

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

**Before
C.L. REISMEIER, F.D. MITCHELL, D.O. VOLLENWEIDER
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRENT A. MICHAEL
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000164
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 2 November 2009.

Military Judge: LtCol Eugene Robinson, USMC.

Convening Authority: Commanding Officer, Instructor
Battalion, The Basic School, Training Command, Quantico,
VA.

Staff Judge Advocate's Recommendation: LtCol J.L. Gruter,
USMC.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

17 August 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as special court-martial convicted the appellant, pursuant to his pleas, of two specifications of larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to confinement for 180 days, to be reprimanded, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

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

our corrective action, we conclude that 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 1 and 2 of the Charge support only a single specification of larceny. These two specifications allege the larceny of a trailer upon which was loaded a car. The providence inquiry reveals that the appellant stole both these items from the same location and at the same time. He stole the car by using his truck to pull the trailer on which the car rested. 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 larceny with respect to his theft of the above-listed items. See *United States v. Harris*, 53 M.J. 514, 522 (N.M.Ct.Crim.App. 2000); *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999).¹

Execution of Punitive Discharge

We 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).

Sentence Reassessment

Having consolidated the two specifications to which the appellant pled guilty, we reassess the sentence. 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 with consolidation of the alleged

¹ Cf. *United States v. Martinezmaldonado*, 62 M.J. 697, 700 (N.M.Ct.Crim.App.2006) (larceny and wrongful appropriation, separated by short period of time.)

offenses into a single specification, the military judge would have adjudged a sentence no less than that approved by the convening authority in this case.

Conclusion

Specification 1 of the Charge is amended by modifying the listing of items stolen to reflect that the appellant stole, in addition to the car, "a vehicle trailer, California Registration Number 4DD7224, of a value of about \$3,600.00." Specification 2 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