

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ARTURO DOMINGUEZ JR.
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100121
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 21 December 2010.

Military Judge: LtCol Stephen F. Keane, USMC.

Convening Authority: Commanding Officer, 1st Marine
Regiment (Rear), 1st Marine Division (Rein), Camp
Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin,
USMC.

For Appellant: LCDR Edward V. Hartman, JAGC, USN.

For Appellee: CDR Monte G. Miller, JAGC, USN; Maj William
C. Kirby, USMC.

19 July 2011

OPINION OF THE COURT

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

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of larceny and falsifying an official document in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The military judge sentenced the appellant to seven months confinement, a fine of \$8,500.00, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

In his sole assignment of error, the appellant alleges that the military judge issued an unjustifiably severe sentence because of a prejudice against Hispanics.¹ We will first consider the allegation that the military judge was not impartial and then consider the appropriateness of the sentence.

Although not raised as error, we note that the combination of automatic forfeitures and the approved fine exceeds the total amount of forfeitures that could have been administratively captured under Article 58(b), UCMJ. We will take corrective action in our decretal paragraph.

After carefully examining the record of trial and the parties' pleadings, we conclude that following our corrective action the findings and the corrected 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.

Military Judge's Impartiality

The appellant alleges that the military judge failed to remain impartial. In support of this allegation, he cites to the military judge's inquiry as to the appellant's citizenship.

There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings. *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). When a military judge's impartiality is challenged on appeal, the test is "whether, 'taken as a whole in the context of this trial,' a court-martial's 'legality, fairness, and impartiality' were put into doubt by the military judge's questions." *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995) (quoting *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987)). In the absence of actual bias, one looks for implied bias from the standpoint of a reasonable man who has knowledge of all the facts. *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999).

We find that the appellant has failed to provide any meaningful evidence that supports his assertion that that military judge was biased against Hispanics and we find nothing about the question that suggests any negative bias toward the appellant in particular, or Hispanics in general. Moreover, in light of the evidence presented by the appellant, the question was a prudent one. During the sentencing phase of the appellant's court-martial, his wife and mother both testified that they were not U.S. citizens. In light of this information and the collateral consequences of conviction for a foreign U.S. service-member, e.g., deportation, such a question was prudent. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010); *Denedo v. United States*, 66 M.J. 114 (C.A.A.F. 2008). Finally, we note

¹ This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

that the military judge stated for the record that, but for the appellant's combat record, character statements and the testimony of his wife and mother, he would have adjudged twelve months confinement for larceny of such a large amount of money. His leniency betrays any suggestion of bias against the appellant or Hispanics. Record at 65. The appellant's allegation of racial bias is without merit.

Sentence Appropriateness

The military judge sentenced the appellant to seven months confinement, a fine of \$8,500.00, reduction to pay grade E-1, and a bad-conduct discharge. The appellant alleges that this sentence was unjustifiably severe in light of his service record, his partial reimbursement to the United States, and multiple testimonials of his character.

Our mandate under Article 66(c), UCMJ, requires that we affirm only such part or amount of the sentence as we determine, on the basis of the entire record, "should be approved." We do not enter the realm of clemency, an area reserved for the CA. However, we are compelled to act when we find inappropriate severity within an adjudged and approved sentence. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We review each case individually "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In this instance, the appellant stole more than \$15,000.00 from the Government over a period of three and one-half years. He wrongly received basic allowance for housing at the with-dependents rate by failing to disclose his correct marital status and fraudulently signing a record of emergency data sheet indicating that he was married. Notwithstanding the appellant's prior service, willingness to make restitution, and evidence attesting to his character, the appellant's offenses more than warranted the adjudged sentence.

After reviewing the entire record, we find that the adjudged sentence was appropriate for this offender and his offense. *Baier*, 60 M.J. 382; *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 298.

Conclusion

The findings and only so much of the adjudged and approved sentence that includes a bad-conduct discharge, confinement for 7 months, and a \$5302.00 fine are affirmed.

For the Court

R.H. TROIDL
Clerk of Court