

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

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

UNITED STATES OF AMERICA

v.

**JONATHAN S. PLAHS
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100647
GENERAL COURT-MARTIAL**

Sentence Adjudged: 1 September 2011.

Military Judge: LtCol Charles Hale, USMC.

Convening Authority: Commanding General, Training Command,
Quantico, VA.

Staff Judge Advocate's Recommendation: Maj C.M. Burnett,
USMC.

For Appellant: Maj Peter Griesch, USMCR.

For Appellee: Mr. Brian Keller, Esq.

12 July 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, pursuant to his pleas, of conspiracy to sell military property, dereliction of duty, two specifications of suffering the wrongful disposition of military property, stealing military property, and possessing unregistered grenades, in violation of Articles 81, 92, 108, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 908,

921, and 934. On 1 September 2011, the military judge sentenced the appellant to confinement for 40 months, reduction to pay grade E-1, forfeiture of all pay and allowances, a fine of \$250.00, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of 12 months.

Although not assigned as error, we note the military judge failed to elicit sufficient facts from the appellant during the plea colloquy to support the appellant's guilty plea to Charge III, Specification 1. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Charge III, Specification 1 alleges the appellant willfully suffered ammunition "to be wrongfully disposed of by Steven N. Cantrell." Charge Sheet. "'To suffer' means to allow or permit." *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 32c(2). "Suffering" includes a deliberate violation of a specific regulation or order. *Id.* The appellant never admitted Private (Pvt) Cantrell wrongfully disposed of the ammunition.

At the time of the offenses, the appellant and Pvt Cantrell were ammunition technicians onboard Marine Corps Base, Quantico, Virginia. The appellant and Pvt Cantrell worked at an Ammunition Supply Point where they were responsible for keeping accurate records of ammunition expended by their respective units during training exercises. If, upon counting the rounds of ammunition, they found more or less ammunition than was reflected in their written records, they would swap rounds to account for the discrepancies. During the providence inquiry into the dereliction of duty charge the appellant said they would "trade to make the numbers match up." Although the appellant said at one point in the inquiry that Pvt Cantrell could do whatever he wished with the rounds he received from the appellant, the appellant was clear the trading of rounds was to account for paperwork discrepancies, and that Pvt Cantrell used the rounds to make up for missing rounds in his own stock of ammunition. The appellant never admitted that Pvt Cantrell did anything else with the ammunition he received from the appellant other than include it with Pvt Cantrell's stock of ammunition.

The appellant never provided any facts that the ammunition left the control of the Government. See *United States v. Holland*, 25 M.J. 127, 128 (C.M.A. 1987). Additionally, there was no showing that the appellant or Pvt Cantrell intended to deprive the Government of the ammunition. *United States v. Faylor*, 24 C.M.R. 18 (C.M.A. 1957). For those reasons, the appellant's explanation of the offense under Charge III,

Specification 1, failed to support his guilty plea to the offense, and should be set aside.

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 serious offenses including larceny of military property, conspiracy to sell military property, suffering military property to be wrongfully disposed of, dereliction of duty, and possessing unregistered grenades. Given that the military judge awarded a sentence that included 40 months of confinement and a bad-conduct discharge, we conclude that, absent the error, the military judge 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 Charge III, Specification 1, and affirm the remaining findings. We affirm the sentence as approved by the convening authority.¹

For the Court

R.H. TROIDL
Clerk of Court

¹ To the extent the convening authority's action purports to order the punitive discharge upon completion of appellate review, it is a nullity and does not require corrective action. See *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).