

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

**Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ZACHARY L. DIXON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000516
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 June 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, 7th Marine Regiment (RBE), 1st Marine Division (REIN), FMF, Marine Corps Air Ground Combat Center, Twentynine Palms, CA.

Staff Judge Advocate's Recommendation: LtCol A.G. Peterson, USMC.

For Appellant: LCDR Luis Leme, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

30 June 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

MITCHELL, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, consistent with his pleas, of one specification of unauthorized absence and one specification of missing movement through design in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. The appellant was sentenced to confinement for six months, forfeiture of \$960.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in accordance

with the pretrial agreement (PTA), suspended all confinement in excess of 90 days.

This court specified two issues on appeal:¹ (1) Whether the colloquy between the military judge and the appellant supports a plea of guilty to missing movement through neglect as originally charged by the convening authority and (2) whether the military judge abandoned his role as a neutral arbiter during a guilty plea for missing movement by neglect when he suggested in a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) conference and on the record, that the appellant's responses reflected he was guilty of the more serious offense of missing movement through design.² After a thorough review of the record of trial, the submissions of the parties, and oral argument, we find that the military judge committed error by effectively rejecting the appellant's guilty plea to missing movement through neglect and by permitting a major modification of the charge sheet without a proper waiver. The record of trial, however, supports a finding of missing movement through neglect, and we affirm a conviction to that offense. Arts. 59(a) and 66(c), UCMJ. Since the military judge's error materially prejudiced a substantial right of the appellant, we will take corrective action in our decretal paragraph. *Id.*

Background

On 22 March 2010, the appellant left his unit, 3d Battalion, 7th Marines, 1st Marine Division, and commenced a period of unauthorized absence. His unit was set to deploy to Afghanistan on 1 April 2010. The appellant was aware of the deployment, and remained absent until he turned himself in on 18 April 2010. He was charged with missing movement through neglect in violation of Article 87, UCMJ. Before trial, the appellant signed a PTA consenting to plead guilty to the offense as charged.³

During the providence inquiry, in response to the military judge's questions on the missing movement charge, the appellant stated in part, "I neglected my duty that I had been given and the orders that I was given, and through not thinking about it and not caring, did not show back up for the duty date I was assigned." Record at 18. He also stated, "I didn't want to go, and I didn't want to be separated from friends and family." *Id.* Upon hearing the appellant's motive, the military judge thought these two statements were in conflict and further inquired,

¹ This case was originally submitted without assignment of error.

² After a thorough review of the briefings by both parties, the entire record of trial, and the oral argument presented in this matter, we are satisfied that the military judge did not abandon his role as an independent arbiter in this case. Therefore, the remainder of this opinion does not address that specified issue.

³ The appellant also pled guilty to an Article 86, UCMJ offense, which is not at issue in this case.

"[t]hat sounds like design, but you're saying it was by accident?" *Id.* at 19. The appellant responded affirmatively. The military judge continued to ask questions pertaining to negligence, and the appellant agreed that he used "less care than a person of ordinary prudence would have under the same circumstances," and that it was his "own fault" that he missed the movement. *Id.*

A recess was subsequently called during which an R.C.M. 802 conference took place. The conference was summarized by the military judge on the record as follows:

I told [counsel] that it sounded like a missing movement by design rather than neglect. . . . The defense counsel took a break and went into his office with the accused, they . . . came back and indicated that the accused would like to plead guilty to it, missing movement by design. The Government agreed to that. They have lined out that word.

. . . .

And I want to be clear on the record, I didn't tell anyone to do this. My only concern was I had the elements for missing a movement but I didn't hear anything about any accidents or any neglect. It sounded by design, so I wanted to clear that up and counsel came up with a solution.

Id. at 21. The appellant declined to object when given the opportunity and stated his understanding that he was now pleading guilty to a more serious offense. Furthermore, the trial counsel indicated the convening authority assented to the change. The word "neglect" was lined-out of the charge sheet and the PTA, and "design" was handwritten in its place. An ensuing providence inquiry occurred, after which the military judge entered a finding of guilty to missing movement through design.

