

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

**Before
W.L. RITTER, E.S. WHITE, B.G. FILBERT
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**HERLLIEN TORRESCASTREJON
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700459
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2006.

Military Judge: Col William Rapp, USMC.

Convening Authority: Commanding Officer, Headquarters and Service Battalion, Marine Corps Recruit Depot, San Diego, CA.

Staff Judge Advocate's Recommendation: Col B.A. White, USMC.

For Appellant: CAPT Patricia Leonard, JAGC, USN.

For Appellee: CAPT Frederic Matthews, JAGC, USN;
LT David Lee, JAGC, USN

22 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a special court-martial composed of a military judge. Pursuant to his pleas, the appellant was convicted of four specifications of making a false official statement and three specifications of making a false claim. His offenses violated Articles 107 and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 932. The military judge adjudged a sentence of confinement for sixty days, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant claims the military judge's providence inquiry did not establish his guilt to making a false claim as alleged in Specification 1 of Charge II. We have carefully examined the record of trial, the appellant's assignment of error, and the Government's response. We find the appellant's guilty plea to making a false claim under Specification 1 of Charge II was improvident and we set aside the guilty finding as to that specification. After taking corrective action in our decretal paragraph with respect to this offense and reassessing the sentence, we conclude that the remaining findings and the reassessed sentence are 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.

Improvident Plea

Before accepting a guilty plea, the military judge must find there is a sufficient factual basis to satisfy each and every element of the pled offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

The appellant contends his guilty plea to making a false claim between 18 November 2003 and 21 May 2004 for Basic Allowance for Housing at the with dependents rate (BAH-D) as alleged in Specification 1 of Charge II was improvident. The appellant argues the inquiry by the military judge was insufficient to establish his guilt to this offense because the appellant testified he did not know he was divorced until he reported to a new duty station in Hawaii in May 2004. We find merit in the appellant's argument.

The offense of making a false claim as alleged in Specification 1 of Charge II has three elements:

(a) That between 18 November 2003 and 21 May 2004 the appellant made a claim for BAH-D against the United States;

(b) That the claim was false or fraudulent in that the appellant was not entitled to BAH-D; and

(c) That the appellant then knew that the claim was false or fraudulent.

MANUAL FOR COURTS MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 58b(1)(a).

The providence inquiry for Specifications 1 through 3 of Charge II established the appellant claimed and received BAH-D from 18 November 2003 to 12 May 2006. The appellant was not entitled to BAH-D during this period because he was actually divorced on 18 November 2003. The appellant testified he did not know he was divorced during the period alleged in Specification 1 of Charge II (18 November 2003 to 21 May 2004) and did not learn his divorce was final until shortly after he checked into his new command in Hawaii in May 2004. The appellant never advised his new command in Hawaii of his divorce and thereafter falsely represented to the military he was married so he could receive BAH-D.

The Government argues the providence of the appellant's plea to making a false claim is established by *United States v. Ward*, 33 C.M.R. 215, 221 (C.M.A. 1963). We disagree. In *Ward*, the accused was asked by a pay clerk to produce a jump manifest to document his entitlement to jump pay for the previous quarter, which pay he had already received. A jump manifest was required to support a jump pay claim, but was not present in the accused's pay records. The accused subsequently produced a fraudulent manifest. Our superior court viewed the production of the false jump manifest as "making" a claim, because the document was requested by the pay clerk to perfect *Ward's* claim to the already paid jump pay. As a result, the false claim was "made" on the date the accused produced the false manifest. *Ward*, 33 C.M.R. at 221. Here, the appellant was not asked to perfect his claim to prior BAH-D payments, and he specifically testified he did not know his marital status had changed during the period alleged in the specification. Accordingly, we find the plea of guilty to Specification 1 of Charge II improvident.

Conclusion

The finding of guilty to Specification 1 of Charge II is set aside and the specification is dismissed. We affirm the remaining findings of guilty. We have reassessed the sentence in accordance with *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). Taking into account the appellant's conduct in committing the remaining offenses to which he providently pled guilty, we are satisfied that the military judge would have adjudged no lesser punishment for the remaining charges and specifications. Accordingly, we affirm the sentence approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court

Former Chief Judge Ritter participated in the decision of this case prior to commencing terminal leave.