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

Before
R.E. VINCENT, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHRISTOPHER D. BROOKS
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800456
GENERAL COURT-MARTIAL

Sentence Adjudged: 13 March 2008.
Military Judge: LtCol David Oliver, USMC.
Convening Authority: Commanding General, Marine Corps Base, Camp Smedley D. Butler, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Maj H.J. Brezillac, USMC.
For Appellant: Capt Kyle Kilian, USMC.
For Appellee: CDR Christopher VanBrackel, JAGC, USN; Capt Geoffrey Shows, USMC.

26 May 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of failure to obey a general regulation, failure to obey a lawful order, making a false official statement, larceny of military property, adultery, and two specifications of obstructing justice, in violation of Articles 92, 107, 121, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 921, and 934. The appellant was sentenced to 15 months confinement, reduction to

pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant raises four assignments of error. His first, third and fourth assignments of error are that the evidence is both legally and factually insufficient to support findings of guilty to Additional Charge I, larceny, Charge III, adultery, and Specifications 1 and 2 of Additional Charge IV, obstructing justice.[1] He also alleges that new post-trial processing is required as the staff judge advocate failed to advise the CA the appellant had served pretrial restriction and the CA failed to consider the appellant's clemency matters.

After careful consideration of the record and the briefs of the parties, 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), UCMJ.

Legal and Factual Sufficiency of the Evidence

A. Principles of Law

Article 66(c), UCMJ, requires this court to conduct a *de novo* review of the legal and factual sufficiency of each approved finding of guilty. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

B. Discussion

The appellant asserts that the evidence is legally and factually insufficient to support findings of guilty to larceny of a Government computer, adultery, and two specifications of obstructing justice.

1. Larceny of Military Property

The appellant argues there is insufficient evidence to prove, beyond reasonable doubt, "that [he] possessed the specific intent to steal the government computer in question." Appellant's Brief of 18 Aug 2008 at 10. The appellant argues in

[1] Assignments of error III and IV were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

the alternative that the evidence was insufficient to prove specific intent to steal from the Government, and that the appellant had "an honest belief that the computer was garbage." *Id.* at 6, 8-10. We disagree.

To be found guilty of the offense of larceny, the Government must prove beyond a reasonable doubt that the appellant had the specific intent to steal. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 46c(1)(f)(i). "[A] person who takes, obtains, or withholds the property of another, believing honestly, although mistakenly, that he has a legal right to acquire or retain the property, is not guilty of an offense in violation of Article 121 . . . ." *United States v. Turner*, 27 M.J. 217, 220 (C.M.A. 1988)(citation and internal quotation marks omitted). "Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States." MCM, Part IV, ¶ 32c(1). "Abandoned property cannot be the subject of a larceny." *United States v. Coffman*, 62 M.J. 676, 679 (N.M.Ct.Crim.App. 2006) (citations omitted). As "larceny is a specific intent offense, if the appellant had an honest belief that the property was abandoned, he has a complete defense." *Id.*; RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Staff Sergeant (SSgt) P, a criminal investigator testified that during an authorized search of the appellant's barrack's room, he observed and seized a computer with "NMCI tags," which appeared to be Government property. Record at 61-62; Prosecution Exhibit 8. The Government subsequently called Mr. P, an "NMCI contractor" responsible for "day-to-day operations" including inventory of NMCI assets. Record at 109. He testified the computer seized by SSgt P had the same serial number, NMCI asset tag number, and IP address as a computer inventoried in May 2005 at Naha Port. *Id.* at 109-12. Mr. P also testified that the computer had not been properly prepared for destruction or sale, as the operating system and government data were intact on the hard drive. *Id.* at 112-13.

The appellant testified that he found the computer in a "TMO warehouse here on Camp Foster . . . . on a shelf with various computer parts; other computers that were sitting around collecting dust." *Id.* at 143. "To my knowledge, it was going to be trashed or DRMO'ed . . . . I took it out [sic] the warehouse to my barrack's room." *Id.* at 144. He testified he didn't conceal the computer while carrying it to his barracks as "I didn't think I was stealing it. I didn't think I had to hide it." *Id.* at 144-45. He acknowledged that he worked at "TMO" and found the computer in a TMO warehouse. *Id.* at 157-58.

At trial, and on appeal, the appellant in effect argues that the Government failed to prove beyond a reasonable doubt that he intended to steal the computer; or, in the alternative, that he had an honest belief that the property was abandoned, thus he has a complete defense. *See* R.C.M. 916(j)(1). In support of this

argument, the appellant argues he testified truthfully, as evidenced by his admissions of responsibility with respect to a number of the other alleged offenses.

We find the evidence of intent compelling. The appellant admitted that he took a computer from a shelf in a government warehouse, and carried that computer to his barrack's room for his personal use. There is no evidence that he sought or received permission to remove the computer from the warehouse. The real issues are whether the appellant's stated belief that the computer "was going to be trashed or DRMO'ed" constitutes a mistake of fact, and whether the military judge found the appellant's testimony credible. *Id.*

Assuming without deciding the appellant's testimony raised a mistake of fact defense, the military judge saw and heard the witnesses testify, and entered findings after articulating the appropriate standard for the mistake of fact defense during trial counsel's argument. Record at 163-64. The military judge's findings reflect that he did not find the appellant's testimony credible with respect to his intent when he took the computer from the government warehouse, and that he was convinced beyond a reasonable doubt that at the time of the offense the accused was not under the mistaken belief that the property was garbage or abandoned. We agree.

