

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ROOSEVELT D. ROBERTS
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS**

**NMCCA 200700027
GENERAL COURT-MARTIAL**

Sentence Adjudged: 25 January 2006.

Military Judge: LCDR John D. Bauer, JAGC, USN.

Convening Authority: Commanding General, Training and Education Command, Marine Corps Combat Development Command, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol J.R. Woodworth, USMC.

For Appellant: CDR Sherry King, JAGC, USN.

For Appellee: LtCol John F. Kennedy, USMC; LT Justin E. Dunlap, JAGC, USN.

20 November 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of four specifications of larceny of military property and two specifications of forgery, in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923. The appellant was sentenced to a bad-conduct discharge and reduction to pay grade E-3. The convening authority (CA) approved the sentence as adjudged.

We have examined the record of trial, the appellant's three assignments of error,¹ the Government's response, and the appellant's reply to the Government's response. We conclude that the findings and the 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.

Background

The appellant, a gunnery sergeant (E-7), served as bookkeeper for the Augmented Dining Fund² (ADF) at The Basic School (TBS) in Quantico, Virginia. There were three people with access to the ADF checkbook: the appellant, Corporal (Cpl) April Poncedeleon and Captain (Capt) Greg Smith. Only Cpl Poncedeleon and Capt Smith were authorized to sign checks drawn from the ADF. At trial, the appellant testified that, prior to embarking on a 96 hour liberty on 2 July 2004, he saw the ADF checkbook lying unsecured. He stated that he put it in his book bag for safekeeping before beginning his drive to Wallace, North Carolina where his family lived.³

While at home, the appellant and his family visited the apartment of Ms. B, a childhood friend of the appellant. The group had dinner in a restaurant and then the appellant drove back to TBS the same night. The appellant testified that, upon arriving at work the following morning, he immediately returned the checkbook to Cpl Poncedeleon. A subsequent audit conducted shortly thereafter revealed that two ADF checks #6317 and #6320 were unaccounted for. Inquiry revealed that each check had been negotiated for \$800.00 by William Walton Properties. Evidence suggests the checks were used to pay the rent on the apartment of Ms. B. It was later discovered that the appellant was a co-tenant on the lease with Ms. B.

The appellant admitted that he took the checkbook with him to North Carolina, but denied stealing the checks, forging Capt Smith's name on the checks or uttering the checks to William

¹ I. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO FIND APPELLANT GUILTY OF LARCENY AND FORGERY.

II. THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF HEARSAY TESTIMONY SUBSTANTIALLY PREJUDICED APPELLANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT.

III. APPELLANT WAS DENIED A SPEEDY TRIAL WHERE THE MILITARY JUDGE EXCLUDED NEARLY THE ENTIRE PERIOD BETWEEN APPELLANT'S FIRST INEFFECTIVE ARRAIGNMENT AND RE-ARRAIGNMENT ON THE CHARGES AFTER AN ARTICLE 32 INVESTIGATION HAD TAKEN PLACE.

² The ADF was a nonappropriated fund used to fund mess nights for officers at TBS. The fund was tax exempt and would help front the costs for mess nights for the junior officers attending TBS. The officers would pay the fund back dollar for dollar. The ADF was audited and shut down on or about October 2004. Record at 191.

³ The checkbook was supposed to be kept in a locked safe when not in use. However, testimony at trial indicated that the safe was often left unlocked because it was difficult to open.

Walton Properties. He testified that Ms. B must have committed the larceny and forgery. On appeal, the appellant asserts that since the Government was unable to prove conclusively which one of them did it, their case was factually insufficient. We disagree.

Factual Sufficiency

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial, and recognizing that we did not see or hear the witnesses as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 24 M.J. 324, 325 (C.M.A. 1987); see Art. 66(c), UCMJ. Reasonable doubt does not mean the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd* 54 M.J. 37 (C.A.A.F. 2000). The appellant claims that the evidence was circumstantial, and did not conclusively prove that he forged or uttered the two checks. We agree that the evidence in this case was circumstantial, however we find, as did the members, that the circumstances point to the appellant as the perpetrator beyond a reasonable doubt.

The appellant admitted that he put the unsecured checkbook in his book bag ostensibly for safekeeping prior to going on liberty. He thus had the opportunity to steal the checks. The evidence also showed that the appellant was a co-tenant on the leased apartment with Ms. B. Prosecution Exhibit 3. There was testimony that Ms. B was behind on the rent. Record at 186. Thus the appellant had a motive to ensure that the rent on the lease was paid since he was financially responsible as a co-tenant. At some point close in time to when the appellant visited Ms. B, two checks were stolen, forged with Capt Smith's endorsement and uttered to William Walton Properties. The defense presented a handwriting expert who opined that he was unable to determine conclusively that the appellant forged the checks. Record at 232.

