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

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

UNITED STATES OF AMERICA

v.

ROOSEVELT D. ROBERTS
GUNNERY SERGEANT (E-7), U.S. MARINE CORPS

NMCCA 200700027
GENERAL COURT-MARTIAL

Sentence Adjudged: 25 January 2006.
Military Judge: LCDR John Bauer, JAGC, USN.
Convening Authority: Commanding General, Training & Education Command, Marine Corps Combat Development Command, Quantico, VA.
Staff Judge Advocate's Recommendation: LtCol J.R. Woodworth, USMC.
For Appellant: LT Dillon Ambrose, JAGC, USN; CDR Sherry King, JAGC, USN.
For Appellee: Maj Elizabeth Harvey, USMC.

09 June 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

This case is before us for a second time. A general court-martial consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of four specifications of larceny of military property and two specifications of forgery, in violation of Articles 121 and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 923. The appellant was sentenced to a bad-conduct discharge and reduction to pay grade E-3. The convening authority (CA) approved the sentence as adjudged.

On initial review before this court, the appellant raised three assignments of error.[1] On 20 November 2007, this court affirmed the findings and sentence approved by the convening authority (CA).[2] The United States Court of Appeals for the Armed Forces (CAAF) subsequently granted review on the following issue:

> WHETHER THE MEMBERS ERRED WHEN THEY FOUND APPELLANT GUILTY OF STEALING `MILITARY' PROPERTY IN ALL OF THE SPECIFICATIONS OF CHARGE I, WHEN THE PROPERTY WAS OWNED BY A NON-APPROPRIATED FUND INSTRUMENTALITY.

The CAAF set aside our previous decision and returned the record to the Judge Advocate General of the Navy for remand to this court for a new review and consideration of the aforementioned issue under Article 66(c), UCMJ. *United States v. Roberts*, 66 M.J. 385 (C.A.A.F. Order Apr. 29, 2008). On remand, the appellant, with the consent of the Government, requested his appeal be assigned to a different panel of this court and that motion was granted.

The appellant raises five assignments of error: incorporating his three original assignments of error, the issue specified by the CAAF, and adding whether the military judge erred when he failed to advise the members that they were to consider certain specifications as merged for sentencing purposes.

We have considered the record of trial, the appellant's five assignments of error, the Government's answers, the appellant's reply, and oral argument by the parties. We will order corrective action in our decretal paragraph and, following that action, conclude that the findings and the sentence, as reassessed, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, a gunnery sergeant (E-7), was assigned as S-4 (Logistics) Chief at The Basic School (TBS) in Quantico, Virginia. As part of his military duties, he served as bookkeeper for the Augmented Dining Fund (ADF). The ADF was

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[1] I. The evidence was factually insufficient to find appellant guilty of larceny and forgery.
II. The military judge's erroneous admission of hearsay testimony substantially prejudiced appellant's right to confrontation under the Sixth Amendment.
III. Appellant was denied a speedy trial where the military judge excluded nearly the entire period between appellant's first ineffective arraignment and re-arraignment on the charges after an article 32 investigation had taken place.

[2] *United States v. Roberts*, No. 200700027, 2007 CCA LEXIS 450, unpublished op. (N.M.Ct.Crim.App. 20 Nov 2007).

funded entirely by contributions from TBS students and was a Non-Appropriated Fund Instrumentality (NAFI). The ADF, a tax exempt entity, was used primarily to fund upfront costs for TBS mess nights, and officers attending mess nights would reimburse the ADF dollar for dollar. Record at 191, 201. An audit of the ADF discovered that two ADF checks, each payable in the amount of $800.00, were used to pay the rent on an apartment where the appellant and Ms. B were co-tenants on the lease. There were three people with access to the ADF checkbook: the appellant, Corporal (Cpl) P and Captain (Capt) S. Only Cpl P and Capt S were authorized to sign checks drawn from the ADF, and both denied signing the two checks at issue.

