

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
W.L. RITTER, E.S. WHITE, R.E. VINCENT  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JOSHUA F. CROSS  
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 200602310  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 14 December 2005.

**Military Judge:** LtCol P.J. Ware, USMC.

**Convening Authority:** Commanding General, Marine Corps  
Recruit Depot/Western Recruiting Region, San Diego, CA.

**Staff Judge Advocate's Recommendation:** Col B.A. White,  
USMC.

**For Appellant:** CDR Sherry King, JAGC, USN.

**For Appellee:** LT Derek Butler, JAGC, USN.

**27 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

WHITE, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of larceny in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 14 months, a fine of \$5,000.00, with additional confinement for 14 months if the fine was not paid by demand of the convening authority, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved a sentence of 14 months confinement, reduction to pay grade E-1, and a bad-conduct discharge.

On appeal, the appellant assigns three errors. First, he contends the military judge erred by admitting evidence in

violation of MILITARY RULE OF EVIDENCE 410, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Second, he contends he was denied effective assistance of counsel due to the cumulative effect of four errors by his trial defense counsel. Finally, he argues he has been denied speedy post-trial review.

After carefully considering the record, the appellant's three assignments of error, and the Government's answer, we conclude 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.

#### I. MIL. R. EVID. 410

The appellant argues the military judge erred by admitting, on the merits, statements made by the appellant during the providence inquiry at a prior special court-martial, and by admitting, on presentencing, a copy of an earlier, failed pretrial agreement.

##### A. Factual background

The appellant was accused of stealing tobacco and alcohol from the Marine Corps Community Services (MCCS) beverage store on board Camp Pendleton, California, where he worked while off-duty from August to November 2004.<sup>1</sup> On 15 November 2004, the appellant admitted to investigators from the Camp Pendleton Criminal Investigation Division (CID) that he had stolen alcohol and tobacco from the MCCS beverage store, with the assistance of his wife. He described where, and how much of, the stolen property was located in his residence. He also consented to a search of his residence, which led to recovery of the type and quantity of property he had described to investigators.

Subsequently, the appellant negotiated a pretrial agreement, and charges were referred to a special court-martial. During the providence inquiry, the appellant told the military judge he had bought the stolen alcohol and tobacco found at this quarters from other beverage store employees. Because his testimony was inconsistent with guilt of larceny, the military judge rejected his plea. The Government then withdrew from the pretrial agreement, and the convening authority referred the charges to a general court-martial, at which the appellant pled not guilty.

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<sup>1</sup> The appellant was also charged with attempting to sell stolen smokeless tobacco, and with two specifications of knowingly selling stolen property. The military judge entered a finding of not guilty to the attempt charge in response to a defense motion pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). He found the appellant not guilty of the two selling stolen property specifications at the conclusion of the evidence on the merits. It appears the Government conceded the latter two specifications had been charged in the alternative with the larceny charge, and did not seek conviction of both larceny and selling stolen property. See Record at 151.

At trial, the appellant testified that the stolen alcohol and tobacco in his quarters had been stored there by, and belonged to, a young man named Tim whom he had met in the vicinity of the beverage shop around August 2004, and who used to drive him home from work occasionally. The appellant testified he believed Tim to be an 18-year-old dependent of a gunnery sergeant who lived in base housing, and that he believed Tim to be a high school student who worked at the beverage store during the day, as well as a member of a violent gang in Oceanside, California. The appellant testified Tim had said he bought the alcohol and tobacco at a discount from the people who worked on the delivery trucks that supplied the beverage store. The appellant denied he had stolen the alcohol and tobacco, and claimed his sworn confession to CID was a misguided attempt to protect his wife and to take blame on himself because he was despondent at the time he made the statement. He was despondent, he said, because his father had recently died, and the CID interrogator had shown him a statement by his wife saying she was secretly putting money aside to leave him.

As part of the Government's case in rebuttal, the trial counsel offered two excerpts from the appellant's providence inquiry at the earlier special court-martial. In those excerpts, the appellant gave an explanation for the stolen property in his quarters different from both his testimony at his general court-martial and his CID statement. Before the trial counsel played these excerpts, the military judge asked the defense counsel if he had any objection. The defense counsel replied, "No, Your Honor." Record at 134. During the defense case in surrebuttal, the appellant reaffirmed his earlier testimony that the stolen alcohol and tobacco belonged to Tim. The trial counsel then cross-examined the appellant on his inconsistent statements in the prior providence inquiry. *Id.* at 145-46.

