

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, M. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ESDRACE DOMINIQUE
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000658
GENERAL COURT-MARTIAL**

Sentence Adjudged: 10 August 2010.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding General, Marine Corps Base,
Camp Smedley D. Butler, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Maj B.C. Corcoran,
USMC.

For Appellant: CAPT Paul Jones, JAGC, USN.

For Appellee: CAPT Mark Balfantz, USMC.

22 November 2011

OPINION OF THE COURT

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

FLYNN, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification each of conspiracy to commit larceny, failure to obey a lawful general order, making a false official statement, wrongful appropriation, and wrongfully receiving stolen property, in violation of Articles 81, 92, 107, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, 921, and 934. The appellant was sentenced to nine months

confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. The terms of a pretrial agreement (PTA) had no effect; however, in an act of clemency, the CA suspended all confinement in excess of eight months for the period of confinement served plus 12 months.

No errors were assigned by counsel; however, we specified the following issue:

WHETHER AN ACCUSED MAY BE CONVICTED OF AN "IMPLICIT" CONSPIRACY WHERE THERE IS NO EVIDENCE OF EITHER A WRITTEN OR ORAL MEETING OF THE MINDS, BUT RATHER WHERE APPELLANT'S PARTICIPATION IN THE CONSPIRACY IS LIMITED TO KNOWLEDGE THAT HIS "CO-CONSPIRATORS" ARE BREAKING THE LAW AND HIS OMISSION OF ACTION IN PREVENTING THEIR ILLEGAL ACTIVITIES?

Oral argument was held on 18 September 2011.

After careful consideration of the record of trial, the pleadings submitted by the parties, and the matters presented at oral argument, we conclude that the appellant's conviction of Charge I and its specification must be set aside. The remainder of the findings are correct in law and fact. Following our corrective action on findings, we reassessed the sentence and concluded that no errors materially prejudicial to the substantial rights of the appellant remain. Arts. 59(a) and 66(c), UCMJ.

Background

At the time of the offenses charged, Private First Class (PFC) Dominique was a postal clerk stationed at Camp Leatherneck, Afghanistan. While there, he developed a friendship with two other postal clerks, Lance Corporal (LCpl) Simpson and LCpl Acevedo who, he learned, were randomly stealing various electronics and other items from the mail. The appellant was charged with conspiracy to steal mail matter; however, he negotiated a PTA and, *inter alia*, pled guilty to the lesser included offense of conspiracy to steal electronics. As part of the terms of the PTA, the appellant entered into a stipulation of fact. Regarding the conspiracy, the stipulation stated:

PFC Dominique had an implicit agreement with LCpl Simpson and LCpl Acevedo that those two Marines would

steal electronics and PFC Dominique would not say anything. PFC Dominique had a meeting of the minds with LCPLs Simpson and Acevedo that such stealing would occur. . . . PFC Dominique acknowledges that the agreement between himself and LCpl Simpson was an agreement to commit larceny. LCpl Simpson intended to steal electronics and communicated as much through his actions to PFC Dominique. PFC Dominique had a meeting of the minds with LCpl Simpson that such larceny would occur. The conspiracy was effectuated when LCpl Simpson did steal such electronics.

Prosecution Exhibit 1 at 3.

At the outset of the providence inquiry, in response to the military judge's question regarding what constituted a conspiracy, the appellant stated, "Conspiracy is being somebody - - with someone while they're doing something, even if you didn't do it, but you were there[.]" Record at 50. After properly advising the appellant of the elements of the offense and supporting definitions, the military judge attempted to elicit the necessary factual predicate for each of the elements. In response to the military judge's question as to why the appellant believed he was guilty of this offense, the appellant stated, "because I knew they were going to do it, and I seen them with the laptop, and I didn't ever talk about it, I never told anybody about it. I kept it to myself." *Id.* at 62. The military judge explained the difference between an explicit agreement and an implicit agreement and, at one point, it became apparent that he had confused the particular electronics involved in two of the charges. *Id.* at 64-65. After clarifying the matter, the following colloquy took place:

MJ: So you became aware that they were randomly stealing electronics and other mail matters. Is that correct?

