

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

**Before  
J.A. MAKSYM, R.E. BEAL, R.Q. WARD  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**RUBEN ORTIZ  
AVIATION BOATSWAIN'S MATE HANDLING THIRD CLASS  
(E-4), U.S. NAVY**

**NMCCA 201000652  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 10 September 2010.

**Military Judge:** CAPT Moira Modzelewski, JAGC, USN.

**Convening Authority:** Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CDR F.D. Hutchison, JAGC, USN.

**For Appellant:** Maj Rolando Sanchez, USMCR.

**For Appellee:** LCDR Sergio Sarkany, JAGC, USN.

**30 September 2011**

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

PER CURIAM:

A general court-martial composed of a military judge alone convicted the appellant, consistent with his pleas, of conspiracy to commit larceny and larceny of military property of a value of more than \$500.00, in violation of Articles 81 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 921.

The approved sentence was confinement for 6 months and a bad-conduct discharge.

The appellant assigns two errors which challenge the providence of his pleas to both offenses. He asks this court to set aside the findings in part and to reassess the sentence. The Government argues that there is no substantial basis to reject the guilty pleas. We have considered the record of trial, the appellant's brief and assignments of error, the Government's answer, and the appellant's reply, and conclude the findings, with one minor exception, are correct in law and fact. After our corrective action on findings, we reassessed the sentence and find that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Background**

While assigned to the USS KEARSARGE (LHD 3), the appellant married Ms. D, a woman living in Norfolk, Virginia, whom the appellant did not know until the day of their wedding ceremony. The appellant was introduced to Ms. D by a fellow Sailor named Airman (AN) Robbins. AN Robbins knew the appellant had unsuccessfully applied for dependent's benefits for his illegitimate son and suggested that if he married Ms. D, he would then be able to collect basic allowance for housing (BAH) at the higher "with dependents" rate. AN Robbins explained that Ms. D would likewise benefit from the marriage in that her married status to a U.S. citizen would assist in her efforts to procure a "green card." AN Robbins offered to introduce the appellant to Ms. D for a fee of \$1,500.00; the appellant accepted AN Robbins' terms. The marriage to Ms. D, in the words of the appellant, was a "sham." The couple never resided together or had any kind of a personal relationship. Following the wedding ceremony, the appellant only had contact with Ms. D a few times, during which he evaded her efforts to get enrolled in the Defense Eligibility Enrollment Reporting System (DEERS). Nonetheless, following the wedding ceremony in May 2007, the appellant once again applied for dependents benefits and presented his wedding certificate to Ms. D as proof of his entitlement. Thereafter, the appellant's BAH increased monthly to the "with dependents" rate. In April 2009, the appellant admitted to authorities that his marriage to Ms. D was a sham and that he was not really entitled to BAH at the "with dependents" rate. Nonetheless, the appellant continued to draw his BAH at the increased rate until his trial. By April 2009, the appellant had received over \$28,000.00 in excess of what he was entitled to at the single rate.

## Guilty Pleas

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

## Larceny

In his first assigned error, the appellant argues he improvidently pled guilty to larceny of BAH at the with dependents rate for the period alleged, i.e. "on or about July 2007 to the present day." Charge Sheet. Relying on *United States v. Gray*, 44 M.J. 585 (N.M.Ct.Crim.App 1996), in which the court found "no evidence that [Gray] took affirmative steps to ensure he would continue to be overpaid" after learning the Government had not corrected his allowance entitlement, the appellant submits the excess payments he received after confessing to authorities that his marriage was a sham could not be wrongful under Article 121 as the taking did not occur without the owner's consent.<sup>1</sup> While the appellant does concede that the Stipulation of Fact states the BAH payments charged were wrongfully received until April 2009, the appellant asserts that the stipulation is at odds with the charge sheet and providence inquiry and asks the pleas be set aside as improvident.

The appellant does concede, "(A)t trial, the government ensured that the military [judge] understood that a \$28,000 amount that Appellant had mentioned 'was for an accounting through April 2009'". Appellant's Brief of 10 Feb 2011 at 7. In Prosecution Exhibit 1, the \$28,642.72 represents the amount received by the appellant from July 2007 through April 2009 and does not include any allotments received from April 2009 through the date of trial. As the figure contained in PE1 more than exceeds the \$500.00 required by the charge, the appellant was sufficiently provident. The proper remedy is to delete the words "the present day" and substitute therefor "April 2009." We will take this remedial action in our decretal paragraph.

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<sup>1</sup> The Government was already investigating the case and obtained the appellant's confession in April 2009.

## Conspiracy

In his second assigned error, the appellant asserts that while Ms. D understood her consent to marry the appellant was in exchange for his assistance in obtaining a "green card" for her, there is no factual support for her being a member of the conspiracy to steal from the Government.

The Government counters that Ms. D's knowledge of the intended BAH fraud is demonstrated through circumstantial evidence. While conceding that Ms. D was not present during the communications between AN Robbins and the appellant on the subject of receipt of additional BAH through a sham marriage, the Government posits her knowledge of that facet of the conspiracy was demonstrated through her subsequent conduct - marriage.

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the Code. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 5(b)(1). The agreement "need not be in any particular form or manifested in any formal words." *Id.* at ¶ 5(c)(2). A conspiracy is "generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves." *United States v. Barnes*, 38 M.J. 72, 75 (C.M.A. 1993). However, conspiracy requires more than joint commission of a substantive offense; rather it requires an agreement knowingly entered into by the parties to the agreement. *Id.* (the agreement can be silent, and manifested by conduct, but an agreement is still necessary).

In the instant case, circumstantial evidence is not required to prove the existence of a conspiracy between the appellant and AN Robbins. The only challenge is whether Ms. D was in agreement with the appellant that they would enter into the sham marriage for him to commit larceny. The appellant did inform the military judge that his agreement with AN Robbins subsequently included Ms. D and that, based upon her conduct, he was convinced that she was a party to the agreement. Record at 40. While the appellant now attempts to characterize the portion of the conspiracy between him and Ms. D as a conspiracy only to violate immigration law, as opposed to larceny, he was clear at trial that Ms. D understood his objective throughout the conspiracy. The appellant stated that when he stalled in entering Ms. Duncan into DEERS to facilitate her acquisition of

a dependent ID card, she told him that "if you don't do this, I'm going to go to your CO or chain of command." *Id.* at 125.

Assuming for a moment that Ms. D was not a party to the appellant's conspiracy to commit larceny following their sham marriage, the conspiracy between AN Robbins and the appellant remains viable. Ms. D's knowing involvement in the conspiracy does not serve to significantly aggravate the offense, thus even if we found the need to amend the findings by excepting Ms. D from the specification, which we do not, we would not be compelled to disturb the sentence as approved by the convening authority.

### **Conclusion**

The findings of guilty to Charge I and Specification 1 thereunder are affirmed. The findings of guilty to Charge II and the sole specification thereunder are affirmed, excepting the words "the present day" in the specification and substituting the words "April 2009." The specification of Charge II as excepted and substituted is affirmed. We have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

We find that our corrective action does not dramatically change the sentencing landscape at this court-martial and are confident that the minimum adjudged sentence for what remains would have included confinement for 6 months and a bad-conduct discharge. See *United States v. Buber*, 62 M.J. 476, 478-79 (C.A.A.F. 2006); and *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). We therefore affirm the sentence.

For the Court

R.H. TROIDL  
Clerk of Court