

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

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CHRISTOPHER L. HENDRICKS
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 200701009
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 21 August 2007.

Military Judge: CDR Mario DeOliveira, JAGC, USN.

Convening Authority: Commanding Officer, Aviation
Maintenance Squadron One, Marine Aviation Training Support
Group-21, Pensacola, FL.

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

For Appellant: LT Anthony Yim, JAGC, USN.

For Appellee: Maj Tai Le, USMC.

16 September 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

This case is before the court on appeal under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866. The case was originally submitted on its merits, but after reviewing the record of trial, the court specified the issue of whether the appellant's guilty plea to obstruction of justice was provident where the appellant destroyed contraband to prevent its discovery by a health and comfort inspection, but the Government did not know of the contraband.

After considering the record of trial and the parties' briefs on the specified issue, we conclude the appellant's plea to obstruction of justice was improvident, as the conduct he described during the providence inquiry amounts to mere concealment of his misconduct, and not to obstruction of justice. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

A. Procedural posture

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use of cocaine on divers occasions, wrongful use of marijuana on divers occasions, wrongful introduction of cocaine onto an installation under the control of the armed forces on divers occasions, and obstruction of justice, in violation of Articles 112a and 134, UCMJ. He was sentenced to seven months confinement, reduction to pay grade E-1, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended all confinement in excess of four months for 12 months from the date of his action.

B. Factual background

On 19 June 2007, the appellant, who lived in the barracks, heard the Staff Duty Officer tell the Marines in the next room that there would be a health and comfort inspection that day. Fearing the inspectors would discover the marijuana in his room, the appellant took the marijuana to another Marine's room and flushed it down the toilet. Some of the marijuana, however, was left on the toilet bowl rim, ultimately leading authorities to discover what the appellant had done.

During the providence inquiry, the appellant and the military judge had the following colloquy:

MJ: . . . [Y]ou said that there was no investigation pending, but you did believe that, *had you been caught with the drugs*, there would have been a case filed against you?

ACC: Yes, sir.

MJ: And how did you believe this?

ACC: That if I had been caught with an illegal substance that I would have been taken into

custody and later went to court for the crime that I have committed.

MJ: And again, what did you think might happen as a result of such an investigation?

ACC: A more harsh punishment, sir.

MJ: And again, what was the purpose of you flushing the drugs?

ACC: To impede an investigation.

MJ: And did you intentionally -- excuse me, did you specifically intend to impede the due administration of justice?

ACC: Yes, sir.

Record at 41-42 (emphasis added).

II. DISCUSSION

A. Principles of Law

Our superior court recently restated the standard of review for a guilty plea.

[W]e review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo*. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.

United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008).

With that standard in mind, we now examine the law related to obstruction of justice. Obstruction of justice requires that: (1) the accused wrongfully did a certain act, (2) in the case of a person against whom the accused had reason to believe there were or would be criminal proceedings pending, (3) with the intent to influence, impede, or otherwise obstruct the due administration of justice, and (4) that under the circumstances, the conduct was to the prejudice of good order and discipline in, or of a nature to bring discredit upon, the armed forces. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 96b.

"[T]he gravamen of the offense is the corruption of the "due administration" of the processes of justice and not simply the frustration of justice in the abstract sense.'" *United States v. Turner*, 33 M.J. 40, 43 (C.M.A. 1991)(quoting *United States v. Asfeld*, 30 M.J. 917, 926 (A.C.M.R. 1990)(emphasis added)).

An accused may obstruct justice even if there are neither charges pending, nor an investigation already underway. *United States v. Finsel*, 36 M.J. 441, 443 (C.M.A. 1993); *United States v. Athey*, 34 M.J. 44, 48 (C.M.A. 1992); *United States v. Guerrero*, 28 M.J. 223, 225 (C.M.A. 1989); *United States v. Culbertson*, 65 M.J. 587, 591 (N.M.Ct.Crim.App. 2007). The law simply requires that, at the time of the alleged obstruction, the accused have "reason to believe there were or would be criminal proceedings pending" against himself or some other person." *Athey*, 34 M.J. at 48 (emphasis in original)(citing ¶ 96b(2), MCM and *Guerrero*, 28 M.J. at 225).

