

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**CORY S. EDWARDS
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900650
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 September 2009.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, 3d Battalion, 7th Marine Regiment, 1st Marine Division (Rein), FMF, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

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

For Appellant: CDR Thomas Belsky, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

27 May 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification each of unauthorized absence and false official statement, violations respectively of Articles 86 and 107, Uniform Code of Military Justice, 10. U.S.C. §§ 886 and 907. The convening authority (CA) approved the adjudged sentence of confinement for 6 months, forfeiture of \$900.00 pay per month for 6 months, and a bad-conduct discharge.

The appellant's sole assignment of error alleges that his guilty plea to the specification under Charge II, for false official statement, is improvident because there is no evidence that appellant's statement was "official." We have carefully considered the record of trial and the parties' briefs, and we find merit in the assigned error. We additionally have identified an error in recording the results of the court-martial that we will order corrected.

Factual Background

The appellant was attached to the 3d Battalion, 7th Marine Regiment, at Twentynine Palms, California, and he failed to return to work after a weekend liberty period in January 2009. Several months later, Officer Olivo, a Texas police officer, stopped the appellant while driving in Rockwall, TX, for having a broken headlight. Record at 16. Officer Olivo asked the appellant for identification, but the appellant did not have any. *Id.* at 20. Officer Olivo then asked the appellant for his name, and the appellant replied "Corbin Phillips". *Id.* at 19-20. When asked by the military judge why he responded that way, the appellant said that he did not want the officer to find out that he was "currently a UA Marine." *Id.* at 18. It appears that Officer Olivo subsequently became concerned about a marijuana pipe in the appellant's car, detaining the appellant and ultimately discovering his unauthorized absence status through a records check.

Discussion

This case presents a mixed question of law and fact; that is, whether a factual basis exists to conclude that the appellant's false statement was official, under Article 107, UCMJ. See *United States v. Holmes*, 65 M.J. 684, 687 (N.M.Ct.Crim.App. 2007). We thus review the military judge's decision to accept the appellant's guilty plea to that offense for an abuse of discretion. *Id.* See generally *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

A statement is official if that statement is "made in the line of duty." *United States v. Tefteau*, 58 M.J. 62, 68 (C.A.A.F. 2003). The critical issue is not whether the recipient of a statement is civilian or military, but whether the statement relates to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach. *United States v. Day*, 66 M.J. 172, 174 (C.A.A.F. 2008).

In *Day*, the appellant's false statements to civilian members of a military base's fire department were official because the firemen were charged with performing an on-base military function. *Id.* at 175. These firemen were responsible for the health and welfare of military personnel who lived on base and over which the command exercised responsibility. *Id.* Similar

false statements to off-base 911 dispatch operators, however, were not official in the absence of a nexus to official military functions. *Id.* at n.4.

The deciding factor for determining the officiality of a false statement is a tie between the basis for the questioning and the appellant's military duties and status. *Holmes*, 65 M.J. at 689. In *Holmes*, we found that the appellant's statements to both a U.S. Customs agent and a California Highway Patrolman (CHP) were not "official" for purposes of Article 107 because the basis for the questioning was enforcement of nonmilitary law unrelated to the appellant's or the questioners' military duties and status. *Id.* at 689-90. We did, however, acknowledge that statements to a Criminal Investigation Division (CID) agent involving the same set of circumstances (wrongful appropriation of a motor vehicle and a "joy ride" across the U.S. border with Mexico) were "official" as the subject of the inquiry -- a suspected violation of Article 121 -- was within the scope of the CID agent's responsibilities. *Id.* at 688.

In the case before us, Officer Olivo stopped and questioned the appellant pursuant to his civilian law enforcement duties, acting just as the Customs agent and the CHP had in *Holmes*. He was discharging his duties as a county police officer, patrolling and safeguarding the roads and highways of the Texas county where he was assigned and enforcing Texas law. Officer Olivo specifically pulled the appellant over for having a broken headlight. He was not acting at the behest of the armed forces.

We cannot tell from this record the exact sequence of events, but it appears that the appellant's false statement occurred before the officer learned of the deserter warrant. We also take this opportunity to mention that the DD 553 is not a command to law enforcement agencies to search for and apprehend deserters; rather, it is a grant of authority to do what might otherwise be outside the scope of a particular agency's duties, and it further grants a modest reward for collecting military absentees. See 10 U.S.C. § 956; see also Department of Defense Directive 1325.2 (2 Aug 2004). We might reach a different outcome in this case if Officer Olivo had detained the appellant with the specific purpose of executing the deserter warrant, but the record does not suggest that that was Officer Olivo's purpose at all. It is significant to our analysis, moreover, that the military judge rejected the appellant's attempt to plead guilty to an involuntary return to military control. Record at 18, 36. The military judge's action tells us that he, too, entertained doubt about Officer Olivo's purpose in stopping the appellant and his role in support of military operations. Unlike the case in *Day*, where the Airman's false statements were made to firemen charged with protecting military installations, the appellant's false statement here did not implicate or impair Officer Olivo's ability to perform any function in support of military operations because, on the record before us, we have no indication that

Officer Olivo was performing any such function when the appellant said his name was "Corbin Phillips".

To be sure, the Marine Corps has a substantial interest in the return of service members who are in an unauthorized absence status, but this military interest was not the subject of Officer Olivo's stop and investigation. The military interest is in the return of its service member, not the traffic infraction that was the basis of the questioning, and we thus have a substantial basis for setting aside the guilty finding.

Conclusion

The findings of guilty to Charge II and its specification are set aside and dismissed. The remaining findings are affirmed. Because of our action on the findings, we must determine whether we can reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). At this point we must also consider the error in the court-martial order (CMO) of 30 November 2009 in which the CA notes that the appellant was found guilty of an unauthorized absence terminated by apprehension. This statement is erroneous; see Record at 36. We presume that this error in the CMO stems from the erroneous information provided by both the results of trial prepared by the trial counsel and the staff judge advocate's recommendation (SJAR), the latter merely adopting by reference the faulty results of trial document.

In performing our function, we note that the appellant enlisted in the Marine Corps in June 2007. He was an unauthorized absentee for over 4 months in 2008, an absence terminated by apprehension, and received a court-martial sentence of 68 days for his offense. Prosecution Exhibit 3. His lost time and "dead time" from confinement, therefore, amounted to a little over 6 months during his first 18 months in the service. The appellant began his current unauthorized absence no more than 3 weeks after his release from confinement for the earlier conviction (taking into account his 58 days of pretrial confinement credit and his trial date of 22 December), and this absence consumed another 4 months. In the roughly 24 months since his enlistment, therefore, the appellant was unavailable for duty due to misconduct for approximately 11 months. His service record shows mediocre proficiency and conduct marks for his observed time.

We are confident that the military judge would have adjudged a sentence which would have included a bad-conduct discharge and at least 90 days of confinement. In view of the error in the CMO, in an abundance of caution, we affirm only so much of the sentence as extends to a bad-conduct discharge.

For the Court

R.H. TROIDL
Clerk of Court