During presentencing, the appellant gave an unsworn statement, in which he told the court he had already reimbursed MCCS \$1,090.00. In rebuttal, the Government offered the earlier pretrial agreement. The trial counsel explained the Government offered the pretrial agreement to show restitution was required by the agreement, in rebuttal of the implication in the appellant's unsworn statement that he had voluntarily made restitution. *Id.* at 180. The military judge then asked, "Both of you [trial and defense counsel] want me to consider this agreement?", to which both answered, "Yes, sir." The military judge then addressed the trial defense counsel, saying, "I will not accept this into evidence if the defense doesn't want me to. It can't be used against [the appellant] in any way." The trial defense counsel replied, "Understood, sir." *Id.*

## **B. Principles of Law**

We review a trial judge's evidentiary rulings for abuse of discretion. *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). A trial judge abuses his discretion if he fails

to apply the law correctly. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001)(citing *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995)).

MILITARY RULE OF EVIDENCE 410 prohibits evidence of any statement made in the course of a judicial inquiry into a withdrawn or rejected guilty plea, or in the course of plea discussions. *Grijalva*, 55 M.J. at 227; *United States v. Heirs*, 29 M.J. 68, 69 (C.M.A. 1989). The protections of this rule may, however, be knowingly and voluntarily waived. See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995)(holding defendant may affirmatively waive similar right under FEDERAL RULE OF EVIDENCE 410).

Where, however, absent waiver, a court-martial receives into evidence statements previously made during a providence inquiry into a withdrawn or rejected guilty plea, the court commits error of constitutional dimension. The error is of constitutional dimension because such use of an accused's statements is beyond the waiver of the right against self-incrimination given as part of the attempt to plead guilty. *Grijalva*, 55 M.J. at 228. Where there has been an error of constitutional dimension, this court may not affirm a conviction unless it is satisfied beyond a reasonable doubt the error was harmless. *Id.*

Courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and will not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(internal quotations omitted); See also *Boykin v. Alabama*, 395 U.S. 238, 279-80 (1969). We will not presume or imply that a military accused understood and waived his right against self-incrimination absent a demonstrable showing in the record that he did in fact do so. Where an accused waives the right against self-incrimination, the record must demonstrate the accused knowingly, intelligently and voluntarily waived it. *United States v. Hansen*, 59 M.J. 410, 413-14 (C.A.A.F. 2004); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

Error may not be predicated on a ruling which admits evidence unless a timely objection appears in the record, stating the specific grounds of the objection (unless the grounds are clear from the context). MIL. R. EVID. 103(a). This court may, however, take notice of "plain error" that materially prejudices the substantial rights of the appellant even in the absence of an objection. MIL. R. EVID. 103(d). To prevail under a plain error analysis, the appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right. See *United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

## C. Analysis

### 1. Excerpts from the Providence Inquiry

The military judge erred by admitting excerpts from the providence inquiry at the appellant's earlier special court-martial. MILITARY RULE OF EVIDENCE 410(a)(3) prohibits the use of "any statement made in the course of any judicial inquiry" into a withdrawn or rejected guilty plea, except as provided in that rule. *Heirs*, 29 M.J. at 69. Neither of the exceptions provided in the Rule apply in this case. See STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, 1 MILITARY RULES OF EVIDENCE MANUAL 4-173 (2003)(even where the accused makes statements at trial inconsistent with his plea discussion statements, he cannot be impeached with those statements)(citing *United States v. Acosta-Ballardo*, 8 F.3d 1532 (10th Cir. 1993)).