On the other hand, mere concealment of one's misconduct is not obstruction of justice. *United States v. Lennette*, 41 M.J. 488, 490 (C.A.A.F. 1995); *Finsel*, 36 M.J. at 443; *Turner*, 33 M.J. at 42. Nor is the mere realization that one's misconduct, if revealed, might result in criminal prosecution enough to give one reason to believe there would be criminal proceedings pending. *Athey*, 34 M.J. at 49.

It can be difficult, of course, to distinguish "whether an act was taken as an effort by the accused to avoid detection [concealment], or whether it was taken in an effort to corrupt the due administration of the processes of justice [obstruction]." *Lennette*, 41 M.J. at 490. To make this distinction, the court must consider, on a case-by-case basis, "the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice." *Id.* (quoting *Finsel*, 36 M.J. at 443). We shall call this distinction the "concealment-obstruction dichotomy."

B. Concealment-Obstruction Dichotomy

Our superior court's decisions on the concealment-obstruction dichotomy -- which we will examine below -- divide into two categories: (1) those in which the appellant believed the authorities knew, or would inevitably learn, information that would lead to a criminal investigation or charges, i.e. where the Government was "on the scent," so to speak; and (2)

those in which the appellant believed the authorities did not know, or would not inevitably learn, information that would lead to a criminal investigation or charges. In those cases falling into the first category, our superior court has found obstruction of justice, whereas in those cases falling into the second category, the court has found the appellant's conduct to be mere concealment, not amounting to obstruction of justice.

1. Authorities "on the scent"

In *United States v. Barner*, 56 M.J. 131 (C.A.A.F. 2001), the appellant, a drill instructor (DI), assaulted a recruit, who then reported it to another DI. When that DI informed Barner of the report, Barner attempted to convince the recruit not to pursue her allegation. At the time, Barner knew his misconduct had been reported to someone in authority, and believed a criminal investigation would result. *Barner*, 56 M.J. at 135-36.

In *Lennette*, the appellant, who worked in his unit's personnel section, stole blank armed forces identification cards. His co-conspirator then falsified an identification card from one of the blanks, and, with Lennette, went to a bank where he attempted to use the false identification card to negotiate a fraudulent check. The co-conspirator, however, was caught in the act, as Lennette watched. Lennette then left the bank and destroyed the remaining blank identification cards in his possession. At the time he did so, Lennette knew the authorities were investigating his crime. *Lennette*, 41 M.J. at 490.

In *Finsel*, the appellant lost a pistol on loan from a superior, for which he was accountable, in a Panamanian brothel during Operation JUST CAUSE. He then staged a fire-fight and falsely told authorities he lost the pistol during the fire-fight. At the time Finsel staged the fire-fight, authorities had not yet learned of the pistol's loss, but Finsel nevertheless had reason to believe the authorities would inevitably learn of the pistol's loss when he returned to base and was unable to turn it in, and then investigate its loss. *Finsel*, 36 M.J. at 444.

In *Guerrero*, the appellant struck pedestrians with his car, then told his passengers to lie to military police. At the time, he knew he had hit pedestrians, and "believed some law enforcement official . . . would be investigating his actions." *Guerrero*, 28 M.J. at 225. While military authorities had not yet learned of Guerrero's hit and run at the time he told his

passengers to lie (and therefore had not yet begun an investigation), it was inevitable the authorities would learn of the hit and run, and then investigate.

2. Authorities not "on the scent"

In *Turner*, the appellant was required to submit a urine specimen as part of a random urinalysis inspection. Turner, however, feared the analysis of her urine would reveal her illegal drug use. Consequently, she attempted to substitute toilet water for urine in her specimen bottle. Our superior court held that Turner "merely sought to preclude discovery of her recent drug use; such action does not support an obstruction of justice charge." *Turner*, 33 M.J. at 43. At the time Turner attempted to submit the adulterated specimen, no one in authority knew of her misconduct (as was the case in *Barner and Lennette*) or of facts that would have inevitably led to a criminal investigation (as was the case in *Guerrero and Finsel*).

