

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

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

UNITED STATES OF AMERICA

v.

**DONALD W. LENARD
OPERATIONS SPECIALIST THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201100242
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 9 February 2011.

Military Judge: CDR Douglas Barber, JAGC, USN.

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

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

For Appellant: Capt Bow Bottomly, USMC; LT Michael Hanzel,
JAGC, USN.

For Appellee: Maj William Kirby, USMC.

19 January 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, contrary to his pleas, of two specifications of making a false official statement and one specification of larceny in violation of Articles 107 and 121,

Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921.¹ The appellant was sentenced to confinement for 6 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has submitted one assignment of error, alleging that the findings were legally and factually insufficient. He avers that the Government failed to prove beyond a reasonable doubt that the appellant knew his wife (TL) did not live in Connecticut when he listed a Connecticut address on two Basic Allowance for Housing (BAH) documents he signed in 2007 and as a result received increased BAH payments. He also asserts that the Government failed to prove beyond a reasonable doubt that the appellant possessed the specific intent to lie and steal.

We have examined the record of trial, the appellant's assignment of error, and the pleadings. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

The appellant in his assignment of error argues that the Government failed to prove beyond a reasonable doubt that he knew his wife did not live in Connecticut when he listed a Connecticut address on two documents he signed in 2007, and that the Government failed to prove beyond a reasonable doubt that the appellant had the specific intent to lie and steal. We disagree.

In accordance with Article 66(c), UCMJ, this court reviews issues of legal and factual sufficiency *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). When testing for legal sufficiency, this court must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A.

¹ The military judge dismissed an additional specification alleging a false official statement upon a motion filed pursuant to RULE FOR COURTS-MARTIAL 917, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

1993); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). Specific intent may be established by circumstantial evidence. *United States v. Davis*, 49 M.J. 79, 83 (C.A.A.F. 1998).

After carefully reviewing the record of trial and considering the evidence in the light most favorable to the prosecution, we are persuaded that a reasonable fact-finder, in this case a military judge, could indeed have found all the essential elements beyond a reasonable doubt. See *Dobson*, 63 M.J. at 21. Furthermore, after weighing all the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced beyond a reasonable doubt of the appellant's guilt. See *Turner*, 25 M.J. at 325.

The case presented by the Government relied on both documentary and circumstantial evidence to prove that the appellant committed larceny and knowingly made false official statements in the context of claiming and receiving undue entitlements. The defense presented a case which included periodic estrangement and marital violence, casting the BAH overpayment as the result of the appellant not knowing where his wife was living. The Government produced numerous records, the gravamen of which debunked the putative validity of the Connecticut address or TL's supposed residence there. These records included maintenance requests signed by TL for the appellant's apartment in Virginia spanning a matter of years; three leases which listed TL as an occupant of the appellant's Virginia apartment; employment records on TL from a fast food establishment in Virginia; and resident pool passes for TL and her children at the apartment in Virginia. Likewise compelling was testimony received from a member of the Naval Criminal Investigative Service, which endeavored unsuccessfully to locate the Connecticut address listed by the appellant, but found only a nonresidential area, proximal to a college campus.

The evidence the Government produced at trial was sufficient to prove the appellant's guilt beyond a reasonable

doubt. While some conflicts were appropriately raised through the adversarial process, they were not of a nature to raise reasonable doubt. See *Rankin*, 63 M.J. at 557. In light of the evidence put forth by the Government, we find the appellant's contrary explanations and assertions insufficiently credible to negate any essential element of proof, including his intent, when viewed against the clear weight of evidence. The evidence demonstrated that TL lived and worked in Virginia with the appellant and that he necessarily knew as much. There is no take on the evidence which favors the conclusion that the appellant believed in good faith that his wife was residing at a non-existent Connecticut address when his false statements were made or when this larceny was committed. Considering the evidence in the light most favorable to the prosecution, we are also persuaded that a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. See *Dobson*, 63 M.J. at 21.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. See *Turner*, 25 M.J. at 325.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL
Clerk of Court