

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

BEFORE

W.L. RITTER

E.S. WHITE

B.G. FILBERT

UNITED STATES

v.

**Byron H. SUBERO
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200601010

Decided 6 August 2007

Sentence adjudged 20 July 2005. Military Judge: J.D. Bauer. Staff Judge Advocate's Recommendation and Second Addendum: Col J.M. Sessoms, USMC. First Addendum: LtCol K.P. Mahne, USMC. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 4th MAW, New Orleans, LA.

CDR BREE A. ERMENTROUT, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a general court-martial composed of members with enlisted representation. Contrary to his pleas, the appellant was convicted of conspiracy and larceny. His offenses violated Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921. The members adjudged a sentence of confinement for three months, forfeiture of all pay and allowances, reduction to pay grade E-1, a fine of \$5000.00, an additional year of confinement if the fine was not paid,¹ and a bad-conduct discharge. The appellant was acquitted by the members of forgery and receiving stolen property through the U.S. Postal Service.

The appellant raises three assignments or error, claiming: (1) the Government failed to prove beyond a reasonable doubt that the appellant committed larceny; (2) the evidence was

¹ The appellant paid the \$5000.00 fine prior to the convening authority's action, making the additional year of confinement moot.

legally and factually insufficient to convict him of conspiracy; and (3) the appellant's right to speedy post-trial review was violated by unreasonable delay in post-trial processing.

We have carefully examined the record of trial, the appellant's three assignments of error, and the Government's response. We conclude that the findings and sentence approved by the convening authority are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. See Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

1. Facts

On 10 January 2003, the appellant deposited a check in the amount of \$78,780.82 into a money-market account at SunTrust Bank. The appellant was listed as the payee on the deposited check and the payor was Lighthouse Properties. The check referenced loan number 35405250-1. In December 2002, the check had been mailed by Sal Goldman Investments to Citibank as a monthly payment on a mortgage loan. At the time the check was mailed, Citibank was listed on the check as the payee. Citibank never received the check.

The appellant testified that he received the check from a street vendor in New York City known to the appellant only as "D." The appellant knew D through purchasing sports jerseys from him on the street in Queens, New York. The appellant testified he drove to Queens almost every other weekend to see his family, that he first met D in May or June 2001, and he saw and spoke with D almost every time he went to Queens to visit his family.

The appellant testified that, in December 2002, D asked the appellant if he would cash an inheritance check for him because D did not have two forms of identification. D told him the check was legitimate. On the appellant's next visit to New York, D gave the check to the appellant and told him he could have \$5000.00 as compensation for helping him and that the appellant was to return the rest of the money to D. The appellant was listed as the payee on the check. He testified that he examined the check and did not believe that it was forged or altered.

On January 22, 2003, after having deposited the check into a money-market account at SunTrust, the appellant obtained two

cashier's checks in the amount of \$20,000.00 each, transferred \$5,000.00 to his checking account, and withdrew \$5,600.00 in cash. Over the course of the next three months, the appellant made five separate withdrawals of cash from the account totaling more than \$25,000.00. The appellant also transferred a total of \$3,000.00 from the money-market account to his checking account in two separate transactions during this period.

The appellant testified that he obtained the two \$20,000.00 cashier's checks because he was limited to two checks. He claimed that over the next few months he withdrew money from the account and gave it to D because the bank did not always have sufficient money on hand. He claimed that he transferred \$3,000.00 to his checking account with the approval of D so the money could accrue interest. The appellant acknowledged, however, that the money-market account accrued more interest than his checking account.

In February 2004, the appellant was interviewed by agents from the Marine Corps Criminal Investigative Division (CID) and the U.S. Postal Service. He relayed to the investigators the story of how he obtained the check from D and stated he believed the check was legitimate. The appellant told investigators that he last saw D in January or February 2004, but testified at trial that he last saw D in May or June 2004. At the time of the offenses, the appellant was a twenty-five-year-old sergeant. He was described by witnesses as intelligent and a person who pays attention to detail.

2. Law

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 229, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

3. Analysis

The elements of the offense of conspiracy alleged in the specification under Charge I are:

(1) That the appellant entered into an agreement with an individual named "D" to commit larceny, an offense under the UCMJ, of check #5018 on account 6392614073, Lighthouse Properties, The Bank of New York;

(2) That while the agreement continued to exist and the appellant remained a party to the agreement, the appellant performed the overt act of cashing said check for the purpose of bringing about the object of the conspiracy.

MANUAL FOR COURTS MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 5.

The elements of the offense of larceny alleged in the specification under Charge II are:

(1) That the appellant wrongfully took or obtained U.S. currency from the possession of SunTrust Bank;

(2) That the currency belonged to the SunTrust Bank;

(3) That the currency was of a value of \$78,780.82;

(4) That the taking or obtaining by the appellant was with the intent permanently to deprive SunTrust Bank of the use and benefit of the currency or permanently to appropriate the currency for the use of the appellant or the use of someone other than the owner.