Likewise, in *Athey*, the appellant told a subordinate, with whom he had an inappropriate relationship, to lie to authorities investigating a different, but related, matter if she were asked about their relationship. At the time, Athey had no reason to believe authorities knew about the relationship, though he realized that, if his misconduct were revealed, he might be prosecuted. That realization, however, was insufficient to render his conduct obstruction of justice, where he did not believe the authorities then had, or would inevitably learn, information that would result in a criminal investigation. *Athey*, 34 M.J. at 49.¹

¹ Precedents of the service courts of criminal appeals also easily divide into these two categories. Compare *Culbertson*, 65 M.J. at 591 (obstruction found where appellant, who asked witness to illicit sexual relations to lie, clearly "was aware that one or more persons in authority had been apprised of his misconduct"); *United States v. Jenkins*, 48 M.J. 594 (Army Ct.Crim.App. 1998) (obstruction found where appellant lied to police investigating allegation of spousal abuse) and *United States v. Kawai*, 2007 CCA LEXIS 474 at 7-8 (A.F.Ct.Crim.App. 2 Oct 2007)(obstruction found where the appellant slit wrists on corpse of woman he had murdered to make it appear she committed suicide because he knew the body would be quickly discovered, a criminal investigation would ensue, and he would likely be identified as one of the last people to be seen with the victim), *aff'd*, ___ M.J. ___, 2008 CAAF LEXIS 781 (C.A.A.F. June 24, 2008)(summary disposition) with *Asfeld*, 30 M.J. at 917 (no obstruction where appellant asked recipient of his obscene phone call not to report him immediately upon her indication that she recognized his voice) and *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989)(no obstruction where the appellant not aware of any investigation or official knowledge of his illicit relationship at time he tells paramour not to tell anyone about the relationship).

3. Applying the precedents to the instant case

In light of these precedents, we conclude the appellant's conduct in the case *sub judice* amounts merely to an effort to avoid detection. At the time the appellant flushed the marijuana down the toilet, the authorities did not know he possessed it, nor were they "on the scent," as in *Guerrero* and *Finsel*. In *Guerrero* and *Finsel*, while the Government did not yet know of the appellants' misconduct at the time of the alleged obstructions, events had occurred² that would inevitably come to the Government's attention and cause it to launch an investigation. In the instant case, the providence inquiry contains no hint that, at the time of the alleged obstruction, the Government in any way suspected the appellant possessed contraband drugs, or even that there were contraband drugs present in the barracks.

Rather, as in *Turner*, where the appellant submitted an adulterated urine specimen to avoid detection of her illegal drug use, no "process of justice" was underway at the time of the alleged obstruction to be corrupted. Rather, the appellant's conduct simply frustrated justice in the abstract, and such conduct is not obstruction of justice. On these facts, then, the appellant did not "have reason to believe there was or would be criminal proceedings pending," nor the intent to corrupt the due administration of the processes of justice.

Finally, we recognize that, during the providence inquiry, the appellant "admitted" that he believed criminal proceedings would be pending, and intended to impede the due administration of justice. Record at 41-42. Those admissions, however, are conclusory and resulted from his misunderstanding of the law. The providence inquiry reveals the reason the appellant believed criminal proceedings *would be* pending against him was because he believed that, *if he were caught* with the marijuana during the inspection, he would be prosecuted. *Id.* at 41. The appellant clearly stated that, at the time he flushed the drugs, no investigation was pending. *Id.* As our superior court held in *Finsel*, the appellant's mere realization that his misconduct, if revealed, might result in criminal prosecution is not reason to believe there *would be* criminal proceedings pending. Further, while the appellant said he flushed the drugs "to impede an investigation," in context, he meant that he flushed the drugs to impede their detection, and thereby avoid an investigation. *Id.*

² A hit and run in *Guerrero*, and the loss of a government-issued sidearm in *Finsel*.

Accordingly, will set aside the findings of guilty to, and dismiss, this charge and specification.

C. Sentence Reassessment

Having decided that we must dismiss the obstruction of justice charge, we must reassess the appellant's sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after carefully considering the entire record, we are satisfied beyond a reasonable doubt that, if error had not occurred, the court-martial would have adjudged a sentence no less than confinement for five months, reduction to pay grade E-1, and a bad-conduct discharge. We are further satisfied that such a sentence is appropriate to this offender and these offenses. Finally, we note that our corrective action does not create a dramatic change in the sentencing landscape of the appellant's court-martial. See *United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006).

III. CONCLUSION

The findings of guilty to Charge III, and the sole specification thereunder, are set aside, and Charge III and its specification are dismissed. The remaining findings of guilty are affirmed. So much of the approved sentence as extends to confinement for five months, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge WHITE participated in the decision of this case prior to detaching from the court.