

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

**Before  
M.D. MODZELEWSKI, E.C. PRICE, J.S. SMITH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**CHAZ W. RUSH  
INTERIOR COMMUNICATIONS ELECTRICIAN THIRD CLASS (E-4)  
U.S. NAVY**

**NMCCA 201200448  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 14 June 2012.

**Military Judge:** CDR Colleen Glaser-Allen, JAGC, USN.

**Convening Authority:** Commander, Naval Air Force Atlantic,  
Norfolk, VA.

**Staff Judge Advocate's Recommendation:** CAPT F.D. Mitchell,  
JAGC, USN.

**For Appellant:** LT Jared A. Hernandez, JAGC, USN.

**For Appellee:** LT Lindsay P Geiselman, JAGC, USN.

**27 June 2013**

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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.**

SMITH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of attempted sale of military property, false official statement, and larceny in violation of Articles 80, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 907, and 921. The appellant was sentenced to confinement for ten months and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but, pursuant to a pretrial agreement, suspended all confinement in excess of six months.

The appellant initially submitted this case for review without specific assignment of error. We specified the following two issues:

WHETHER THE APPELLANT'S PLEA TO FALSE OFFICIAL STATEMENT, AS ALLEGED IN THE SPECIFICATION OF CHARGE II, SUFFICIENTLY ESTABLISHED THAT IT WAS AN OFFICIAL STATEMENT AND WAS PROVIDENT, IN LIGHT OF *UNITED STATES V. SPICER*, 71 M.J. 470 (C.A.A.F. 2013)?

ASSUMING THIS COURT WERE TO FIND APPELLANT'S PLEA TO FALSE OFFICIAL STATEMENT, AS ALLEGED IN THE SPECIFICATION OF CHARGE II, IMPROVIDENT, CAN WE REASSESS THE SENTENCE OR SHOULD THE RECORD BE RETURNED FOR REHEARING?

In response to the specified issues, the appellant contends that his plea to making a false official statement was improvident as there was no evidence that the statements were "official" as required by Article 107, UCMJ, and that we should reassess the sentence.

After careful consideration of the record of trial and the pleadings submitted by the parties, we find that the appellant's plea of guilty to making a false official statement was improvident and conclude that the appellant's conviction of Charge II and its specification must be set aside. We will take corrective action in our decretal paragraph. Otherwise, we affirm the findings and, upon reassessment, the sentence. Following our corrective action and reassessment, no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Background**

While assigned to the USS ENTERPRISE (CVN 65), the appellant stole five brass valves, military property with a replacement value of over \$33,000.00. The valves were stored aboard USS ENTERPRISE in a locker within the engineering department spaces. The appellant's division was responsible for the storage locker, but the valves were used by another division within the engineering department. The appellant discovered the valves while cleaning, removed the valves from the ship, and subsequently attempted to sell the valves as scrap metal to a private metal salvage business.

Salvage business employees suspected that the valves were stolen from a nearby private company, Newport News Shipbuilding,

so they contacted SP, a civilian loss investigator for the company. SP travelled to the salvage business and interviewed the appellant in an effort to determine if the valves were stolen. At the time of the interview, military authorities had not yet initiated any investigation regarding the theft of the valves. SP did not interview the appellant at the request or direction of military authorities, but instead acted solely in her capacity as a civilian loss investigator for a private company. The appellant made a false statement to SP that he had been given permission by his supervisor to take the valves. SP subsequently contacted the Naval Criminal Investigative Service and reported the incident. The appellant's false statement to SP formed the basis of the specification of Charge II, to which the appellant entered a plea of guilty.

### **Discussion**

"We review a military judge's decision to accept a guilty plea for an abuse of discretion [.]" *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea. *Id.*

### **False Official Statement**

Conviction of making a false official statement under Article 107, UCMJ, requires proof beyond a reasonable doubt:

- (1) That the appellant signed a certain official document or made a certain official statement;
- (2) That the document or statement was false in certain particulars;
- (3) That the appellant knew it to be false at the time of signing it or making it; and,
- (4) That the false document or statement was made with the intent to deceive.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 31b. The text of the UCMJ provides that: "Any person subject to this chapter who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct." Art. 107, UCMJ. The Manual indicates that the term

"official statements" includes all "statements made in the line of duty," but does not define "line of duty." MCM, Part IV, ¶ 31c(1).