ACC: Yes, sir.

MJ: And when you saw them with these items - - they didn't feel the need to hide them from you, because you knew of this ongoing enterprise?

ACC: Yes, sir.

MJ: Do you agree that you had an implicit agreement with them that they would steal electronics and that you would not say anything about that?

ACC: Yes, sir.

MJ: I guess it's fair to say that they talked about this openly with you?

ACC: We never talked about it, sir, but it was going on, and I knew it was going on.

MJ: And you knew it was happening?

ACC: Yes.

MJ: And you agreed to the conspiracy in that you knew they were going to steal items on a routine or regular basis, and you agreed to allow that to occur, is that what you're saying?

ACC: Yes, sir.

MJ: It says in your stipulation of fact that you had a meeting of the minds with Lance Corporal Simpson and Acevedo that such stealing would occur. Is that correct?

ACC: Yes, sir.

Id. at 66-67.

The military judge also attempted to ascertain what benefit the appellant derived from the conspiracy. The appellant indicated that it was a sense of loyalty in that he did not want to leave his friends "out there." *Id.* at 68. The military judge responded by saying, "So the key factor, I guess, for me to accept the plea would be, it's more than a mere failure for you to report the incident. You actually believe that you entered into an agreement with them for the larcenies to occur. Is that what you're telling me?" The appellant answered, "Yes, sir." *Id.* at 68-69. After an additional series of leading questions, to which the appellant responded in the affirmative, the military judge stated that, while he did not consider it to be "the strongest conspiracy charge," he was satisfied with the inquiry:

I understand there's a pretrial agreement, and I am satisfied with the plea. It's my duty, the appellate courts state, that if the accused is trying to plead guilty, that I not try to shoot down the deal, and if there is a provident and factual basis for his plea to accept it. . . . It sounds like his benefit in the agreement was - - it was unspoken. They had a certain degree of trust, loyalty, and friendship between the parties, and he agreed that he was going to be a party

to this conspiracy. Who knows what benefit he would have received, whether it was simply more loyalty or friendship with these parties or maybe at some point he was going to get electronic gear or whatever it is that he thought. But there was, at least as he's told me, an implicit agreement that these larcenies would occur, and his particular role was simply sitting back and not reporting the offenses. But the overt actions to which he's actually responsible for, once the agreement takes effect and he remains a party to the agreement, were criminal actions; and that was larceny. So, again, is it the strongest conspiracy charge I've ever seen? No. Am I willing to accept the plea on it, at this point? Yes, I will. Based on the pretrial agreement and the accused's desire to plead guilty, I do believe there's a factual basis for the plea. I believe it's somewhat of a weak charge, as far [as] sentencing is concerned, but looking strictly at the law, I believe, I am duty-bound to accept the plea, so I am going to accept the plea for that.

Record at 70-72.

The appellant also pled guilty to wrongfully receiving stolen property. Specification 7 of Charge IV, alleging that he received stolen property in violation of Article 134, UCMJ, reads as follows:

In that Private First Class Esdrace Dominique, U.S. Marine Corps, on active duty, did at Camp Leatherneck, Afghanistan, between on or about 1 August 2009 and 15 November 2009, wrongfully receive an Epson LCD projector, of a value of about \$500, the property of a person unknown, which property, as he, the said Private First Class Esdrace Dominique, then knew, had been stolen.

The appellant did not object to the sufficiency of the foregoing specification. Instead, he negotiated a pretrial agreement and pled guilty to receiving stolen property.

During the providence inquiry, the military judge explained the elements of receiving stolen property, one of which was that his conduct must have been "to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the Armed Forces" and defined those terms.

Record at 98-99. The appellant stated that he understood the definitions and indicated why he thought his conduct was both service discrediting and prejudicial to good order and discipline. *Id.* at 99-100.