Modification of Charges

A. Principles of Law

Minor changes of charges and specifications are permitted "at any time before findings are announced, if no substantial right of the accused is prejudiced." R.C.M. 603(c). R.C.M. 603(a) defines minor changes as ". . . any except those which add a party, offenses, or substantial matter not fairly included in those previously preferred, or which are likely to mislead the accused as to the offenses charged." Changes or amendments other than minor changes (i.e. major changes) may not be made over the objection of the accused unless the charge and specification is preferred anew. R.C.M. 603(d). See also *United States v. Parker*, 59 M.J. 195, 197 (C.A.A.F. 2003) (citing R.C.M. 603(d)). We apply the following two-pronged test to decide if a change is

a major or minor one: (1) Whether the change results in an additional or different offense and (2) whether the change prejudices a substantial right of the appellant. *United States v. Sullivan*, 42 M.J. 360, 365 (C.A.A.F. 1995). Both prongs must be answered affirmatively before an appellant is entitled to relief. See *United States v. Smith*, 49 M.J. 269, 271 (C.A.A.F. 1998). However, if an accused intentionally relinquishes a known right, then waiver may apply. See *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). We review issues of waiver *de novo*. *United States v. Gudmundson*, 57 M.J. 493, 495 (C.A.A.F. 2002) (citation omitted).

B. Analysis and Discussion

1. Waiver

The Government asks this court to apply waiver in this case due to the defense counsel's acquiescence to the modification to the charge sheet. Appellee's Brief of 24 Jan 2011 at 8-9. The record, in fact, indicates that the suggested modification of the charge originated with the appellant and his trial defense counsel. Record at 21. Although this could be construed as waiver, after reviewing the record, we do not find that the appellant knowingly and intelligently waived his rights pertaining to the modification of the charge. While the military judge did ask the appellant if he had any objection to the Government changing the charge sheet, he did not inform the appellant that if he did object, the charges had to be withdrawn and preferred anew or that he would be entitled to an additional three-day statutory waiting period. Absent a full disclosure of his rights pertaining to modifying the charge sheet in which a greater offense was referred, we cannot conclude that the appellant knowingly and intelligently waived his rights regarding this matter. Moreover, the record reflects that although he never formally rejected the plea, the military judge's comments to counsel no doubt indicated to them that he would not have accepted the appellant's plea to missing movement through neglect, which he could have at that point in the trial, if the appellant had not acquiesced to the change.⁴ Even if we assume that the appellant did waive his rights at trial by acquiescing to the modification of the charge sheet, any alleged waiver was precipitated by the erroneous statements made by the military judge. Therefore, under the facts of this case, we decline to

⁴ The appellant was present at the R.C.M. 802 conference and heard the military judge express concern as to the providence of his pleas based on the colloquy between the two of them. After this conference, the appellant and his counsel went into a separate room and afterwards indicated to the military judge that they would plead to the greater offense of missing movement through design. While we are leery to speculate as to how the appellant was advised by his counsel, we find it difficult to fathom that his counsel advised him that the military judge was satisfied with the providence inquiry and then further advise him that it would be in his best interests to agree to plead to a greater offense. This is particularly so where the R.C.M. 802 conference included the judge's "concern" that he didn't hear anything about accident or neglect during the initial colloquy.

apply waiver, particularly where all parties acted upon a misunderstanding of the law. See *United States v. Chaney*, 53 M.J. 621, 624 (N.M.Ct.Crim.App. 2000); see also *Claxton*, 32 M.J. at 159 (noting the "should be approved" language of Article 66(c), UCMJ, overrides any doctrinal constraint, including waiver, upon the CCA's review authority).

