

**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.**

**John A. FAGBAMIYE  
Cryptologic Technician (Technical) Third Class (E-4), U. S. Navy**

NMCCA 200600539

Decided 21 March 2007

Sentence adjudged 06 October 2004. Military Judge: L.T. Booker. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS ENTERPRISE (CVN 65).

CDR JEFFREY MCCRAY, JAGC, USN, Appellate Defense Counsel  
LCDR PAUL BUNGE, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTA, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of attempted larceny and making a false official statement, in violation of Articles 80 and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 907. A panel of officer and enlisted members sentenced the appellant to reduction to pay grade E-1 and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

We have considered the record of trial, the appellant's three assignments of error,<sup>1</sup> 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.

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<sup>1</sup> This court has considered appellant's brief even though it was submitted 186 days "out of time." N.M.CT.CRIM.APP. RULES 4-1h and 4-3a.

### **Improvident Plea**

In his first assignment of error the appellant claims his guilty plea to attempted larceny is improvident because the military judge failed to (a) inquire whether the appellant intended to permanently deprive the Government of the Basic Allowance for Housing (BAH) funds the appellant attempted to steal, and (b) elicit facts supporting the conclusion that the property owner had a greater right to the property than the appellant. Appellant's Brief of 13 Nov 2006 at 3-6. We disagree.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. Pleas of guilty should not be set aside on appeal unless there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); see also RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

We conclude that the military judge did not specifically ask whether the appellant's intent was to permanently deprive the Government of these funds or whether the Government had a greater proprietary right to them. The military judge did, however, inform the appellant of each of these elements, Record at 21-22, and the appellant thereafter acknowledged that these elements were true, *id.* at 57. Moreover, in his stipulation of fact the appellant admitted that he "wanted to use the money to buy a new car." Prosecution Exhibit 1. The appellant also repeatedly stated that the funds were property of the military. *Id.*; Record at 26-27, 41-45. We find that there is no substantial basis in law or fact to question the appellant's guilty plea to attempted larceny. We find, therefore, that the military judge did not abuse his discretion by accepting the appellant's pleas of guilty.

### **Post-Trial Delay**

The appellant's second assignment of error asserts he was denied speedy post-trial processing because it took 408 days following the convening authority's action for the case to be

docketed with this court. The convening authority's action was completed within 174 days of trial.

While the 582-day delay between sentencing and docketing is facially unreasonable, the post-trial delay in the appellant's case does not rise to the level of a due process violation. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)); see also *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Even assuming that the appellant was denied the due process right to speedy post-trial review and appeal, we conclude that any error in that regard was harmless beyond a reasonable doubt. *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006).

We next consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ, in the absence of a due process violation. *Moreno*, 63 M.J. at 129. Having considered the post-trial delay in light of our superior court's guidance in *Toohey* and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considering the factors we explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(*en banc*), we find that the delay does not affect the findings and sentence that should be approved in this case.

### **Sentence Appropriateness**

In his final assignment of error the appellant contends that the bad-conduct discharge he received as part of his sentence<sup>2</sup> was inappropriately severe in light of his lack of a disciplinary record, his remorse, and the fact he did not gain from his crimes. We disagree.

The appellant admitted to attempting to steal an extra \$842.00 per month in BAH funds by deceit for no reason other than he wanted to buy a car and move off the ship. Prosecution Exhibits 1 and 5; Record at 41-42. He did so by preparing and submitting both a fraudulent Record of Emergency Data (RED), and a fraudulent lease with forged signatures, and then later lied to his senior chief about it. Prosecution Exhibits 1 and 5; Record at 52-55. He involved another Sailor and a civilian in his scheme. Prosecution Exhibit 5. The appellant fully expected his fraudulent request for additional BAH funds to be approved and but for watchful eyes in his chain of command he would have received those funds. Record at 46-48.

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<sup>2</sup> The appellant does not contest that part of his sentence which reduced him to pay grade E-1. Appellant's Brief at 8.

The maximum punishment authorized for the offenses to which the appellant pled guilty was confinement for 12 months, forfeiture of 2/3 pay per month for 12 months, a fine, reduction to pay grade E-1, and a bad-conduct discharge. The appellant asserts that the members "may not have been aware of the severity of a bad-conduct discharge." Appellant's Brief at 8. We do not find this persuasive. The record reflects that the members included two commanders, a lieutenant commander, and three senior enlisted members. We are confident such senior personnel fully understood the impact of a bad-conduct discharge. Further, the members were specifically instructed by the military judge on the effects of a bad-conduct discharge. Record at 220. This assignment of error lacks merit.

We find the approved sentence is appropriate for this offender and these offenses. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982). Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96.

#### **Conclusion**

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL  
Clerk of Court