

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

**Before
E.E. GEISER, R.G. KELLY, J.H. BENNETT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRIAN J. CARBONE
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200800120
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 October 2007.

Military Judge: Maj Charles Hale, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Base, Camp Foster, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col S.D. Marchioro, USMC.

For Appellant: LT Gregory Manz, JAGC, USN.

For Appellee: CDR Paul LeBlanc, JAGC, USN.

13 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BENNETT, Judge:

A special court-martial with officer members convicted the appellant, consistent with his pleas, of wrongful appropriation, unlawful entry, and wearing an unauthorized award, in violation of Articles 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. 921, 930, and 934. He was found guilty, contrary to his pleas, of unauthorized absence, making a false official statement, two specifications of wrongful appropriation, larceny, unlawful entry, and impersonating a non-commissioned officer, in violation of Articles 86, 107, 121, 130, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, 921, 930, and 934. The appellant was sentenced to confinement for six months, reduction

to pay grade E-1, forfeiture of \$867.00 pay per month for six months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant declined to raise any assignments of error. We have carefully examined the record of trial and note that there was insufficient evidence to support the finding of guilty to Specification 2 of Charge III (false official statement). We will take appropriate action in our decretal paragraph. Following our action, we conclude that the findings and the sentence are now correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Specification 2 of Charge III alleged that the appellant made a false official statement to Builder Third Class (BU3) Jeff Tjader, U.S. Navy, to wit: "I'm on call to be Colonel Hardy's driver and was told to take the vehicle home over the weekend and clean it," or words to that effect. The entire evidence to support this specification consists of BU3 Tjader's answers to five questions posed by the prosecution during his testimony.

BU3 Tjader testified that he was on duty at the appellant's barracks on the day in question, and was properly attired. He indicated that he observed the appellant cleaning a government vehicle. BU3 Tjader testified that he asked the appellant what he was doing with a government vehicle, and that the appellant replied that "he was supposed to be on - - on call to be the driver for the colonel." No colonel was identified, and no statements were made regarding taking the vehicle home to clean.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Art. 66(c), UCMJ. 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, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

On the basis of the record before us and considering the evidence in the light most favorable to the Government, no reasonable factfinder could have found all the essential elements of this offense beyond a reasonable doubt. *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)(citing *Jackson*, 443 U.S. at 319). Likewise, we too are convinced of the appellant is not guilty of this offense beyond a reasonable doubt. The testimony of BU3 Tjader constitutes a fatal material variance between the statement alleged and the statement proved.

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We are satisfied that the adjudged and approved sentence is no greater than that which would have been imposed had no error occurred. We further find the approved sentence to be appropriate.

Conclusion

Accordingly, the findings of guilty as to Specification 2 of Charge III is set aside and Charge III is dismissed. The remaining findings are affirmed. The approved sentence is affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court