

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

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

UNITED STATES OF AMERICA

v.

**JAMES R. BISHOP II
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201000464
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 22 April 2010.
Military Judge: CAPT D.J. Smith, JAGC, USN.
Convening Authority: Commanding Officer, Instructor
Battalion, The Basic School, Training Command, Quantico,
VA.
Staff Judge Advocate's Recommendation: LtCol J. Gruter,
USMC.
For Appellant: Capt Bow Bottomly, USMC.
For Appellee: LT Ritesh Srivastava, JAGC, USN.

13 September 2011

OPINION OF THE COURT ON RECONSIDERATION

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

BOOKER, Senior Judge:

We issued our original decision in this case on 28 June 2011 and set aside the appellant's conviction for conspiracy to sell stolen property, an alleged violation of Article 81, Uniform Code of Military Justice, 10 U.S.C. § 881. In a motion dated 27 July 2011, the United States requested *en banc* reconsideration of the panel decision. The appellant did not file a pleading in response to the Government's motion.

Having considered the Government's motion, the court denied the motion for *en banc* reconsideration, however the panel

withdraws our original opinion and substitutes this one for it. We stand by our original decision to set aside the appellant's conviction for conspiracy to sell stolen property, we affirm the remaining guilty findings, and we affirm the approved sentence.

To recap from our earlier decision, a military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of conspiracy to sell stolen property, larceny, and housebreaking, in violation of Articles 81, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 921, and 930. The convening authority (CA) approved the adjudged sentence of "time served,"¹ reduction to pay grade E-1, and a bad-conduct discharge from the service.

The appellant initially raised one assignment of error: that the military judge accepted his guilty plea to Charge I and its specification without ensuring that the appellant understood the offense to which he was pleading guilty. We subsequently specified an issue with regard to Charge I and its specification: whether the specification, which alleges a conspiracy to sell stolen property, states an offense. We have carefully considered the record of trial and the briefs submitted by counsel on the assigned error and specified issue. We conclude that the appellant's conviction of Charge I and its specification must be set aside because the specification fails to state an offense; accordingly, we need not address the appellant's assigned error. Following our corrective action, we conclude that there are no remaining errors that are materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Failure to State an Offense

There are two elements to conspiracy: an agreement to "commit an offense under this chapter" and an overt act to effect the object of the conspiracy. Art. 81, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 5b. For purposes of this appeal, we consider offenses under clauses 1 and 2 of the General Article, Article 134, to be offenses under the Code.

Ordinarily, an allegation of a conspiracy is sufficient if it alleges that the accused member agreed with another to commit a target offense and then some conspirator performed an overt act in furtherance of the conspiracy. The elements of the target offense need not be pleaded in the specification, but the target offense must be sufficiently identified and the agreement must have comprehended the target offense.

¹ While the appellant has not asserted error, and we find no prejudice, we question the form of the sentence announcement of "time served". We believe the better practice, consistent with instructions in a members case, is to state a period of restraint in terms of days, months, or years. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), App. 11.

The General Article has a paragraph devoted to disposition of stolen property. The President, exercising his "ability to suggest ways in which Article 134, UCMJ, might be charged," see *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010), has determined that receiving, buying, and concealing, but not selling,² known stolen property are ways in which the Article is violated. MCM, Part IV, ¶ 106. Consistent with long-standing practice, a specification alleging receipt, purchase, or concealment of known stolen property is sufficient, even if it does not allege that the act was prejudicial to good order and discipline or was of a nature to bring to discredit upon the armed forces. Compare *United States v. Herndon*, 4 C.M.R. 53, 55-57 (C.M.A. 1952) with *United States v. Marker*, 3 C.M.R. 127, 134 (C.M.A. 1952). Furthermore, when such an offense is the target offense of a conspiracy, it is not necessary to allege all the elements of the target offense in the conspiracy specification; citation to the general offense is sufficient.

On the other hand, when the specification alleges activity that is not recognized as "criminal," some theory of liability must be alleged. Cf. *United States v. Feola*, 420 U.S. 671, 694 (1975) (law generally makes criminal only antisocial conduct, and conspiracy addresses agreement to engage in a criminal venture). The allegation could be as simple as saying that the appellant agreed to violate Article 134 and set out the overt act, or it could allege that the appellant intended to engage in service-discrediting conduct by selling property that he knew to be stolen. The specification before us does not satisfy the minimal due process requirement, and accordingly we hold that it does not state an offense.

Accordingly, the conviction of conspiracy to sell stolen property, Charge I and its underlying specification, is set aside, and the charge and its specification are dismissed.