MCM, Part IV, ¶ 46.

The appellant claims the evidence was legally and factually insufficient to convict him because he acted under a mistaken belief the check he deposited was valid and that he had a right to the proceeds from the check. We disagree.

It is a defense that an accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring specific intent, the ignorance or mistake need only have existed in the mind of the accused. RULE FOR COURTS-MARTIAL 916(j)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); see *United States v. Binagar*, 55 M.J. 1, 5 (C.A.A.F. 2001). An

honest mistake of fact as to a service member's entitlement to take property is a defense to a charge of larceny. *Binegar*, 55 M.J. at 5; *United States v. Gillenwater*, 43 M.J. 10, 13 (C.A.A.F. 1995); *United States v. Turner*, 27 M.J. 217, 220 (C.M.A. 1988).

The members were instructed that they had to find that the appellant was not "under the mistaken belief that the check was unaltered or that [the appellant] had a superior right to the check or to the funds." Record at 380. The totality of the circumstances surrounding how the appellant came into possession of the check, as well as his actions following his deposit of the check, makes it evident the members properly rejected the mistake of fact defense for the larceny and conspiracy offenses.

First, the appellant's description of how he came to deposit the check was not credible. The appellant claimed that he agreed to deposit a sizeable inheritance check from D, a street vendor from New York whose real name the appellant did not know and who did not have any form of identification. For the relatively simple task of depositing the check, the appellant was to receive \$5,000.00. This remarkable explanation of how the appellant ended up depositing the altered and stolen check is directly contradicted by the check itself. The check does not indicate in any way that it is related to an inheritance by D or by any individual. The payor on the check is Lighthouse Properties and the check specifically references the fact that it is for a loan.

The central facet of the appellant's mistake of fact defense was his claim he received a one-time payment of \$5,000.00 for depositing the check and he gave the rest of the proceeds to D. This claim, which the appellant made to investigators and repeated at trial, was undermined by the appellant's own bank records and by common sense. The bank records established that on 23 January 2004, after obtaining two cashier's checks in the amount of \$20,000.00 each, and transferring \$5,000.00 to his checking account, the appellant withdrew \$5,600.00 in cash. Over the course of the next three months, the appellant made five separate withdrawals of cash from the account totaling more than \$25,000.00. The appellant also transferred \$3,000.00 from the money market account to his checking account in two separate transactions during this period. This series of transactions is clearly at odds with his claim that he only received \$5,000.00 from the proceeds of the altered check.

Contrary to his trial testimony, the appellant told investigators that he last saw D in January or February 2004. Yet, the appellant's cash withdrawals and money transfers from his money market account continued into March and April 2004. Thus, this admission by the appellant severely undermined his claim that he gave D all the money he withdrew and transferred to his checking account. Additionally, the appellant's explanation that he withdrew cash from the money market account in a piecemeal fashion over a three-month period because the bank did not always have sufficient money on hand defied common sense. Moreover, given that his money market account accrued higher interest than his checking account, the appellant's claim that he transferred \$3,000.00 to his checking account so the money could accrue more interest was likewise nonsensical.

Accordingly, we find the appellant's first two assignments of error to be without merit. Based on the entire record, we are convinced that a rational fact-finder could have found the appellant guilty of the conspiracy and larceny offenses. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to Charges I and II.

Post-Trial Delay

The appellant contends that the fourteen-month delay in the post-trial processing of his case warrants relief. We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *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)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

In the instant case, there was a delay of fourteen months from the date of sentencing to the date of docketing. We find this delay to be facially unreasonable, triggering a due process review.

We balance the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second

factor, the Government offers no excuse for the delay. With regard to the third factor, the appellant asserted his right to timely post-trial review in his clemency request to the convening authority. Finally, regarding the fourth factor, the appellant offers no claim or evidence of specific prejudice due to the delay in this case, and we find none. He asserts that prejudice should be presumed based on the length of delay involved in this case. This position is contrary to our superior court's guidance on post-trial delay and prejudice. See *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). Moreover, we find the delay in this case was not so egregious as to give rise to a presumption of prejudice. Thus, we find that no due process violation occurred due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ, even in the absence of actual prejudice. *Toohey*, 60 M.J. at 102; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). We conclude that the post-trial delay in this case does not affect the "findings and sentence [that] 'should be approved' based on all the facts and circumstances reflected in the record." *Tardif*, 57 M.J. at 224.

Thus, we find no merit in this assignment of error and decline to grant the requested relief.

Conclusion

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

Senior Judge RITTER and Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court