At trial, the appellant testified that, prior to embarking on a 96-hour liberty period on 2 July 2004, he saw the ADF checkbook lying unsecured on top of the office safe. He stated that he took the checkbook and put it in his book bag for safekeeping before driving to North Carolina to visit his family. The appellant and his family subsequently visited Ms. B's apartment, and then he, his wife, and Ms. B went out to dinner together. The appellant drove back to TBS the same night. He testified that he went to work the next morning, removed the checkbook from his bag and "set it back on top of the safe where [he] took it from the Friday before [he] left." *Id.* at 247. When Cpl P reported for duty, the appellant told her to "[s]ecure those checks." *Id.* at 247, 266.

At trial, the appellant denied stealing the checks, forging Capt S's signature on the checks or uttering the checks. He testified that Ms. B must have taken the checks from his backpack and signed Capt S's name. On appeal, the appellant asserts that since the Government was unable to prove conclusively which one of them did it, the evidence is factually insufficient. We disagree.

Factual Sufficiency

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)).

The appellant argues that "[s]ince there are at least two viable alternatives [that either he and/or Ms. B could have written and sent the checks]" the proof is insufficient to prove beyond a reasonable doubt that he committed the forgeries or stole the checks. Appellant's Brief of 19 Mar 2007 at 12-13, 16. The appellant also asserts that the evidence of guilt was circumstantial and did not conclusively prove that he forged or uttered the two checks.

The evidence showed that: the appellant was a co-tenant on an apartment lease with Ms. B; Ms. B was behind on the rent; two checks were stolen from the ADF checkbook, forged with Capt S's endorsement and uttered in payment of the rent on that apartment. Record at 186; Prosecution Exhibit 3. At trial, the appellant admitted placing the ADF checkbook in his book bag, taking his book bag to Ms. B's apartment, and leaving it on her couch while he, his wife, and Ms. B went to dinner.

The forgery of Capt S's signature is particularly significant as the appellant testified that he had never discussed Capt S with Ms. B, and there is nothing in the checkbook identifying Capt S as an authorized endorser. Record at 272; PE 7. In fact, the only cancelled check in the book was endorsed by another person. When questioned on this point, the appellant speculated that Ms. B must have seen a voided check with Capt S's signature on it that was no longer in the checkbook. Record at 272. There was no plausible explanation as to how Ms. B stole the checks or how she became aware that Capt S was an authorized endorser.

Although there was no direct evidence presented regarding who signed or uttered the checks, we find the circumstantial evidence compelling. Similarly, the members personally observed the appellant's testimony, which included repeated denials of all misconduct.

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 the opportunity to see and hear the witnesses, we are also convinced beyond a reasonable doubt that the appellant stole the checks and funds from the ADF, forged and then uttered the checks.

Military Property

As aforementioned, the CAAF directed that we determine "[w]hether the members erred when they found appellant guilty of stealing `military' property in all of the specifications of Charge I, when the property was owned by a Non-Appropriated Fund Instrumentality."

The appellant argues that ADF checks and funds were funded "by personal contributions of the service members" used only for "Mess nights," and "[a]s such, they were non-appropriated funds that were not `military' property." Appellant's Brief of 5 Jun 2008 at 12-13. The Government argues that "NAFIs cannot be categorically excluded from the definition of 'military' property as a matter of law because doing so would focus entirely on the source of the funds as opposed to the function." Government's Answer of 5 Aug 2008 at 15.

A. Principles of Law

"Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States." MANUAL FOR COURTS-MARTIAL, UNITED STATES, Part IV, ¶32c(1) (2005 ed.). "[I]t is either the *uniquely military nature* of the property itself, *or the function to which it is put*, that determines whether it is 'military property' within the meaning of Article 108." *United States v. Sneed*, 43 M.J. 101, 103-04 (C.A.A.F. 1995)(quoting *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983))(emphasis in original).

