

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

**Before
L.T. BOOKER, E.C. PRICE, P.D. KOVAC
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**THOMAS S. YOUNG III
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900614
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 20 February 2009.

Military Judge: LtCol Joseph Smith, USMC.

Convening Authority: Commanding Officer, 5th Battalion,
11th Marines, 1st Marine Division (Rein), FMF, Camp
Pendleton, CA.

Staff Judge Advocate's Recommendation: Col B.D. Landrum,
USMC.

For Appellant: CDR Matthew Schelp, JAGC, USN.

For Appellee: Mr. Brian Keller, Esq.

12 February 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 two specifications of unauthorized absence, five specifications of wrongful drug use, and one specification of wrongful appropriation, violations respectively of Articles 86, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 921. The convening authority approved only so much of the adjudged sentence as extended to confinement for eight months,

reduction to pay grade E-1, and a bad-conduct discharge from the U.S. Marine Corps.

This case was submitted without specific assignment of error. During our review, however, we have determined that the military judge did not secure an adequate factual basis to support the guilty plea to one of the specifications of drug abuse. We will set aside the guilty finding and dismiss the affected specification. We have determined the implications for sentencing, and after our action we are satisfied 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.

Discussion

The appellant was arraigned on, among other things, six specifications alleging wrongful drug use, and he entered guilty pleas to five of those specifications. Record at 10-12. The military judge properly explained the elements to the appellant. *Id.* at 44-45. The military judge and the appellant then discussed the facts that supported the appellant's pleas. *Id.* at 46-59. The appellant was alleged to have used cocaine, marijuana, and methamphetamine on or about 29 December 2007, but our review of the record reveals only discussions of marijuana use and methamphetamine use on that date. There had been earlier cocaine and heroin use, on or about 31 October, to which the appellant providently pleaded guilty, and the appellant made statements that could begin to establish a factual basis for cocaine use on or about 29 December, Record at 46, but beyond that the record does not provide a clear "basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense . . . to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Accordingly, because there is a substantial basis in fact for questioning the finding, we must set it aside. See *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Having set aside one of the guilty findings of drug use, we must determine whether to reassess the sentence or to return the record to the convening authority for further proceedings. See generally *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). If we are confident that there has not been a "dramatic change in the penalty landscape" and that a sentence would have been of at least the same magnitude, absent the trial error,

then we may properly reassess the sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(citations omitted).

The appellant was properly convicted of uses of multiple drugs on each of two occasions. He further absented himself for two lengthy periods without authority, and each of those absences was terminated by apprehension. The second of those periods of unauthorized absence was caused by his arrest and confinement by civilian authorities for violation of California's penal code, specifically multiple counts of burglary. He wrongfully appropriated another Marine's wallet and cash. We also note the testimony of the appellant's father and the contents of the appellant's unsworn statement. We are satisfied that a sentence of at least the severity as that awarded to the appellant would have been imposed had he been convicted of the four drug uses, not five, and the absences and wrongful appropriation to which he providently pleaded. See *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998).

Conclusion

The finding of guilty to Specification 3 of Charge III, as originally denominated on the charge sheet of 19 December 2008, is set aside and that specification is dismissed. The remaining findings of guilty and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court