2. Modification

The question before this court now is whether this modification is a minor or major change to the charge sheet. With respect to the first prong of the *Sullivan* test, the charge remained missing movement after the modification. However, a modification of the offense that changes the "identity" of the offense can still result in a major change. See *United States v. Cooper-Tyson*, 37 M.J. 481, 482-83 (C.M.A. 1993) (finding a major change when the type of drug was changed but the offense remained "use of a contraband drug"). Here, the modification replacing the statutory element "through neglect" with the different statutory element of "through design" doubled the maximum punishment and required a stricter *mens rea*. As a result, we find the modification to be a "substantial matter" that changed the "identity" of the offense as to constitute a "different offense" within the meaning of the first prong.⁵ See *Smith*, 49 M.J. at 271 (citing R.C.M. 603(a)).

Second, the substantial rights of the appellant were prejudiced by the modification. Despite the fact the appellant always remained subject to the jurisdictional maximum of a special court-martial, he was still exposed to on an offense that carried double the maximum punishment. See *Id.* (finding a major change after the addition of a sentence escalator).⁶ And while the appellant had confinement protection in his PTA for any period adjudged in excess of 90 days, the adjudged sentence was six months, which left suspended confinement time. Appellate

⁵ While we find *United States v. Cooper-Tyson* instructive for whether a change is a major one, we also find its result distinguishable from the present facts as the modification in that case was found to be initiated by the appellant. 37 M.J. at 483.

⁶ We note that the Court of Appeals for the Armed Forces (CAAF) in *Smith*, after finding that amending the specification to reflect that the property stolen was "military" property was not minor, ultimately concluded that the appellant was not prejudiced. While this case is instructional and relevant to the case at bar, it is readily distinguishable. In *Smith*, the CAAF noted that the modification did not add an element to the offense, but added a sentence escalator. The CAAF additionally opined that [the appellant] "was not surprised by the amendment or hindered in his preparation for trial." Finally, the CAAF noted that given the sentence appellant received at court-martial (reduction to E-1, and a bad-conduct discharge) that they could say "with fair assurance . . . that the judgement was not substantially swayed by the error. *Smith*, 49 M.J. at 271. In the case *sub judice*, the amendment not only increased the punitive exposure (subject of course to the jurisdictional limitations of a special court-martial), it added an element to the offense - one of which he was unaware of prior to trial.

Exhibit II. Finally, the "accused's right to understand to what he is pleading guilty *and on what basis*" was prejudiced. *United States v. Morton*, 69 M.J. 12, 15-16 (C.A.A.F. 2010) (citing *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) and *United States v. Lubasky*, 68 M.J. 260, 265 (C.A.A.F. 2010)) (emphasis added).

For the reasons discussed above, we find the substantial rights of the appellant were prejudiced, and that the modification was a major one without a proper waiver from the appellant. We further find that because this charge was not properly before the court, the military judge's finding of guilty to the modified charge and specification to be a legal nullity. We will provide appropriate relief in our decretal paragraph.

Providence of Pleas

Having decided that the military judge's finding of guilty on the missing movement through design charge was a legal nullity, we now consider whether the record established a factual basis for the military judge to accept the appellant's plea of missing movement through neglect and whether he erred by not accepting the appellant's plea to the specification as originally charged.

A. Principles of Law

A military judge's decision to accept or reject an accused's guilty plea is reviewed for an abuse of discretion.⁷ *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). If the facts elicited make out each element of the offense, a guilty plea will be found provident. *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007). However, if an accused "sets up matter inconsistent with the plea," the military judge has a duty to resolve the inconsistency or reject the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting Article 45(a), UCMJ). This court may approve only such findings of guilty and the sentence or such part of the sentence we find correct in law and fact and determine, on the basis of the entire record, should be approved. Art. 66(c), UCMJ.

B. Analysis and Discussion

Missing movement as defined by congress in Article 87, UCMJ reads:

⁷ As noted earlier, we realize that nowhere in the record does the military judge formally reject the appellant's plea with regards to the missing movement through neglect charge. However, the military judge accepted a plea to an offense that was not properly before the court.