B. Discussion

The checks and funds subject of Charge I were property of the ADF. Marines assigned to TBS administered the ADF as part of their official duties. The ADF was sourced by funds provided by individual TBS students; used primarily to fund upfront costs for TBS mess nights, and reimbursed by the junior officers attending TBS.[3] Operation of the ADF likely enhanced TBS student morale by providing upfront funding of mess night expenses and saving TBS students money through tax exempt contracting with mess night vendors. Record at 191.

At trial no witnesses testified or identified the funds or checks as military or government property, and neither the trial nor defense counsel even mentioned the words "military property" during opening statements, witness examination, or argument on findings or sentencing. Although the words "military property" appeared on the charge sheet, they were only mentioned on the record when the military judge instructed the members on findings. Record at 303-06. Based upon the record before us, we are not convinced beyond a reasonable doubt that the ADF checks or funds were military property. Art. 66(c), UCMJ; *see also Sneed*, 43 M.J. at 103-04. We therefore, conclude the members erred when they found the appellant guilty of stealing 'military' property in all of the specifications of Charge I.

[3] Although the ADF was also used to purchase morale and welfare items including televisions and computers for enlisted Marines assigned to TBS, this evidence was not introduced on the merits and is therefore not relevant to disposition of this matter. Record at 333-34.

That does not conclude our analysis, as we must assess what, if any, prejudice the appellant may have suffered. We may only reassess a sentence to cure the effect of prejudicial error when we are confident that, absent any error, the sentence adjudged would have been at least a certain severity and when so convinced may reassess and affirm only a sentence of that magnitude or less. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citation omitted); *see also United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Under Article 121, UCMJ, larcenies involving military property are subject to increased maximum punishment. The maximum period of confinement authorized for larceny of military property of a value of more than $500.00 is ten years; the maximum period of confinement authorized for theft of other than military property of the same value is only five years. MCM, Part IV, ¶¶ 46e(1)(c) and (d). To obtain the sentence enhancement, the nature of the property as military property must be proven as an additional element of the offense. *Id.* at ¶¶ 46b(1)(d) and (e). The effect of our determination reduces the maximum period of confinement authorized as punishment from 30 years to 20 years, all other authorized punishments remain the same. Of note, the military judge's instructions on sentencing provided the members with no insight into the escalating effect of "military property" on the maximum authorized confinement.

The sentencing landscape is virtually unchanged by our determination that the members erred when they found the appellant guilty of stealing 'military' property in all of the specifications of Charge I. *See Buber*, 62 M.J. at 479-80. The status of the checks and funds as military property was not mentioned, much less focused upon by either the Government or the appellant during trial on the merits or presentencing. The admissibility of evidence on sentencing is unchanged as the permissible aggravation evidence remains the same.

Similarly, the Government and defense sentencing theories would be unaffected. The gravamen of the Government's presentencing case was that the appellant, a senior staff noncommissioned officer in a position of trust used his position to steal from his fellow Marines, and demonstrated his lack of rehabilitative potential by lying about his criminal actions. Testimony in aggravation focused upon the impact on individual and office morale caused by the discovery, investigation, audit, and subsequent prosecution. The appellant's case in sentencing primarily focused upon his almost 19 years of service, including combat service and anticipated eligibility for retirement in approximately one year, his family, and rehabilitative potential as evidenced by his performance after receiving an adverse fitness report during the period of this offense and the remorse he displayed in court.

The length of confinement was not a central issue during presentencing and the sentence awarded by the members did not include confinement. The Government requested only 60 days confinement, forfeiture of two months pay, reduction in grade to E-3, and a bad-conduct discharge. Whereas the defense argued for reduction in grade below E-6, no confinement, and no punitive discharge so that the appellant could retire from the Marine Corps.