The trial defense counsel, however, did not object to the introduction of these statements. Indeed, he affirmatively said he had no objection. Nevertheless, for the following reasons, we do not apply the waiver rule of MILITARY RULE OF EVIDENCE 103(a). Because an accused is required to establish his guilt in order to plead guilty, the statements made during a providence inquiry constitute compulsory self-incrimination. Consequently, before the accused is questioned, the trial judge must inform him of his constitutional right against self-incrimination, and obtain his knowing, voluntary and intelligent waiver of that right. *Hansen*, 59 M.J. at 413-14; *Care*, 40 C.M.R. at 253. In obtaining that waiver, the judge must inform the accused that, if his guilty plea is not accepted, then his statements could only be used against him in a prosecution for perjury or false statement. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), App. 8, at A8-5 and A8-6. The use of the appellant's providence inquiry statements at this general court-martial, therefore, was beyond the scope of his prior waiver of his right against self-incrimination.

To use the appellant's prior providence inquiry statements in this case, the Government would have needed a new waiver. Because the right at stake is a constitutional right, we do not presume waiver. Rather, the record must reflect the accused knowingly, intelligently and voluntarily waived his right. Although the appellant's trial defense counsel affirmatively said he had no objection to the statements, the record is devoid of any indication either he or the appellant were knowingly waiving the appellant's right against self-incrimination, or even knew it was at stake. There is no mention in the record of either the right against self-incrimination or MILITARY RULE OF EVIDENCE 410, and prior discussions about the admissibility of the providence inquiry statements suggest the trial defense counsel was focused on authenticity and foundation.

Because the appellant did not personally make a knowing, intelligent and voluntary waiver, the use of his providence

inquiry statements against him violated his constitutional right against self-incrimination. As this error is of constitutional dimension, we do not apply the plain error rule, which would burden the appellant to demonstrate the error materially prejudiced a substantial right. See MIL. R. EVID. 103(d). Rather, we must determine whether the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Grijalva*, 55 M.J. at 228.

After examining the entire record, we have no doubt the military judge would have found the appellant guilty even without the providence inquiry statements, and, therefore, conclude the erroneous admission of these statements was harmless beyond a reasonable doubt.

First, before confessing, the appellant gave CID an exculpatory explanation different from the one he offered at trial,<sup>2</sup> undermining the credibility of his trial testimony. Second, the appellant's confession to CID contained significant indicia of reliability. Before giving his statement, the appellant was informed of his rights and waived them. After the statement was typed, the appellant read it, initialed each paragraph, was sworn, and signed the statement. He gave this confession after being unable to meet a CID challenge to corroborate his earlier exculpatory explanation. In his confession, the appellant described the location and amounts of the stolen property located in his quarters, and gave CID consent to search. CID found the stolen property just where appellant told them it was, in roughly the quantities he described.

Third, the appellant's trial testimony was wholly incredible. For example, despite the fact this property was purportedly stored at his quarters temporarily, CID found large quantities of alcohol and cigarettes in the kitchen pantry -- suggesting he meant to use them -- rather than with the smokeless tobacco, which was separately stored in a spare bedroom closet. The appellant also testified he had not taken inventory of what Tim left at his quarters, but, nevertheless, accurately described the location and quantities in detail to CID. Boxes for some of these products were found collapsed in the appellant's trash, which also suggests he was using the products, rather than merely storing them for a friend. The appellant testified he believed Tim was a high school-aged dependent of another Marine, but also said he believed this underage minor was working at the alcohol beverage store during the day. He testified Tim had called him and threatened his wife on 13 November, two days before he was called in and questioned by CID about the stolen property; at that point, however, there was no reason for Tim to believe CID was interested in the stolen property. Further, the appellant

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<sup>2</sup> The appellant initially told CID he had bought the large quantity of alcohol and tobacco observed in his quarters at various exchanges around Camp Pendleton, though he was unable to produce any documentation to support that story.

testified he sold alcohol cheaply to comrades as a way to repay their prior kindness, yet a Marine who bought alcohol from the appellant testified he paid nearly full retail price for it. Perhaps most tellingly, the appellant claimed he confessed, in part, to protect his wife, yet his statement squarely implicates her in his crime.

The incredibility of the appellant's testimony, together with the evidence corroborating his confession, convince us the erroneous admission of his prior providence inquiry statements was harmless beyond a reasonable doubt.