Guilty Pleas

Prior to accepting a guilty plea, a military judge must make an inquiry of an accused to ensure a factual basis exists for the plea. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); see also Art. 45(a), UCMJ. This inquiry must elicit sufficient facts to satisfy every element of the offense in question. R.C.M. 910(e). 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)).

Conspiracy

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the Code and, while the agreement continues to exist, either conspirator performs an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 5(b). 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). The evidence must show that the accused possessed "deliberate, knowing, and specific intent to join the conspiracy, not merely that he was associated with persons who were part of the conspiracy or that he was merely present when the crime was committed." *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984) (citing *United States v. Glen-Archila*, 677 F.2d 809 (11th Cir. 1982)). See also *United States v. Knowles*, 66 F.3d 1146, 1157 (11th Cir. 1995) (mere presence

and association with conspirators insufficient to support conspiracy conviction). The Supreme Court has unambiguously held that acts of concealment are not part of the original conspiracy. *Grunewald v. United States*, 353 U.S. 391, 401-02 (1957). Rather, concealment "indicate[s] nothing more than that the conspirators do not wish to be apprehended." *Id.* at 406.

During the providence inquiry, the military judge made several attempts to flesh out the requisite factual support for the plea by asking leading questions to which the appellant supplied the suggested affirmative replies. Nevertheless, the terms or substance of the agreement remained undeveloped. In *United States v. Jordan*, 57 M.J. 236, 240-41 (C.A.A.F. 2002), the Court of Appeals for the Armed Forces (CAAF) set aside a decision of this court on the basis that the military judge had not adequately developed a factual basis for one of the elements of a charged offense. The CAAF found that the judge had merely posed a series of conclusory questions to which the accused simply responded, "Yes, sir." *Id.* at 239. See also *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) ("Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea"). The CAAF also advised reviewing courts that the entire record should be considered in determining whether a providence inquiry is legally sufficient. *Id.* at 239. In this case, despite the military judge's repeated efforts to obtain more details as to the nature of the agreement and what constituted the "meeting of the minds," the record reflects little more than that the appellant was aware of the ongoing larcenies and allowed them to occur out of a sense of loyalty. Record at 67-68.

On appeal, the Government concedes that the part each conspirator was to play was not explicitly described, but asserts that the appellant's role was to ignore his obligation as a postal clerk to stop LCpl Simpson from stealing or otherwise failed to secure the mail and that such failure was critical to LCpl Simpson's ability to steal mail. Government's Brief of 9 Jun 2011 at 6-7. However, during the trial, no evidence was proffered regarding any specific duties the appellant had as a postal clerk and, during the providence inquiry, the military judge made only a passing reference to all three Marines' positions as postal clerks in the context of discussing whether the larceny was a wrongful taking, withholding, or obtaining. Record at 61. Additionally, although the Government emphasizes that the agreement can be proven by the conduct of the parties, on this record, we are unable to ascertain anything more than the appellant's mere

presence or association with two fellow postal clerks who stole electronics from the mail. In *United States v. Harman*, 66 M.J. 710 (Army Ct.Crim.App. 2008), *aff'd*, 68 M.J. 325 (C.A.A.F. 2010), the Army Court found that the accused's smiling face and "thumbs up" hand signals in a photo of a pyramid of naked detainees showed that she joined in and encouraged her co-conspirators as they maltreated prisoners. As such, an inference that she had the intent to join the conspiracy was justified. Here there is no evidence of any shared criminal purpose between the appellant and the postal clerks engaged in larceny. While there might well be facts that would establish more, we find the plea improvident because the military judge elicited an insufficient factual basis.

Receipt of Stolen Property

Specification 7 under Charge IV, alleging a violation of the General Article, did not allege the terminal element. Although this issue was not raised during trial or on appeal, in the interest of completeness, we will address it briefly.¹ In *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the CAAF held that the terminal element in an Article 134, UCMJ, offense must be expressly alleged or necessarily implied by the language of the specification in a contested trial. However, its decision did not specifically address the absence of the terminal element in the context of a guilty plea. We distinguish this case on that basis. Indeed, the *Fosler* holding relied in part on *United States v. Watkins*, 21 M.J. 208 (C.M.A. 1986), a case that significantly distinguished a guilty plea from a contested case. In *Watkins*, the court stated:

Where . . . the specification is not so defective that it "cannot within reason be construed to charge a crime," the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice, the conviction will not be reversed on the basis of defects in the specification.

