

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**DIANA P. BUSSELL  
Dentalman (E-3), U. S. Navy**

NMCCA 200601100

Decided 28 November 2006

Sentence adjudged 29 December 2005. Military Judge: B.D. Landrum. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Okinawa, JA.

LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel  
LT BRADLEY D. NEWBERRY, JAGC, USN, Appellate Defense Counsel  
Capt BRIAN K. KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

Consistent with her pleas, the appellant was convicted by a military judge sitting as a general court-martial of violating a lawful general regulation (failure to report an offense), making a false official statement, and larceny, in violation of Articles 92, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 921. The appellant was sentenced to a dishonorable discharge, 4 years confinement, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. First, she asserts that her plea of guilty to Specification 2 of Charge I (failure to report a murder) was improvident because she had no duty to report an offense in which she was criminally involved. Second, the appellant avers that the military judge's providence inquiry into her plea of guilty to the Additional Charge alleging a false official statement was legally and factually insufficient

to support a finding of guilty because there was no evidence in the record of the specific statements.

We have examined the record of trial, the assignments of error and Government's response. We conclude that the findings and 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.

### Background

Shortly after being stationed in Okinawa, Japan, the appellant became involved with a shoplifting ring made up of personnel from the dental clinic where she was stationed. The ring included Dentalman (DN) Audley Evans, DN Tiffany Brooks, Dentalman Recruit (DR) Robert Person, and the appellant. Record at 40; Prosecution Exhibit 1 at 2. Between September and December 2004, the appellant and her three accomplices stole merchandise from the local Army and Air Force Exchange Service (AAFES) estimated to be worth \$100,000. PE 4 at 3. The appellant, while she did not personally participate in every theft from the exchange, admitted during the providence inquiry that she participated in at least 30 separate thefts. Record at 41, 54.

Simultaneously, another group of Sailors, including DN Adam J. Palecco, were involved in a separate ongoing shoplifting scheme in which the appellant was not directly involved. In November 2004, DN Palecco and another sailor, DR Darryl Trappier, were apprehended for shoplifting. PE 1 at 1. Some months later, on 1 February 2005, Trappier, whose court-martial for shoplifting was rapidly approaching, reported to Evans that Palecco was going to inform authorities about others involved in thefts from the exchange including Evans and his three accomplices.

Later that same day, a meeting was held in the barracks room shared by the appellant and Brooks. Present were Evans, Brooks, Person and the appellant. While they were all present and listening, Evans discussed the need to take action against Palecco for being a "snitch." He discussed causing Palecco bodily harm. *Id.* On 2 February 2005, Evans, Person, and Brooks stabbed DN Palecco to death. *Id.* While the appellant was aware that Evans and the others were angry at Palecco and might physically hurt him, she testified that she never believed that their anger would lead to Palecco's murder. Record at 28.

On 4 February 2005, investigators from Naval Criminal Investigative Service (NCIS) interviewed all personnel at the dental clinic to include the appellant. NCIS told the appellant that Palecco had been murdered. This was the first she'd heard of it. In response, the appellant told investigators, *inter alia*, that she could not think of anyone who wanted to hurt or harm Palecco. *Id.* at 2. Later that same day, Evans informed the appellant that he, Person and Brooks had murdered Palecco.

On 12 February, 17 March, and 19 July 2005, the appellant gave additional voluntary statements to NCIS. In these statements, she addressed the activities of the theft ring but did not report her knowledge of the murder. On 12 February, the appellant stated that she only received stolen merchandise from Evans but did not participate in the thefts. Record at 54. On 17 March, the appellant again stated that she only received stolen goods but did not participate in the theft. *Id.* On 19 July, the appellant admitted to an NCIS investigator that she "did not tell the truth in the first statement." PE 4 at 2. She then went on to state that she participated in the thefts on two occasions, the first being in November 2004 and the second being in December 2004. PE 4 at 2-3. As noted above, during her providence inquiry, the appellant finally admitted to her participation in approximately 30 separate thefts from the exchange. Record at 41, 54.

### **Failure to Report an Offense**

The appellant pled guilty to Specification 2 of Charge I, which alleged that she violated Article 1137, U.S. Navy Regulations, by failing to report the murder of DN Palecco to proper authorities when she became aware of it. On appeal, she claims that she was exempt from reporting the crime because of her personal involvement in it. A military judge's decision to accept or reject an accused's guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). We will find a military judge abused his discretion in accepting a guilty plea only if the record shows a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Rejecting a guilty plea must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

If an appellant's statements or other evidence appear inconsistent with an initial guilty plea, the military judge should conduct a thorough inquiry to determine the appellant's position regarding the apparent inconsistency. *United States v. Parker*, 10 M.J. 849, 851 (N.C.M.R. 1981). In the instant case, the military judge extensively explored Article 1137, U.S. Navy Regulations, with the appellant to include a detailed discussion of the provision which excuses reporting in situations where the individual participated in the offense and would incriminate herself by reporting it. Record at 32, 37. The appellant clearly stated on multiple occasions during the providence inquiry that she "did not feel she was involved in the murder in any way." Record at 32.

