

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN W. BOWMAN, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100505
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 29 June 2011.

Military Judge: Maj Clay Plummer, USMC.

Convening Authority: Commanding Officer, 2d Assault
Amphibian Battalion, 2d Marine Division, Camp Lejeune, NC

Staff Judge Advocate's Recommendation: Col T.M. Dunn,
USMCR.

For Appellant: LCDR Shannon Llenza, JAGC, USN.

For Appellee: Capt David Roberts, USMC.

30 April 2012

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.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of malingering in violation of Article 115, Uniform Code of Military Justice, 10 U.S.C. § 915. The military judge sentenced the appellant to confinement for ten months, reduction in pay grade to E-1, forfeiture of \$968.00 per month for ten months and a bad-conduct discharge. The convening authority (CA) approved

the sentence as adjudged; however, pursuant to a pretrial agreement (PTA), the CA suspended confinement in excess of 45 days.

For the first time on appeal, the appellant raises two assignments of error: (1) that the sole charge and specification of malingering fail to state an offense because it alleges that the appellant solicited another to shoot him instead of intentionally inflicting the injury himself; and, (2) that the military judge erred in accepting the appellant's guilty plea where the facts adduced showed that another individual inflicted the injury upon the appellant.

Facts

In November 2010, the appellant, an enlisted Marine serving with 2d Assault Amphibian Battalion, 2d Marine Division, was informed by his chain of command that he was scheduled to deploy to Africa. Prosecution Exhibit 3 at 1. The appellant had two previous deployments, was recently married, and did not want to deploy again. PE 3 at 2; Record at 20-24. He decided to avoid deploying by convincing a fellow Marine, Corporal S (Cpl S), to shoot him in the leg. PE 3 at 2. He then provided Cpl S with a pistol and, after a hastily and ill conceived plan, Cpl S successfully shot the appellant in the leg, albeit on the second attempt. Record at 20-24; PE 2; PE 3. It is undisputed that the appellant provided Cpl S with the pistol and solicited Cpl S to shoot him, all with the express purpose to cause an injury that would prevent the appellant from deploying to Africa.

The Charge and specification read as follows:

In that Lance Corporal John W. Bowman, Jr., U.S. Marine Corps, 2d Assault Amphibian Battalion, 2d Marine Division, Camp Lejeune, North Carolina, did . . . between on or about 12 November 2010 and on or about 13 November 2010, for the purpose of avoiding service as an enlisted person, intentionally injure himself by soliciting Corporal [S], U.S. Marine Corps, to shoot him in the leg.

Discussion

In the appellant's first assignment of error, he claims that the malingering charge is fatally defective because it fails to allege the essential element that the appellant intentionally inflicted injury upon himself. Failure to state an offense is a question of law, which this court reviews *de*

novo. United States v. Sutton, 68 M.J. 455, 457 (C.A.A.F. 2010). A specification must allege every element of the charged offense, either expressly or by implication, so as to give the accused notice and protect him against double jeopardy. RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see also *United v. States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006).

The elements of malingering in this case are: that the appellant was assigned to or aware of prospective assignment to work, duty or service; that the appellant intentionally inflicted injury upon himself; and that the appellant's purpose or intent in doing so was to avoid the work, duty, or service. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 40(b). The infliction of the injury "may be accomplished by any act or omission which produces, prolongs, or aggravates any sickness or disability." *Id.* at ¶ 40(c)(2).

The essence of the appellant's argument is that the element of self-injury under Article 115 can never be legally satisfied unless the appellant inflicts the injury upon himself. Therefore, regardless of the facts pleaded, the offense of malingering can never lie where the specification alleges another caused the injury. Our view of the plain language of the statute and prevailing precedent brings us to the opposite conclusion.

MCM, Part IV, ¶ 40(c)(2) contains the definitions for the element of self-injury. It states that infliction of injury "may be accomplished by any act or omission which produces . . . disability." Under the plain meaning of this provision, use of another person as the instrument of self-injury may be an act which produces a disability. In the instant case, when Cpl S acted as a tool in appellant's design, it was no different than if the appellant had shot himself to bring about the disability. The key is that the appellant orchestrated the injury with the specific intent to avoid deployment. Whether he pulled the trigger or solicited Cpl S to do so is of no import -- just as it is of no import whether he used a pistol to cause the injury or instead lay down on the street and asked Cpl S to drive over his leg.

Finding infliction of injury under this set of facts is supported by the small body of case law for malingering. See *United States v. Yarborough*, 5 C.M.R. 106, 111 (C.M.A. 1952) (dicta notes that a charge of malingering would be supported if the evidence showed beyond a reasonable doubt that two

conspirators made a plan to shoot the first conspirator in the foot in order for that person to get out of work and the plan was executed as envisioned); *United States v. Boudrie*, No. 850536, 1985 CMR LEXIS 2936, unpublished op. (N.M.C.M.R. 30 Dec 1985) (appellant's conviction for malingering proper where he asked a friend to shoot him in a suicide attempt to avoid further military service); *United States v. Burton*, No. 8501533, 1985 CMR LEXIS 2911, unpublished op. (N.M.C.M.R. 31 Dec 1985) (companion case to *Boudrie*, upholding the validity of the conviction for conspiracy to commit malingering for shooting another in the head). Therefore, in light of the plain meaning of the statute and precedent we find that the challenged specification states an offense.

The appellant's second assignment of error amounts to nothing more than a repeat of his first assignment of error, couched under a different theory. He argues that the military judge erred by accepting his plea where the facts adduced showed that he did not cause the injury himself. We find that the providence inquiry and the record of trial establish an adequate factual basis for the essential element of self-injury under Article 115. Using the appropriate standard of review, *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996), we find no substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant exists. Arts. 59(a) and 66(c), UCMJ. The findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court