We conclude that exception of the words "military property" and the attendant reduction in authorized confinement does not dramatically alter the sentencing landscape. *Id.* We have reassessed the sentence and are confident that the adjudged sentence would have been at least the same as that adjudged by the members and approved by the CA even if the error had not occurred. *Id.* We also find the sentence to be appropriate for this offender and his offenses. Art. 66(c), UCMJ; *United States v. Baier,* 60 M.J. 382, 384-85 (C.A.A.F. 2005).

Military Judge's Failure to Advise Members that Certain Specifications were Merged for Sentencing Purposes

The military judge concluded that Specifications 1 and 2 of Charge I, and Specifications 3 and 4 of Charge I were multiplicious for sentencing, but did not inform the members of his ruling. Record at 60-62, 328, 342-54. The defense counsel did not object to this omission. However, based upon the members' findings and his ruling, the military judge properly instructed the members on the maximum authorized sentence, at that time. *Id.* at 343.

The appellant asserts that he was sentenced based upon two additional specifications, and that he was prejudiced because the members were not instructed they could only consider two, instead of four, specifications of Charge I. He further argues a sentence rehearing is required because we have no way of knowing what sentence would have been imposed if the members had been informed by the military judge that Specifications 1 and 2 of Charge I were to be considered as one for sentencing, and that Specifications 3 and 4 of Charge I were also to be to be considered as merged.

The Government argues the appellant suffered no prejudice where the military judge properly instructed the members on the maximum authorized punishment.

A. Principles of Law

Defense counsel's failure to make a timely objection to "omission of an instruction before members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." RULE FOR COURTS-MARTIAL 1005(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). "To prevail under a plain error

analysis, [the] 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." *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

B. Discussion

Both parties agree that, if the specifications were multiplicious, the military judge's failure to so instruct the court members before deliberation on sentence constitutes error. *See United States v. Holsworth*, 7 M.J. 184, 187 (C.M.A. 1979). Assuming without deciding that the military judge correctly found the specifications multiplicious, we next analyze potential prejudice.

The specifications at issue include Specification 1, theft of a single ADF check; Specification 2, theft of $800.00 worth of ADF funds by presenting the check subject of Specification 1; Specification 3, theft of a single ADF check, and Specification 4, theft of $800.00 worth of ADF funds by presenting the check subject of Specification 3. The appellant was also convicted of forgery and uttering these same two checks to a property management company to pay the rent on an apartment where he was a co-tenant on the lease.

Of note, theft of the two checks was directly related to the subsequent uttering of those checks and theft of the ADF funds, thus admissible as evidence in aggravation. *See* R.C.M. 1001(b)(4). There is also a substantial difference between the physical theft of two checks, and the forgery and uttering of those checks and subsequent theft of $1,600.00 worth of funds from the ADF. We are not persuaded that the military judge's failure to inform the members of his ruling and merger of the specifications reflecting the theft of the two checks and ADF funds influenced the members to impose a more severe sentence than they would have imposed if properly instructed. We therefore conclude the error did not materially prejudice a substantial right of the appellant's.

Assuming without deciding the error did materially prejudice a substantial right of the appellant, the sentencing landscape remains unaltered, as the admissible evidence in aggravation remains the same. *Buber*, 62 M.J. at 478-79 (citations omitted). After reviewing the evidence presented on the merits and on sentencing, and the appellant's unsworn statement, we are satisfied that the adjudged sentence would have been at least the same as that adjudged by the members and approved by the CA.

Remaining Assignments of Error

We have considered assignments of error II and III, and conclude they are without merit in accordance with our prior decision. *United States v. Roberts*, No. 200700027, 2007 CCA LEXIS 450, unpublished op. (N.M.Ct.Crim.App. 20 Nov 2007).

Conclusion

The words "military property" and "the property of the United States Government" are excepted from all four specifications of Charge I. The remaining findings and the sentence, as approved by the convening authority and reassessed by this court, are affirmed.

Senior Judge VINCENT and Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court