMCCA 200602269

Decided 14 August 2007

Sentence adjudged 24 March 2006. Military Judge: P.J. Ware. Staff Judge Advocate's Recommendation: Colonel B.A. White, USMC. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Support Battalion, Recruit Training Regiment, Marine Corps Recruit Depot, San Diego, CA.

CDR TED Y. YAMADA, JAGC, USN, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

The appellant, an unsuccessful Marine recruit awaiting administrative discharge, began an unauthorized absence on New Year's Eve 2005, along with three other similarly unsuccessful Marine recruits. Their foray was terminated the next day when the stolen car they were using was stopped by the police. The primary issue of this appeal is whether the appellant can be held liable for the theft of the car. We find that under the facts of this case, he may not.

Pursuant to his pleas, the appellant was convicted by a military judge sitting as a special court-martial, of a one-day-long unauthorized absence (terminated by apprehension), conspiracy to commit an unauthorized absence, and larceny of the car used for the unauthorized absence, in violation of Articles 81, 86, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, and 921. He was sentenced to confinement for 150 days and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of 120 days.

The appellant argues that his plea to the larceny offense was improvident, and asks that we dismiss it. He further argues that if the larceny conviction is set aside, the remaining charges, which he does not contest, do not warrant a bad-conduct discharge. We agree, although not for the reasons propounded by the appellant. We conclude that the appellant's pleas to unauthorized absence and conspiracy to commit an unauthorized absence are provident. Arts. 59(a) and 66(c), UCMJ.

Larceny

The appellant argues he did not know that the car used in the unauthorized absence had been stolen, and therefore he should not be liable for its theft, despite the car's use in his escape from the Recruit Depot in San Diego. While we agree the appellant should not be liable for the theft, our reasoning revolves around the timing of the theft, not the appellant's knowledge (or lack thereof) of the theft.

Facts

This is a guilty plea case, so the relevant facts are derived from the appellant's statements during the providence inquiry and a stipulation of fact. The appellant and a Private Bisbee had been sitting in the barracks on New Year's Eve after duty hours, talking about leaving the post with neither leave nor liberty. Later, Private Bisbee approached the appellant, telling him in essence that he had obtained a car, and asked whether the appellant wanted to leave with him in the car. With the belief that Private Bisbee had obtained a vehicle, the appellant agreed to go. They left the barracks, and met up with two other Marine privates who had agreed with Private Bisbee to leave with him. The four privates left, driving east until they were arrested in Texas. It was not until they were arrested that the appellant learned the vehicle had been stolen by Private Bisbee from his drill instructor.

Discussion

The facts as related during the providence inquiry and the stipulation of fact indicate that the vehicle's key was stolen prior to the appellant's entry into the conspiracy to commit an unauthorized absence. The timing of the larceny is fatal to the appellant's larceny conviction.

The MANUAL FOR COURTS-MARTIAL explains the Government's larceny theory in this case:

Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 5c(5). The problem with the Government's theory is that this provision allows conspirator liability only where the crime occurs after the conspiracy has formed. In this case, the crime occurred prior to the agreement by the appellant to enter the conspiracy to go UA. Therefore, he may not be found guilty of this larceny. *United States v. Collier*, 14 M.J. 377, 378 (C.M.A. 1983); *United States v. Johnson*, 25 M.J. 878, 883 (N.M.C.M.R. 1988).

Conclusion

The findings of guilty as to Charge I and its specification and to the Additional Charge and its specification are affirmed. The findings of guilty as to Additional Charge II and its specification and the sentence are set aside. The record is returned to the Judge Advocate General, and a rehearing on Charge II and its specification is authorized. In the event a rehearing on Charge II and its specification is not ordered by an appropriate convening authority, a rehearing on the sentence may be ordered. If a rehearing on the sentence is impracticable, the convening authority may approve a sentence of no punishment. RULE FOR COURTS-MARTIAL 1107(e)(1)(C)(iii), MANUAL FOR COURTS-MARTIAL, United States (2005 ed.). Thereafter, the record will be returned to this court for completion of appellate review.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court