The appellant now urges this court to disregard her repeated statements under oath during the providence inquiry and to further disregard PE 1, a stipulation of fact, which expressly indicates that she has no legal justification or excuse for failing to report the murder. Instead, the appellant would have us rely on her statements and the statements made by two of the murderers to NCIS investigators, which were admitted during sentencing. PE 6 and 7. We decline to do so. We note that the Appellant's Brief and Assignment of Errors of 12 September 2006, repeatedly misquotes and mischaracterizes the record and wholly ignores the appellant's repeated unequivocal statements under oath to the military judge that she was not involved in the murder.

In stark contrast to her assertions during the providence inquiry, the appellant's brief now claims that she was "scared she was connected to the murder." Appellant's Brief at 5. In support of this, the appellant cites to her 2 August 2005 statement to NCIS. PE 5. A painstaking review of PE 5 reveals nothing that could remotely be construed as stating or even reasonably implying that the appellant was "scared she was connected to the murder." The closest is a line on page 5 of the statement which indicates that one reason she didn't come forward was because she thought something might happen to her. The rest of her statement makes crystal clear that her apprehension related to physical injury at the hands of the other shoplifters and to the fact that her involvement in the shoplifting crew would come to light. Nowhere does PE 5 suggest that she had any concern whatsoever that she was somehow implicated in the murder of DN Palecco. In fact, the rights warning associated with PE 5 states that she was under investigation only for larceny and failure to report an offense.

The appellant also cites the statement of DN Brooks as evidence that the appellant was "a participant in procuring the murder weapons on the day of the murder." Appellant's Brief at 5; PE 7. Wholly contrary to the assertion in the appellant's brief, DN Brooks statement actually says that she, Evans, and Person stole the knives used to murder Palecco while the appellant was "in a different area of the exchange." PE 7 at 3. While DN Brooks goes on to state that she was "sure" the appellant knew the three were "stealing items," there is no indication in Brooks' statement that the appellant was aware that the three were specifically stealing knives or that they were planning to use the knives to murder DN Palecco. This is a far cry from being "a participant" in procuring murder weapons.

Finally, the appellant's brief contends that "there is evidence in the record that the appellant believed she was criminally involved in the murder of DN Palecco. In fact, nothing could be further from the truth. The record is rife with evidence to the contrary including a stipulation of fact and the appellant's sworn testimony during the providence inquiry. PE 1;

Record at 25-37. The appellant appears to be relying on the fact that NCIS informed the appellant on 12 February that they were investigating the murder of DN Palecco and that she was being questioned concerning her "knowledge of and/or involvement surrounding the circumstances of Palecco's death." PE 2 at 2. The appellant's brief does not explain, however, how the fact that she, along with every other Sailor at the dental clinic, was questioned about their "knowledge and/or involvement" in the murder during the early days of the investigation proves or even reasonably implies that she personally "believed" she was criminally involved in the murder.

While there was some contradictory evidence presented regarding the appellant's level of knowledge that something bad was going to happen to DN Palecco, we find that the military judge's decision to accept the appellant's plea to Specification 2 of Charge I was not arbitrary, fanciful, clearly unreasonable or clearly erroneous. Having carefully reviewed the entire record, we find no substantial basis in law and fact to question the appellant's plea. We find no evidence that the appellant ever believed that she was involved or otherwise implicated in the murder of DN Palecco such that she would be relieved of her Article 1137 obligation to report the crime. We find, therefore, that the military judge did not abuse his discretion.

#### **Improvident Guilty Plea**

The appellant asserts that the evidence does not support the allegations that she made false official statements. The appellant's argument focuses on the first element of the offense which requires that an accused have made a particular official statement. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 31b(1). The appellant asserts that there is no evidence the false statements were ever made. In support of this, the appellant cites to the several written statements provided by the appellant to NCIS investigators which were admitted during the sentencing portion of the trial. PE 2-5.

The appellant appears to be making a legal and factual sufficiency argument more appropriate to a contested specification than to a guilty plea. We will treat this assignment of error as an assertion that the appellant's pleas to this specification were improvident.<sup>1</sup>

During the instant providence inquiry, the appellant admitted lying to various NCIS investigators regarding her involvement in the theft ring. Contrary to the appellant's assertions on appeal, she freely admitted in open court that she

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<sup>1</sup> The essence of a guilty plea is that an accused admits under oath and in open court that certain facts sufficient to prove every element of the charged offense are true. The Government is thereby relieved of the burden to present evidence. RULE FOR COURTS-MARTIAL 910, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

made all of the individual statements attributed to her in the specification under the Additional Charge. Record at 52-59. While all of the statements articulated in the specification under the Additional Charge are not reflected in the appellant's formal written statements to NCIS, there is nothing in any of the written statements that is inconsistent with her sworn testimony under oath regarding what she said to investigators during the several interviews. The military judge correctly walked the appellant through every element of the offense and particularly addressed each false statement alleged. We hold, therefore, that this assignment of error is wholly without merit.

### **Conclusion**

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL  
Clerk of Court