## **2. Prior Pretrial Agreement offered on Presentencing**

The appellant next contends he was prejudiced by the admission of the failed pretrial agreement. Again, the trial defense counsel did not object. Unlike the providence inquiry statements, the admission of the failed pretrial agreement does not implicate the appellant's constitutional right against self-incrimination. So, while admission of the pretrial agreement over objection would violate MILITARY RULE OF EVIDENCE 410, it would not be an error of constitutional dimension. Further, an accused may affirmatively waive his rights under MILITARY RULE OF EVIDENCE 410, see *Mezzanatto*, 513 U.S. at 210, and may forfeit any claim of error on appeal by not objecting at trial. MIL. R. EVID. 103(a).

The military judge did not explicitly invoke MILITARY RULE OF EVIDENCE 410, but he did specifically advise the defense of the substance of the appellant's right under that provision when he said, "I will not accept this into evidence if the defense doesn't want me to. It can't be used against [the appellant] in any way." Record at 180. The appellant, therefore, waived his rights under MILITARY RULE OF EVIDENCE 410 when, through counsel, he affirmatively declined to object to admission of the failed pretrial agreement after the military judge's advisement. It was not, therefore, error to admit the agreement.

## **II. Ineffective Assistance of Counsel**

Next, the appellant argues the cumulative effective of four errors by his trial defense counsel denied him effective assistance of counsel. Two of the four errors are the ones discussed above, namely: failure to object to admission of the providence inquiry statements and the failed pretrial agreement. To these, the appellant adds his counsel's failure to object to the introduction of Prosecution Exhibit 9, a prior inconsistent statement by the appellant's wife, and his failure to object to cross-examination of the appellant concerning uncharged misconduct. We do not agree the appellant was denied effective assistance of counsel.

## **A. Principles of Law**

Members of the armed forces are guaranteed the effective assistance of counsel. Article 27(b), UCMJ; *United States v. Gonzalez*, 62 M.J. 303, 307 (C.A.A.F. 2006)(citing *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005)). We review claims of ineffective assistance of counsel *de novo*. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006).

A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To overcome this presumption of competence, an appellant must demonstrate: "(1) a deficiency in counsel's performance that is 'so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment'; and (2) that the 'deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)(quoting *Strickland*, 466 U.S. at 687); see *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007); *Perez*, 64 M.J. at 243. "[W]e need not determine whether any of the alleged errors [in counsel's performance] establish[] constitutional deficiencies under the first prong of *Strickland* . . . [if] any such errors would not have been prejudicial under the high hurdle established by the second prong of *Strickland*." *United States v. Santaude*, 61 M.J. 175, 183 (C.A.A.F. 2005).

## **B. Discussion**

We have already discussed why the appellant was not prejudiced by the admission of excerpts from his prior providence inquiry. We are likewise convinced he was not prejudiced by the admission of the failed pretrial agreement, his own testimony that he had been in trouble for shoplifting at Camp LeJeune, or his wife's prior inconsistent statement admitting complicity in the larceny.

### **1. The Failed Pretrial Agreement**

The appellant argues he was prejudiced in two ways by admission of the failed pretrial agreement. First, he contends that, because the trial judge learned he had previously agreed to plead guilty to every offense charged, the judge could have felt "deceived," having acquitted the appellant of all but the larceny charge. Second, he argues the trial judge likely relied on the agreement in arriving at a sentence. He notes the judge recommended disapproval of the fine if the appellant provided additional restitution of \$2,000.00, for a total of \$3,090.00. This amount, the appellant argues, corresponds with the value of the property he agreed to plead guilty to having stolen, by exceptions and substitutions, in the pretrial agreement.

We are completely satisfied the trial judge fully understood and appreciated the appellant's constitutional right to plead not guilty, and was not "deceived" by learning the appellant had previously agreed to plead guilty to all charges. Further, the judge clearly found the appellant not guilty of Charge I because the Government had failed to meet even the minimal standard of R.C.M. 917. Similarly, it appears the judge found the appellant not guilty of Charge III on the Government's concession that those offenses had been charged in the alternative with larceny. There is no danger that learning of the appellant's earlier willingness to plead guilty to all the charges prejudiced the military judge against the appellant.