It is well-settled that false statements made by an accused to a military investigator are generally "official" for criminal liability under Article 107. *United States v. Solis*, 46 M.J. 31, 32-33 (C.A.A.F. 1997) (citing *United States v. Jackson*, 26 M.J. 377, 379 (C.M.A. 1988)). However, whether statements made to others are official depends on the status of both the speaker and the listener, and the nature of the communication. The Court of Appeals for the Armed Forces recently addressed this issue, noting that, "'the critical distinction is . . . whether the statements relate to the official duties of either the speaker or the hearer, and whether those official duties fall within the scope of the UCMJ's reach.'" *United States v. Spicer*, 71 M.J. 470, 474 (C.A.A.F. 2013) (quoting *United States v. Day*, 66 M.J. 172, 174 (C.A.A.F. 2008)). The court went on to articulate that, "[t]he speaker may make a false official statement 'in the line of duty,' MCM pt. IV, para. 31.c.(1), or to civilian law enforcement officials if the statement bears a 'clear and direct relationship' to the speaker's official duties." *Id.* (quoting *United States v. Tefteau*, 58 M.J. 62, 69 (C.A.A.F. 2003)) (emphasis added). The court re-affirmed this principle in *United States v. Capel*, 71 M.J. 485, 487 (C.A.A.F. 2013).

Turning to the present case, the appellant's false statement that forms the basis of the specification of Charge II was not made to a military investigator and was not made in the "line of duty." *Spicer*, 71 M.J. at 474. The Government argues that the appellant's false statement "bore a clear and direct relationship to his official duties" because it involved the larceny of valves from a storage area he was duty-bound to maintain on board USS ENTERPRISE. Government Brief of 14 Jun 2013 at 11. However, the record establishes that the investigator was an employee of a private company instead of a civilian law enforcement officer and, contrary to the Government's assertion, the record is devoid of any facts suggesting that the appellant's statement related to his official duties. For example, he did not appear in uniform or hold himself out as being on official business from any particular command or military organization. Additionally, there was no military investigation ongoing at the time the appellant made the statement. For these reasons, we find a substantial basis in law and fact for questioning whether the appellant's statement to the civilian company's loss investigator was "official," as defined in military

jurisprudence. *Spicer*, 71 M.J. at 474; MCM, Part IV, ¶ 31b(1). We conclude that the military judge abused her discretion in accepting the appellant's guilty plea to making a false official statement and set aside the findings of guilty to Charge II and the specification thereunder. *Inabinette*, 66 M.J. at 322.

### **Sentence Reassessment**

We next determine whether we can reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We are satisfied that the sentencing landscape in this case has not changed dramatically as a result of our decision to set aside the findings of guilty to making a false official statement. See *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). We conclude that the adjudged sentence for the remaining offenses would have been at least the same as that adjudged by the military judge and approved by the CA.

The larceny and attempted sale of military property were the gravamen of the appellant's misconduct and the most serious offenses. We note that the false official statement charge carried the lightest authorized punishment of all the charges, that the authorized maximum confinement for the remaining two charges is 20 years, and that the trial court imposed a sentence of 10 months confinement, of which four months were suspended pursuant to a pretrial agreement. Finally, we note that the facts and circumstances surrounding the improvident false official statement charge would have been admissible as aggravation evidence in sentencing.

### **Conclusion**

The findings of guilty of Charge II and its specification are set aside and that specification and charge are dismissed.

The remaining findings and the sentence are correct in law and fact and are affirmed.

Senior Judge MODZELEWSKI and Judge PRICE concur.

For the Court

R.H. TROIDL  
Clerk of Court