After considering the evidence in the light most favorable to the Government, we are convinced that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. After taking into consideration that we did not have to opportunity to see and hear the witnesses, we are also convinced beyond a reasonable doubt of the appellant's guilt.

2. Adultery and Obstruction of Justice

We have considered assignments of error III and IV and found them to be without merit. *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

Errors in Post-Trial Processing

A. Principles of Law

As the sentence in this case includes 15 months confinement and a punitive discharge, the staff judge advocate's recommendation (SJAR) is required to include "[a] statement of the nature and duration of any pretrial restraint." *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005)(quoting R.C.M. 1106(d)(3)(D)). "The [SJAR] plays a vital role in providing the convening authority with complete and accurate advice in the exercise of command discretion. Accurate advice is particularly important in light of the fact that the convening authority is

not required to review the record of trial personally before taking action. *Scalo*, 60 M.J. at 436 (citations omitted).

If defense counsel fails to make a timely comment on SJAR error, "the error is waived unless it is prejudicial under a plain error analysis." *Id.* (citations omitted). "To prevail under a plain error analysis, Appellant must persuade this Court that: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (citations and internal quotations omitted).

B. Discussion

The appellant asserts that new post-trial processing is required as the SJAR did not reflect the appellant had served 24 days of pretrial restriction. The appellant argues it is unreasonable to assume the CA was aware of the pretrial restriction, even though it was mentioned in his clemency submission, as the CA's action reflects consideration of clemency matters submitted "28 April 2008" vice "05 May 2008," and that it is unclear the CA properly considered the appellant's clemency request. Appellant's Brief at 12-13. The Government concedes that the SJAR failed to mention the appellant's pretrial restriction, but argues that the appellant suffered no prejudice as the appellant's clemency matters of 5 May 2008 discussing the appellant's pretrial restriction were attached to the SJAR. The Government further asserts there were no clemency matters submitted on 28 April 2008 and that the CA action's reference to 28 April 2008 was a scrivener's error.

The issue in this appeal involves the third prong of the plain error test, the appellant's burden to establish that the error materially prejudiced a substantial right. To meet this burden, the appellant must make "some colorable showing of possible prejudice." *Scalo*, 60 M.J. at 436-37 (citations and internal quotation marks omitted). The threshold for material prejudice with respect to an erroneous post-trial recommendation is low and reflects the CA's vast clemency power, but "[t]here must be a colorable showing of possible prejudice in terms of how the omission potentially affected an appellant's opportunity for clemency." *Id.* at 437.

In his clemency submission, the appellant made two basic arguments in support of a three-month reduction in confinement: (1) his family needed his financial support and presence as a caregiver, and (2) he believed that the final convictions warranted no more than special court-martial punishment, since he was acquitted of the majority of the charges that, in his view, resulted in his case being referred to general court-martial.

The appellant argues that unlike in *Scalo*, he mentioned the pretrial restriction in his clemency matters, requested clemency in the form of reduction of confinement from 15 to 12 months and

was acquitted of aggravated assault in violation of Article 128, UCMJ, the charge that in his view resulted in all charges being referred to a general court-martial vice a special court-martial where 12 months confinement would have been the maximum authorized confinement. The appellant also argues it is "unreasonable to assume" the convening authority considered his matters in clemency where the CA's action does not clearly reflect consideration of those matters. Appellant's Brief at 12.

First, the record reflects that the CA considered the appellant's clemency matters of 5 May 2008, and that the CA action's mention of matters submitted 28 April 2008 is likely a scrivener's error. The SJAR included the appellant's clemency submission of 5 May 2008 as an enclosure and the CA is required to consider the SJAR and acknowledged having done so in his action. The record reflects only one clemency submission by the appellant, the matters submitted via trial defense counsel on 5 May 2008. Although the CA's action mentions clemency matters of 28 April 2008, we conclude that the CA reviewed the appellant's matters in clemency which discussed pretrial restriction.

Second, the appellant's argument on appeal provides a speculative connection between the time he spent in pretrial restriction (24 days) and the requested reduction in confinement. The appellant's mention of the pretrial restriction in his clemency matters was as background before noting the pretrial restriction was terminated when he was ordered into pretrial confinement, where he remained until trial, 164 days later, ostensibly for violating a military protective order. Clemency Request of 5 May 2008, Enclosure (1) at 1. In addition, the 24-day period of pretrial restriction was not of such unusual duration that there is a reasonable likelihood based upon length alone – that it would have attracted the CA's attention for purposes of clemency. That this pretrial restriction was terminated for suspected misconduct and that the appellant was immediately ordered into pretrial confinement renders it even less likely to attract the CA's attention for purposes of clemency.

We conclude that the appellant has not made a colorable showing of possible prejudice of how the error in the SJAR – failure to reflect 24 days pretrial restriction - prejudiced him where the pretrial restriction information was reflected in the appellant's clemency request, and was considered by the CA. *See Scalo*, 60 M.J. at 437.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court