We note that Capt Smith's signature was forged on the check. This is significant in that the appellant testified that he had never discussed Capt Smith with Ms. B. Further, the checkbook itself was placed into evidence. Prosecution Exhibit 7. There was nothing in the checkbook identifying Capt Smith as an authorized endorser. In fact, the only cancelled check in the book was endorsed by another person. When questioned on this point, the appellant speculated that Ms. B must have seen a voided check with Smith's signature on it that was no longer in the checkbook. Record at 272.

Regarding opportunity, the appellant did not testify or even speculate how or when Ms. B might have had an opportunity to steal the checks from his book bag or how she even knew the checkbook was in the bag. He testified that he took his book bag to her apartment and left in on her couch while he, his family,

and Ms. B went to dinner. There was no plausible explanation as to how Ms. B had unobserved access to steal the checks or how she became aware that Capt Smith was an authorized endorser.

Although there was no direct evidence presented regarding who signed or uttered the checks, we find that the circumstantial evidence supports the members' finding that the appellant was the perpetrator beyond a reasonable doubt. After reviewing the record, we too are convinced beyond a reasonable doubt that the appellant stole, forged, and uttered the checks.

Speedy Trial

The appellant claims that his right to a speedy trial was violated. He specifically asserts that the military judge erred when he ruled that the period of time between 12 May 2005 and 4 November 2005 was excludable delay. An accused not in pretrial restraint is entitled to be brought to trial within 120 days of the preferral of charges. RULE FOR COURTS-MARTIAL 707(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). There are exceptions to this rule. Additional delay is permissible and excludable if it is approved by the military judge or CA, provided they did not abuse their discretion. R.C.M. 707 (c) and 707(c)(1), Discussion. See also, *United States v. Lazauskas*, 62 M.J. 39, 41-42 (C.A.A.F. 2005). We give substantial deference to the findings of fact made by the military judge and will reverse those findings only if they are clearly erroneous. We review questions of law *de novo*. We have reviewed the military judge's chronology of events and, finding no clear error, adopt them as our own.

The original charges against the appellant were preferred on 23 February 2005. On 24 March 2005, the appellant ostensibly waived his right to an Article 32 hearing through counsel.⁴ On 21 April 2005, the CA, believing the Article 32 investigation was properly waived, referred the charges to a general court-martial. The appellant was arraigned on 12 May 2005. On 12 August 2005, the military judge ruled that the waiver of the Article 32 was not valid as it was not signed by the appellant. Appellate Exhibit I at 29. The military judge also explained to the appellant that by moving for an Article 32 hearing, the defense was waiving any speedy trial issues. *Id.* at 30. He further ruled that the issue was not jurisdictional and the case was still properly referred. *Id.* The Article 32 investigation was completed on 15 September 2005 with one additional charge preferred.

On 4 November 2005, a new military judge refused to arraign the appellant on the original charges ruling that they were not,

⁴ The e-mail stated: "GySgt Roberts, through counsel, hereby waives his Article 32 investigation. I will execute a signed waiver and send it to you directly. Have a great day." The e-mail was signed by Capt Bartnicki. The signed waiver was never executed.

in fact, properly referred as the previous military judge had indicated. On 8 November 2005, the CA signed an excludable delay letter, excluding the period from 12 August 2005 until 8 November 2005 for speedy trial purposes. AE III at 54. On 17 November 2005, the appellant was arraigned anew on all charges.

At trial the new military judge ruled that the period of time from the original arraignment on 12 August 2005 through 4 November 2005, the date of the new military judge's ruling, was excludable from the R.C.M. 707 calculation. The military judge reasoned that the Government had reasonably relied on the 12 August 2005 ruling by the first military judge that it was not necessary to re-refer the charges and should not be responsible for that period of delay. He further reasoned that the cutoff date was 4 November 2005 when the Government was put on notice that a new referral was needed.

In effect, the military judge's ruling excluded approximately 176 days. Exclusion of the 176 days reduces the delay to less than the 120 days provided for in the Rule. Accepting the military judge's factual chronology of events, our own *de novo* review leads us to conclude that the military judge did not abuse his discretion when he excluded the 176 days from his speedy trial calculation. While the Government was responsible for keeping the case moving toward resolution, their reliance on a ruling by a military judge was in no way unreasonable. We find no R.C.M. 707 violation and no relief is warranted.

Conclusion

The appellant's remaining assignment of error is without merit. The findings and the approved sentence are affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court