

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

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

**UNITED STATES OF AMERICA**

**v.**

**JUSTIN D. TANNER  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201200250  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 14 February 2012.

**Military Judge:** Col Michael Richardson, USMC.

**Convening Authority:** Commanding General, 1st Marine  
Division, Camp Pendleton, CA.

**Staff Judge Advocate's Recommendation:** Maj V.G. Laratta,  
USMC.

**For Appellant:** LT Toren Mushovic, JAGC, USN; Capt David  
Peters, USMC.

**For Appellee:** CDR Monte G. Miller, JAGC, USN; Maj David N.  
Roberts, USMC.

**30 November 2012**

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**OPINION OF THE COURT**  
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**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 one specification of stealing U.S. military property of a value of over \$500.00 and one specification of wrongfully receiving stolen military property in violation of Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934. The

appellant was sentenced to confinement for 18 months, reduction to paygrade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but pursuant to the pretrial agreement, suspended all confinement in excess of 365 days for the period of confinement served plus 12 months.

The appellant alleges five assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).<sup>1</sup>

### **Background**

On 30 October 2010, Oceanside, California police were dispatched to the appellant's home. The police arrived to find the appellant intoxicated and threatening to commit suicide with a stolen fragmentation grenade. The situation was defused and the appellant was arrested. A search of the appellant's apartment yielded numerous pieces of stolen military property wrongfully obtained from a fellow Marine.<sup>2</sup> Additionally, from 1 May 2010 to 27 June 2011, the appellant participated in a *quid pro quo* sham marriage arrangement wherein he collected nearly \$15,000.00 in fraudulent Basic Allowance for Housing (BAH) payments.

During the sentencing proceedings, the military judge *sua sponte* reopened the providence inquiry and ordered an examination under RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The R.C.M. 706 board diagnosed the appellant with Alcohol Dependence and Personality Disorder Not Otherwise Specified. Appellate Exhibit XXVII. The board also concluded that the appellant was able to appreciate the nature

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<sup>1</sup> (1) That the military judge erred by finding the appellant mentally responsible at the time of the offenses;

(2) That the military judge abused his discretion by finding that the appellant was mentally responsible to participate in his own defense;

(3) That the appellant's plea to the receipt of stolen property charge was not provident;

(4) That the appellant's plea to the larceny was not provident;

(5) That the adjudged sentence was inappropriate given the nature of the offenses and psychiatric problems of the appellant.

<sup>2</sup> The stolen military equipment the appellant received included ammunition, the fragmentation grenade, several digital cameras, four thermal sights, and various pieces of body armor and allied gear. The total value was estimated at \$40,000.00. Record at 404.

of his actions at the time of the offenses and possessed sufficient mental capacity to understand the proceedings and participate in his own defense. *Id.*

### **Providence of the Pleas**

We review the military judge's decision to accept the appellant's plea of guilty for an abuse of discretion. *United States v. Inabinette*, 66 M.J 320, 322 (C.A.A.F. 2008). In reviewing a military judge's acceptance of a plea, we discern whether the record contains a substantial basis in law or fact for questioning the guilty plea. *Id.* If an appellant establishes facts which raise a possible defense, the military judge must inquire further and resolve the matters inconsistent with the plea, or reject the plea. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006).

In reviewing this case, we find a substantial factual basis for the appellant's pleas. With respect to the adequacy of his pleas, the appellant freely entered into a stipulation of fact wherein he outlined, in detail, the factual basis of his misconduct. Prosecution Exhibit 1; Record at 271. Moreover, the military judge conducted an extensive providence inquiry of the appellant across both charges, during which the appellant recounted the facts of the misconduct committed. Record at 283-315. Taken together, the record clearly establishes a factual basis for each element of the charges.

As for the appellant's mental state, the military judge conducted the providence inquiry in accordance with the tenets of *Phillippe*. The military judge inquired into possible defenses raised by the inquiry and *sua sponte* ordered an R.C.M. 706 board. The staff psychologist who conducted the R.C.M. 706 board found that the appellant had "sufficient mental capacity to understand the nature of the proceedings against him and to conduct and cooperate intelligently in his defense." AE XXVII. The board also found that the appellant "was able to appreciate the nature and quality or wrongfulness of his conduct" at the time of the offense. *Id.* The appellant did not dispute those findings at trial. In fact, both before and after the R.C.M. 706 board, the appellant and his defense counsel stated they had discussed mental responsibility and did not believe that the defense existed. Record at 315; 390-92. To the contrary, the appellant expressly stated that he was able to participate in his defense and that his treatment for depression did not impact his ability to make decisions in committing misconduct. *Id.* at 384, 387. Moreover, during the providence inquiry, the

appellant expressly acknowledged having the capacity to form - and then actually forming - the requisite intent. *Id.* at 314-15; 399-400. Lastly, the military judge noted that he observed "no problems with [the appellant's] performance" during the entirety of the proceedings. *Id.* at 383. Based on this record, we find that the military judge did not abuse his discretion in accepting the appellant's pleas.

### **Sentence Severity**

The appellant asserts that his sentence, particularly the bad-conduct discharge, was unjustifiably severe. We disagree. This court reviews the appropriateness of the sentence *de novo*. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005). We engage in a review that gives "'individualized consideration' of the particular accused '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)). Here, the appellant stole \$15,000.00 in BAH payments through a fraudulent marriage scheme and received nearly \$40,000.00 worth of military gear stolen from his Marine Corps special operations unit. The gear included combat essential gear such as a live fragmentation grenade, valuable infrared sights, and body armor. Taking into consideration the nature and seriousness of the appellant's crimes, we find the sentence entirely appropriate.

### **Conclusion**

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), Uniform Code of Military Justice. The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court