

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

**Before  
F.D. MITCHELL, R.E. BEAL, P.H. MCCONNELL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DUSTIN D. HAMMOCK  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201000346  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 23 February 2010.  
**Military Judge:** CDR Thomas Fichter, JAGC, USN.  
**Convening Authority:** Commanding Officer, Headquarters and  
Service Battalion, Marine Corps Base, Quantico, VA.  
**Staff Judge Advocate's Recommendation:** Col S.C. Newman,  
USMC.  
**For Appellant:** CDR Howard Liberman, JAGC, USN.  
**For Appellee:** Mr. Brian Keller, Esq.

**7 October 2010**

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**OPINION OF THE COURT**  
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**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, consistent with his pleas, of unauthorized absence, failure to obey a lawful order, three specifications of larceny, and three specifications of burglary, in violation of Articles 86, 92, 121 and 129, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 921, and 929. The appellant was sentenced to confinement for 300 days and a bad-conduct discharge. The convening authority approved the adjudged sentence but suspended confinement in excess of 270 days in accordance with the pretrial agreement.

The appellant's case was submitted to this court without assignment of error. Upon review, we find that corrective action is necessary, which we will take in our decretal paragraph. Following our corrective action, we conclude that the findings and 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.

### **Larceny of Multiple Items**

Although not raised as error by the appellant, we find that the providence inquiry concerning Specifications 2 and 3 of Charge II supports only a single specification of larceny. The providence inquiry reveals that the appellant broke into the barracks room shared by Private First Class (PFC) P and PFC S, cut the locks off their respective lockers, and stole their personal property at substantially the same time. None of the parties at trial raised the issue, and the specifications were not merged for findings or for sentencing. The Manual for Courts-Martial specifically provides that "[w]hen a larceny of several articles is committed at substantially the same time and place, it is a single larceny . . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 46c(1)(h)(ii). Accordingly, the appellant is guilty of only one specification of larceny with respect to his theft of items taken from the barracks room of PFC P and PFC S. See *United States v. Harris*, 53 M.J. 514, 522 (N.M.Ct.Crim.App. 2000), *aff'd* 55 M.J. 433 (C.A.A.F. 2001); *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999).

### **Sentence Reassessment**

Having consolidated two of three specifications listed under Charge II, we conclude that there has not been a dramatic change in the penalty landscape. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. Accordingly, no further action is deemed necessary.

### **Execution of Punitive Discharge**

We also note that the convening authority approved the sentence, which included a bad-conduct discharge, and then stated, "In accordance with the UCMJ, Rules [for] Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed." Under Article 71(c)(1), UCMJ, a punitive discharge cannot be ordered executed until, after the completion of direct appellate review, there is a final judgment as to the legality of the proceedings. Thus, to the extent that

the convening authority's action purported to execute the bad-conduct discharge, it was a nullity that does not require correction. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

### **Conclusion**

Specification 2 of the Charge is amended to reflect that the appellant stole, in addition to the items delineated in the original specification, "a Dell laptop, a Nikon digital camera, and Ipod Nano, five(5) digital video discs (DVD's), and three(3) X-Box 360 video games, the property of Private First Class [S], U.S. Marine Corps." Specification 3 of the Charge is ordered dismissed. The remaining guilty findings, as modified herein, and the sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court