Any person subject to this chapter who through neglect or design misses the movement a ship, aircraft, or unit with which he is required in the course of duty to move shall be punished as a court-martial shall direct.⁸

The colloquy between the appellant and the military judge clearly established the elements of missing movement through neglect. The appellant admitted he knew of the prospective deployment but was more interested in remaining behind with his family and friends. Record at 17-18. He also admitted that he used less care than a person of ordinary prudence would have under the same circumstances, and that he missed the movement due to his own negligence. *Id.* at 19. The appellant further stated that he failed to take appropriate measures to return to his unit because he was focused on his family.⁹ *Id.* at 17-19. These facts were all elicited prior to the R.C.M. 802 conference, so the appellant's responses during the providence inquiry adequately showed he met the elements of the originally charged offense, including the definition of neglect. The military judge had a sufficient basis in law and fact to accept a plea to missing movement through neglect. In fact, the military judge, prior to the R.C.M. 802 conference, asked counsel for each side if they requested further inquiry into this charge. Both the trial counsel and the counsel for the appellant responded in the negative. After carefully considering the record, we find that the colloquy between the military judge and the appellant on the missing movement through neglect charge and specification provided the factual basis necessary for the military judge to accept the appellant's guilty plea. We further find that the military judge abused his discretion by not accepting it. We will affirm the charge of missing movement through neglect in our decretal paragraph.

Sentence Reassessment

After action on findings, we must consider whether we can reassess the sentence. *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We can reassess a sentence without ordering a rehearing if we can determine the sentence would have been at "least of a certain magnitude," unless there is a "dramatic

⁸ The MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 11(b) defines the elements of missing movement: (1) That the accused was required in the course of duty to move with a ship, aircraft or unit; (2) that he accused knew of the prospective movement of the ship, aircraft or unit; (3) that the accused missed the movement of the ship, aircraft or unit; and (4) that the accused missed the movement through design or neglect.

⁹ It appears that the military judge understood the appellant's motive for failing to take appropriate measures - he didn't want to be separated from his family - to instead be a statement of intent - that he planned to miss movement. This conclusion lead the military judge to note a problem in need of a solution where none existed.

change in the penalty landscape." See *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006); *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

Based on convictions for unauthorized absence and missing movement through design, the military judge sentenced the appellant to six months confinement, forfeiture of \$960.00 pay per month for six months, reduction to pay grade E-1, and a bad-conduct discharge. Record at 42. Pursuant to the pretrial agreement, the convening authority was able to approve the adjudged sentence, except that confinement in excess of 90 days would be suspended. AE 2. Our action affirming the LIO does not dramatically change the penalty landscape because the appellant would still face the jurisdictional maximum at a special court-martial. Additionally, for several reasons, a rehearing is unnecessary because we can reassess the sentence by determining it would be at least of a certain magnitude.

First, the appellant committed a 28-day unauthorized absence and missed his deployment to Afghanistan. Although we approve only that much of the violation of Article 87 charge and specification reflecting that the appellant was guilty of missing movement through neglect, we find that the punishment awarded was appropriate.¹⁰ Even if the military judge had sentenced the appellant on the original charge, the admissions of motive by the appellant that he "didn't want to go, etc" were still fair game for the judge to consider on sentencing. We can say "with fair assurance that the [sentence] was not substantially swayed by the error." *Smith*, 49 M.J. at 271 (citing *Kotteakas v. United States*, 328 U.S. 750, 765 (1955)). See also Art. 66(c), UCMJ.

Conclusion

We affirm the findings of guilty for Charge I and its specification. As to Charge II, we affirm the findings of guilty to that charge and the specification as originally referred on the charge sheet, i.e., missing movement through neglect. Arts. 66(c) and 59(b), UCMJ. We affirm the sentence as approved by the convening authority.

Chief Judge REISMEIER and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court

¹⁰ We note that the appellant requested a bad-conduct discharge. Record at 36. Although this cannot be the sole reason for awarding one, a bad-conduct discharge is appropriate for this offender and his offenses. *United States v. Strauss*, 47 M.J. 739, 741 (N.M.Ct.Crim.App. 1997); *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005).