

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

**Before
E.E. GEISER, R.G. KELLY, L.T. BOOKER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RENICO A. SMITH
PERSONNEL SPECIALIST SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 200800256
GENERAL COURT-MARTIAL**

Sentence Adjudged: 22 December 2007.

Military Judge: CDR Robert Redcliff, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: CDR N.A. Hagerty-Ford, JAGC, USN.

For Appellant: LT Heather Cassidy, JAGC, USN.

For Appellee: LT Elliot Oxman, JAGC, USN.

9 December 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BOOKER, Judge:

Officer and enlisted members sitting as a general court-martial convicted the appellant, contrary to his pleas, of making three false official statements and stealing \$108,614.00 in military property. The approved sentence extended to confinement for a year, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant, a personnel specialist with training as a disbursing clerk and experience working in a personnel office in San Diego, claimed to have married AB in November 1999. He subsequently claimed her as his dependent wife in his personnel records. The couple never shared quarters. As early as 1999 and

no later than October 2001, the appellant claimed that AB was living in Los Angeles, California, and that he was therefore entitled to a basic allowance for housing payment based on her location. Her location in Los Angeles also entitled the appellant to a continental United States cost-of-living allowance ("CONUS COLA"). During the period alleged for the larceny of military property, the appellant served in both San Diego and the Kingdom of Bahrain, his latter service entitling him further to a family separation allowance ("FSA").

The representations that the appellant made regarding AB's residence are at odds with the testimony that she provided and with the testimony of the appellant's aunt, who owned the house identified by the appellant as his spouse's location. In their finding of guilty on the larceny and the official statement offenses, the members clearly rejected any alleged honest belief on the part of the appellant that he was married to AB. The members determined that the actual amount of money stolen was different from that alleged and they entered an appropriately excepted and substituted finding.

The appellant assigns seven errors for our consideration.¹ We find partial merit in one of them and will take corrective action in our decretal paragraph.

Ineffective Assistance in the Post-Trial Arena

We dispense summarily with the appellant's first assignment of error, namely, that his defense counsel was ineffective for failing (a) to advise the appellant of his post-trial and appellate rights and (b) to present clemency matters to the convening authority (CA) after trial. The record of trial was concededly missing the clemency petition when it arrived at this court, but the Government has procured the clemency petition and we are satisfied, based on the CA's action, that it was presented and properly considered. Further, Appellate Exhibits XCI and XCII and the military judge's colloquy with the appellant, Record at 835, satisfy us that the appellant was properly advised of his post-trial and appellate rights.

Instructional Error

We reject the appellant's assertion that the military judge failed properly to advise the members of the elements of the larceny offense. A military judge is required to advise the members, in open court, of all elements and applicable

¹ I: Ineffective assistance of counsel in the post-trial process; II: Instructional error; III: Insufficient evidence of larceny; IV: Ineffective assistance of counsel regarding witnesses; V: Error in determining a witness unavailable and admitting deposition; VI: Error in allowing three members to sit; VII: Error in duration of session. Assignments of Error III through VII were personally asserted by the appellant. See *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

definitions, and of any defenses reasonably raised by the evidence. RULE FOR COURTS-MARTIAL 920(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Failure to request additional instructions or to object to proposed instructions waives any error except plain error. R.C.M. 920(f).

The elements of larceny are:

That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

That the property belonged to a certain person;

That the property was of a certain value, or of some value;

That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner; and

That the property was military property.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 46b(1).

In his instructions to the members, provided orally on the record and physically in the form of an appellate exhibit, the military judge informed the members of all these elements and the applicable definitions. He further gave detailed instructions on the mistaken claim of right defense raised by the defense. Record at 695-700; Appellate Exhibit LXXXIV. There are no recorded objections to the instructions or requests for additional instructions.

There being the potential for waiver, we next examine the military judge's instructions for plain error. Plain error is that error which is plain or obvious and which harms the appellant. *See, e.g., United States v. Kahmann*, 59 M.J. 309, 313 (C.A.A.F. 2004). As noted above, the military judge's oral and written instructions to the members were comprehensive and tailored to the facts of this case. There being no error, our application of the plain-error analysis is complete.

Ineffective Assistance of Counsel Regarding Witnesses

We summarily reject the appellant's assertion that his defense counsel was ineffective for not calling three witnesses identified by the appellant. The appellant's self-serving affidavit makes mention of three persons who he claims were aware of his difficulties in locating AB and his requests to have his housing allowances stopped. His affidavit does not reveal the time at which these witnesses allegedly became aware of the facts, nor does it provide statements from the witnesses themselves.

Judicial Error Regarding Witness Availability

We reject the appellant's assertion that the military judge abused his discretion by permitting testimony via deposition of a Government witness. A military judge enjoys discretion in the mode and order of presentation of evidence, MILITARY RULE OF EVIDENCE 611, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), and in determining the availability of evidence he is not bound by the formal rules of evidence, except for privileges. Mil. R. Evid. 104(a). The appellant was afforded confrontation of the deponent, his disabled aunt, and he, through his counsel, stipulated to the authenticity of the videotape and consented to its publication. The appellant waived this error by not interposing a timely objection at trial; further, based on the proceedings held to grant the deposition and the proceedings surrounding its introduction, we conclude that any error was invited by the appellant and we therefore deny any relief. See, e.g., *United States v. Anderson*, 51 M.J. 145, 153 (C.A.A.F. 1999)(citations omitted).

Judicial Error With Respect to Members and Implied Bias

The appellant asserts that the military judge erred by not removing, *sua sponte*, three members of the venire who had expressed personal views that they would testify if they believed themselves falsely accused of a crime. There was no challenge to any of the three after voir dire had been completed, so once again we turn to a plain error consideration.