Second, we are not persuaded the military judge relied on the agreement in reaching his sentence. The appellant confessed he had roughly \$3,000.00 worth of stolen property at his quarters, and had used or sold roughly another \$2,000.00 worth. While the military judge did not find the Government had proven, beyond a reasonable doubt, that the value of the stolen property totaled "about \$5,000.00," he appears to have given some weight to the appellant's admission, since he imposed a fine of \$5,000.00. Further, the \$3,000.00 of restitution the trial judge suggested corresponds not only with the amount the appellant was willing to plead guilty to stealing in the pretrial agreement, but also to the amount of stolen property recovered from his possession. While it might not have been certain, beyond a reasonable doubt, how much more than \$3,000.00 the appellant had stolen, the judge knew, quite apart from the pretrial agreement, that he had stolen at least \$3,000.00 worth of property.

## **2. Admission to Previous Shoplifting**

Evidence the appellant had been in trouble previously for shoplifting could not be used to prove he committed larceny on this occasion, MIL. R. EVID. 404(a), nor was it proper impeachment by specific acts of his character for truthfulness. *United States v. Jefferson*, 23 M.J. 517, 519 (A.F.C.M.R. 1986); MIL. R. EVID. 608(b). Such evidence was not proper impeachment because shoplifting is not probative of truthfulness. Nevertheless, a military judge is presumed to know and follow the law. *United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000); *United States v. Raya*, 45 M.J. 251, 253 (C.A.A.F. 1996); *United States v. Prevatte*, 40 M.J. 396, 393 (C.M.A. 1994). We find nothing in the record that rebuts this presumption.

That bad character cannot be used to prove a person acted in conformity therewith is so basic a principle that we have no doubt the trial judge did not erroneously rely on this evidence in determining the appellant's guilt of the larceny charge. Likewise, as shoplifting is not probative of truthfulness, the appellant was not prejudiced in the evaluation of his credibility by the admission of this evidence. Finally, as noted above, the appellant's testimony was incredible, even without this weak attack on the appellant's credibility.

### 3. Wife's Prior Inconsistent Statement

Nor was the appellant prejudiced by the admission of his wife's prior inconsistent statement. First, the main thrust of the appellant's wife's testimony during presentencing was the extent of her dependence on the appellant for support. Insofar as her prior statement acknowledging awareness of her husband's larceny was inconsistent with her trial testimony, and therefore undermined her credibility, it did not significantly add to the evaluation of her credibility, as the judge also had before him PE 1, the appellant's confession, in which he said his wife not only knew of his larceny, but had assisted him.

### 4. Cumulative Effect

Even considering the cumulative effect of these four errors, we conclude they are not so serious as to have deprived the defendant of a fair trial, a trial whose result is reliable. Accordingly, we hold the appellant was not denied his Sixth Amendment right to effective assistance of counsel.

## III. Speedy Post-Trial Review

Finally, we turn to the appellant's contention he was denied his due process right to speedy post-trial review. The appellant was sentenced on 14 December 2005, but due to a post-trial session pursuant to Article 39(a), UCMJ, the proceedings before the court-martial were not concluded until 18 January 2006. The trial judge authenticated the record on 8 March 2006, and the convening authority took action on 31 July 2006. The record was docketed with this court on 16 November 2006. In total, 302 days elapsed between the conclusion of trial and docketing at this court.

If we can determine that any possible error was harmless beyond a reasonable doubt, we need not reach the question of whether an appellant has actually suffered a denial of due process as a result of post-trial delay. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). The appellant has not identified, nor do we find, any harm from the delay in this case. The appellant has not suffered oppressive incarceration pending the outcome of his appeal. He has not shown, or even alleged, that he has suffered any particularized anxiety or concern related to the delay, distinct from the anxiety and concern normal for persons awaiting appellate decisions. We have found no error that requires a rehearing at which the appellant could be prejudiced by the delay. *See United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006) (quoting *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006)). Further, we find that the delay in this case is not so egregious that tolerating it would adversely effect the public's perception of the fairness and integrity of the military justice system. *Toohey*, 63 M.J. at 362. We find, therefore, that the delay in this case is harmless beyond a reasonable doubt.

We are also aware of our authority to grant relief under Article 66, UCMJ, but decline to do so. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Tardiff*, 57 M.J. 219 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc).

#### **IV. Conclusion**

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Chief Judge RITTER and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court