

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

**Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, M. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**FRANK E. MORENO
ELECTRICIAN'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 201200005
GENERAL COURT-MARTIAL**

Sentence Adjudged: 23 September 2011.

Military Judge: CAPT Tierney Carlos, JAGC, USN.

Convening Authority: Commander, Navy Region Europe, Africa,
Southwest Asia, Naples Italy.

Staff Judge Advocate's Recommendation: CDR T.D. Stone,
JAGC, USN.

For Appellant: LT Toren Mushovic, JAGC, USN.

For Appellee: Maj David Roberts, USMC.

31 August 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 general court-martial convicted the appellant, consistent with his pleas, of six specifications of indecent conduct, two specifications of larceny, two specifications of housebreaking, two specifications of wrongfully taking images of women, one specification of adultery, and four specifications of wrongfully concealing military property in violation of Articles 120, 121, 130, and

134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 921, 930, and 934. A members panel, consisting of officer and enlisted representation, sentenced the appellant to confinement for two years, reduction to pay grade E-1, total forfeitures, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) disapproved the adjudged forfeitures and deferred and then waived for six months the automatic forfeitures for the benefit of the appellant's dependents.

No errors were assigned by counsel; however, after carefully considering the record of trial, we conclude that the military judge abused his discretion in accepting the appellant's guilty pleas to the four specifications of wrongful concealment of military property under Charge IV. We will reassess the sentence. Following our action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant's charges of wrongful concealment of stolen property are based on a series of thefts which began approximately seven to eight years ago. In approximately 2005 or 2006, while assigned to a ship, the appellant took one pair of night vision goggles out of the force protection locker. He put the goggles in his backpack and took them home, intending to keep them permanently. In approximately early 2009, the appellant placed the goggles in his own storage unit, and they were later discovered in 2011 by the Naval Criminal Investigative Service when they were searching the unit.

Similarly, the appellant took a variety of other items, including an Hi8 miniature VCR, an EtherFast 5-Port Workgroup Switch, and a flat screen monitor from the ship. The appellant was not clear on the dates of his thefts, but testified that these subsequent thefts could have been as early as 2004. After stealing the items, the appellant concealed them and ultimately placed them in his storage unit. It is undisputed that the appellant stole each of the items. However, because the statute of limitations for larceny had expired when charges were preferred, as part of the terms of a pretrial agreement, he elected to plead guilty to concealment of stolen property.

Discussion

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A decision to accept a guilty plea will be set aside if there is 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).

Here, we conclude that the military judge abused his discretion in accepting the appellant's guilty plea. The military follows the common law rule that it is impossible for the thief to receive the goods he has stolen. *United States v. Ford*, 30 C.M.R. 3, 4-5 (C.M.A. 1960). Military case law does not provide a direct answer as to whether a thief can be liable for concealing the military property he has stolen. Concealment of stolen property was not a crime at common law, but there are two telling circumstances that suggest treating the liability of the thief as the same for the crimes of concealment and receiving stolen property. First, concealment and receiving stolen property are part of the same enumerated Article 134 crime and contain virtually the same elements. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 106. Secondly, the previously mentioned elements are similar to the common law crime of receiving stolen property, except for the addition of the terminal element for the Article 134 offense. Compare MCM, Part IV, ¶ 106(b) with *WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES*, § 381 (4th ed. 1940).

Looking to common law, the crime of receipt of stolen property is similar to concealment of stolen property in that the person must conceal property whose character is stolen at the time of the concealment. *CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES*, §§ 381 and 383. It would be a strange and undesirable legal fiction to parse out a larceny in order to create multiple crimes from essentially one transaction. This is the logical conclusion as a thief ordinarily conceals the property he has stolen. Withholding and concealing are the thief's purpose at the moment he gains possession. Thus, it follows that the same impossibility of receiving stolen property by the thief should attach to concealment of stolen property by the thief. Therefore, we conclude in the absence of facts indicating a complete divorcement of the concealing from the initial course of conduct by the thief, a thief may not be found guilty of concealment of the same stolen property. Here, the appellant was the thief, and the instant facts reflect a single transaction and purpose. After stealing the items, the appellant immediately concealed them and, despite the variety of

hiding places, there are no facts which tend to show a complete divorcement from the original theft. Accordingly, the military judge abused his discretion in accepting the appellant's guilty pleas to the four specifications of wrongful concealment of military property under Charge IV.

As a result of our decision, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 41-42 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). 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).

The appellant remains convicted of a multitude of serious offenses, including six specifications of indecent conduct, two specifications of larceny, two specifications of housebreaking, two specifications of wrongfully taking images of unsuspecting women, and one specification of adultery. We conclude that, absent the error, the panel would have imposed, and the convening authority would have approved, the same sentence previously adjudged and approved.

Therefore, we set aside the finding of guilty to Specifications 50, 51, 52 and 53 of Charge IV, and affirm the remaining findings. We affirm the sentence as approved by the convening authority.

R.H. TROIDL
Clerk of Court