Id. at 210. Here, the appellant entered into a pretrial agreement that contemplated guilty pleas to the General Article offense; he received the correct statutory elements and definitions from the military judge; and he satisfactorily completed the providence inquiry. Record at 98-109.

¹ Although not an issue specified by the court, the parties were given the opportunity to address the matter during oral argument.

Even if *Watkins* should for some reason be overruled or severely limited, we note that the military judge, in informing the appellant here of the elements, included the "prejudice" and "discredit" aspects of the two statutory elements of Article 134. The appellant did not object to what is arguably a major change, see R.C.M. 603(d), and thus waived the objection. He did not request re-preferral, re-investigation, re-referral, or the statutory delay afforded between referral and trial. See Art. 35, UCMJ. We are satisfied, then, that the appellant enjoyed what has been described as the "'clearly established' right of due process to 'notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.'" *Fosler*, 70 M.J. at 229 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

We emphasize as well, that this was a guilty-plea case and that "[a] flawed specification first challenged after trial . . . is viewed with greater tolerance than one which was attacked before findings and sentence." *Watkins*, 21 M.J. at 209 (citations omitted). If we were to set aside a finding on a guilty plea, we would have to determine a substantial basis in law or fact to do so. *Inabinette*, 66 M.J. at 322. We note specifically that the appellant here knowingly admitted facts that met all the elements of the offense and that the appellant never set up matters inconsistent with his guilty plea. See *id.*

The law at the time of the appellant's trial was well-settled that the terminal elements need not be pleaded. Even with the changes wrought by *Fosler*, we are satisfied that the military judge's informing the appellant of the nature of the terminal elements, and the appellant's assurances that he and his counsel had had sufficient time to discuss the allegations and the elements of proof, militate against any substantial basis in law for setting aside the finding. We thus hold that Specification 7 of Charge IV states an offense.

Sentence Reassessment

Because we have set aside the military judge's finding of guilty with respect to the conspiracy charge, we next analyze the case to determine whether we can reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We conclude that we can. Although our action on findings changes the sentencing landscape, the change

is not sufficiently dramatic so as to gravitate away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). In this regard, we note that, notwithstanding our dismissal of the conspiracy charge, the admissible evidence to be considered at sentencing does not alter significantly. Even if the appellant had not been charged with conspiracy to steal, the circumstances surrounding his receipt of the stolen laptop and subsequent false official statement denying knowledge of the theft of electronics from the mail by his fellow mail clerks would have necessarily included the fact that appellant was aware of an ongoing conspiracy to steal. Further, the appellant was sentenced by the military judge who specifically stated that he viewed the conspiracy charge as "weak . . . as far [as] sentencing is concerned." Record at 71-72.

The appellant stands convicted of disobeying a lawful order by drinking alcohol while in a combat zone, receiving stolen property, wrongfully appropriating a laptop computer from a fellow Marine, and lying to an investigator about his knowledge of and extent of an ongoing scheme to steal electronic equipment from the mail of Marines stationed at Camp Leatherneck. The maximum penalty for these offenses includes seven years, nine months confinement and a dishonorable discharge, far greater than that awarded by the military judge: a bad-conduct discharge, reduction to the lowest pay grade, and confinement for nine months. Moreover, we note that in an act of clemency, the CA suspended confinement greater than eight months. After carefully considering the entire record, we are satisfied beyond any reasonable doubt that the military judge would have adjudged a sentence no less than that approved by the CA in this case. We find the adjudged sentence continues to be appropriate for the appellant's rather serious offenses committed within the confines of a combat zone.

Conclusion

The findings of guilty to Charge I and its specification are set aside and Charge I and its specification are dismissed.

The remaining findings of guilty and sentence as approved by the CA are affirmed.

Senior Judge MAKSYM and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court