Sentence Reassessment

Having set aside one of the offenses of which the appellant was convicted, we must now "assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). The appellant admitted that he broke into his fellow Marines' barracks and stole their personal items which had a total value of approximately \$1,350.00. Record at 35-38. The appellant's prohibited conduct resulted in a significant suspicion within his platoon which directly affected the unit's and the individual Marine's morale. *Id.* at 113-14, 148, and 159. We balance this evidence against

² Noting that sale of stolen property is evidence of the intent permanently to deprive the owner of the use and benefit of the property, MCM, Part IV, ¶ 46c(1)(f)(ii), we leave for another day the question whether the policy that shields the actual thief from a prosecution for receipt of stolen property should extend as well to the sale of stolen property.

the defense submissions of medical records, testimony from the appellant's mother, letters of recommendation, and other mitigating matter, and we conclude that the sentencing authority would impose, and the CA would approve, a sentence of at least confinement for 99 days, reduction to pay grade E-1, and a bad-conduct discharge.

Convening Authority's Action

The CA approved the sentence, which included a bad-conduct discharge, and then stated, "[i]n accordance with the UCMJ, Rules of [sic] Courts-Martial, applicable regulations, the pretrial agreement, and this action, the sentence is ordered executed." While we do not read this provision to be anything more than a recognition of a CA's duty and authority, we do acknowledge that this formulation has been declared a "legal nullity". *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

Conclusion

We set aside the guilty finding of Charge I and its underlying specification, and that Charge and its specification are dismissed. The remaining findings of guilty and the sentence extending to confinement for 99 days, reduction to pay-grade E-1, and a bad-conduct discharge are affirmed.

Senior Judge CARBERRY concurs.

PRICE, Judge (concurring in part and dissenting in part):

I concur in the decision to affirm the sentence as approved by the convening authority. However, I respectfully dissent from my brethren's decision to set aside the appellant's conviction of conspiracy to sell stolen property based upon their apparent conclusion that "the specification alleges activity that is not recognized as 'criminal,' [thus necessitating allegation of] some theory of liability[.]" Slip op. at 3 (citing *United States v. Feola*, 420 U.S. 671, 694 (1975)).

I agree that the sale of stolen property has not been specifically enumerated as an offense under the UCMJ and the President has not explicitly suggested selling known stolen property as a violation of Article 134, UCMJ. However, contrary to the majority, I conclude that such conduct is recognized as "criminal" and punishable under Article 134, UCMJ. *See, e.g. United States v Benitez*, 65 M.J. 827, 828 (A.F.Ct.Crim.App. 2007)(claim that preemption doctrine prohibits criminalizing the selling of stolen, non-military property under Article 134, UCMJ, when Congress excluded such conduct from punishment under Article 108, UCMJ and another specified provision of Article 134 (Concealing, Receiving, and Buying Stolen Property)is without merit)); *United States v Canatelli*, 5 M.J. 838 (A.C.M.R. 1978) (Violation of 18 U.S.C.S. § 842(h) dealing with commerce in stolen explosive materials by military personnel may be

prosecuted under 10 U.S.C.S. § 934); 18 U.S.C.S. § 2315 (Sale or receipt of stolen goods); Va. Code Ann. § 18.2-108.01 (2011) (“[S]ale of stolen property . . . with an aggregate value of \$200 or more where he knew or should have known that the property was stolen is [a felony].”).

Although failure of a specification to state an offense is a fundamental defect which can be raised at any time, the United States Court of Appeals for the Armed Forces (CAAF) long ago chose to follow the rule of most federal courts of liberally construing specifications in favor of validity when they are challenged for the first time on appeal. RULE FOR COURTS-MARTIAL 907(b)(1)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (citing *United States v. Whyte*, 1 M.J. 163 (C.M.A. 1975)); *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953)). “In addition to viewing post-trial challenges with maximum liberality, [CAAF views] standing to challenge a specification on appeal as considerably less where an accused knowingly and voluntarily pleads guilty to the offense.” *Watkins*, 21 M.J. at 210 (citation omitted).

The specification of Charge I, Conspiracy in violation of Article 81 UCMJ states:

In that [the appellant] did, on board Marine Corps Base Quantico, Virginia, between on or about August 2009 and November 2009, conspire with [Corporal (Cpl) MacKay], to commit an offense under the [UCMJ], to wit: the sale of stolen property, and in order to effect the object of the conspiracy the [appellant and Cpl MacKay], did sell stolen property.

The elements of this conspiracy are that:

1. During the period alleged that the appellant entered into an agreement with Cpl MacKay to commit an offense under the UCMJ (to sell stolen property);
2. While that agreement existed and while the appellant remained a party to that agreement, either he or Cpl MacKay performed one or more overt acts for the purpose of bringing about the object of that agreement (sold stolen property).

Charge Sheet; Article 81, UCMJ; Record at 20.

This specification clearly states the offense of Conspiracy, alleging “either expressly or by implication, every element of the offense, so as to give the accused notice and protection against double jeopardy.” *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006)(citation omitted). I also find that the

appellant's pleas were voluntary and knowing and after review of the entire record, including the pleadings of the parties, I conclude there is no substantial basis in law or fact to question that plea. Finding no error materially prejudicial to the substantial rights of the appellant, I would affirm the conviction of conspiracy to sell stolen property, Charge I and its underlying specification. See Article 59(a), Uniform Code of Military Justice, 10 U.S.C. § 859(a).

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge BOOKER participated in the decision of this case prior to detaching from the court.