A military judge has inherent authority to remove a court-martial member even absent objection from the parties when the interests of justice require. See, e.g., *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). In *Strand*, one of the panel members revealed during voir dire that he was the son of the acting CA. Both parties and the military judge (coincidentally, the same military judge as in this case) interviewed the member, and neither party challenged him for cause. Neither party used its peremptory challenge against the member. *Id.* at 456-57.

As was the case in *Strand*, the parties here were aware of the salient facts regarding the three members whose participation the appellant now challenges. Also as in *Strand*, the first challenge to these members' participation is raised on appeal. The members' responses to the parties' and to the military judge's questions provide "facts of clarity and consequence" useful in determining implied bias against an accused who might not take the stand in his own defense. All three members responded that theirs was a personal choice to testify; that all would be open to the advice of their counsel not to; and that the appellant's decision not to testify would not be used against him in any way. Record at 144, 148-49, 155-57.

As noted above, neither party challenged any of the three members for cause. The military judge did grant two other challenges for cause employing an implied-bias analysis. *Id.* at 199. Based on this record, we are satisfied that the military judge did not commit error, plain or otherwise, in failing *sua sponte* to excuse the three panel members whose participation is challenged for the first time on appeal.

Judicial Error in Allowing Extended Sessions of Court

We dispense summarily with the appellant's assignment of error that the military judge abused his discretion by allowing the court-martial to proceed into the early morning hours of 22 December 2007. The members were polled before beginning pre-sentencing proceedings as to their preference, and they desired to continue with the session. Neither party interposed any objection during the multiple Article 39(a), UCMJ, sessions between findings and sentencing. The military judge did not abuse his discretion. R.C.M. 801(a).

Insufficiency of Proof of Larceny of \$108,614.00

We turn now to the assignment of error, personally raised by the appellant, which in our view merits relief. Although it is not clear due to the summary nature of the assignment, we presume that the appellant challenges both the factual and the legal sufficiency of the finding. We will therefore address both prongs.

The test for factual sufficiency is whether, weighing all the evidence in the record of trial, and taking into account the fact that we have not observed the witnesses ourselves, we are nonetheless convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency, on the other hand, is whether, considering the evidence in the light most favorable to the prosecution, any reasonable factfinder could have found all the essential elements beyond a reasonable doubt. *Id.* at 324 (citing *Jackson V. Virginia*, 443 U.S. 307, 319 (1979)).

We assume that a "reasonable" factfinder is one who has been properly instructed on the law to be applied to a particular case, and our resolution of the second assignment of error leads to our conclusion that the panel of members who convicted the appellant was comprised of "reasonable" members. We are satisfied that these reasonable members determined that the appellant wrongfully withheld or obtained certain property, namely, housing, separation, and cost-of-living allowances, which was military property; that he did so through various fraudulent methods; that he did so with an intent permanently to defraud; and that this property belonged to the United States.

Where we have difficulty with the findings is on the amount. We assume, based on the findings of the court-martial, that the members rejected the appellant's claim of a mistaken belief that he was married. In performing our own independent review of the record, we, too, are satisfied that the appellant was not married, nor mistakenly believed himself married, to AB.

The proof submitted to the members included the appellant's leave and earning statements for approximately five years; judicial notice of several allowance amounts; the testimony of an expert on provision of allowances; the appellant's admissions to a Government investigator; the testimony of the appellant's "spouse"; and the testimony of the appellant's aunt, whose home was listed as that of his spouse. Unfortunately, the housing allowance amounts offered and judicially noted do not allow meaningful comparisons; rates for a number of years are missing, and the rates that are supplied invite a comparison between the rate for a single service member in a particular pay grade in one area and the rate for a married service member in the same pay grade in a different area. There was further considerable question whether the appellant would have been entitled to housing allowances if, as a single junior sailor, he elected to live off-base in San Diego.

We are convinced beyond a reasonable doubt, based on the appellant's statements, the testimony of the appellant's aunt, and the appellant's pay records, that he was not entitled to a CONUS COLA (a total of \$6,830.07) relative to Los Angeles, California, from the period of May 2002 through June 2006. His receipt of the FSA (a total of \$28,697.06) for the period beginning October 2001 and ending December 2005 was also larcenous.

Exercising our authority under Article 66, therefore, we modify the guilty finding of the larceny to reflect the amount of \$35,527.13 instead of the \$108,614.00 found by the members. The lower amount has been established by legal and competent evidence beyond a reasonable doubt.

Sentencing Matters

Having modified the guilty findings, we now must reassess the sentence. *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998). Considering the appellant's proven knowledge of the disbursing and personnel systems, considering the length of time over which the larceny occurred, and considering that the appellant took affirmative acts separated by many years to keep the fraud alive, we are satisfied that members would have sentenced him at least to confinement for nine months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. We therefore will approve a sentence of that magnitude.

Conclusion

The findings of guilty to the three specifications of Charge I and to Charge I itself are affirmed. The finding of guilty to the specification of Charge II is modified to read as follows:

Guilty, except for the amount "\$108,614.00," substituting therefor the amount "\$35,527.13"; of the excepted figures Not Guilty, of the substituted figures Guilty, of the Specification as excepted and substituted Guilty.

The modified guilty finding to the specification of Charge II and to Charge II itself is affirmed. Only so much of the sentence as extends to confinement for nine months, forfeiture of all pay and allowances, reduction to pay grade E-1, and discharge from the Naval Service with a bad-conduct discharge is affirmed.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court