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.

EMILIA J. SMITH
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 200700831
GENERAL COURT-MARTIAL

Sentence Adjudged: 30 October 2002.
Military Judge: LtCol S.M. Immel, USMC.
Convening Authority: Commanding General, 3d Marine Aircraft Wing, MARFORPAC, MCAS Miramar, San Diego, CA.
Staff Judge Advocate's Recommendation: Col C.J. Woods, USMC.
For Appellant: LT Dillon Ambrose, JAGC, USN.
For Appellee: Maj J.W. Weirick, USMC; Capt R.E. Mattioli, USMC; LT Elliot Oxman, JAGC, USN.

19 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STOLASZ, Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with her pleas, of conspiracy to wrongfully appropriate military property, willful dereliction of duty, wrongful appropriation of military property, and larceny of military property in violation of Articles 81, 92, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 921. The appellant was sentenced to 60 days confinement, reduction to pay grade E-1, and a bad-conduct

discharge. The convening authority (CA) approved the findings and sentence as adjudged. The terms of the pretrial agreement (PTA) required the CA to defer and waive automatic forfeitures for the benefit of the appellant's family.

The appellant asserts the following assigned errors: (1) her pleas to all charges and specifications were improvident; (2) the record of trial has substantial omissions requiring invocation of RULE FOR COURTS-MARTIAL 1103(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); (3) she was deprived of her right to clemency; (4) her due process right to speedy post-trial processing was violated; (5) the Government failed to honor a material term of the PTA rendering her pleas involuntary; and, (6) there was unlawful command influence.

We have carefully examined the record of trial, the appellant's brief, the Government's answer, the appellant's reply, and the affidavit with attachments submitted by the appellant. After careful review of the appellant's first assigned error regarding the providency of her pleas, we conclude that the appellant's pleas to Charge I (conspiracy to wrongfully appropriate military property), and Specifications 1 (wrongful appropriation of military property) and 2 (larceny of military property) of Charge III are not supported by the record and were improvident. The appellant's plea to Charge II (willfully derelict in the performance of duties) is supported by the record, but we find the plea was involuntary because there was a mutual misunderstanding of a material term of the pretrial agreement. As a result of our corrective action, the appellant's assignments of error regarding substantial omissions in the record of trial and failure of the CA to consider clemency matters are rendered moot. We find no merit to the appellant's assertion of unlawful command influence. *United States v. Matias,* 25 M.J. 356, 363 (C.M.A. 1987). The appellant's assertion of a due process violation as a result of post-trial delay is not yet ripe for determination.

A. Facts (Conspiracy and Larceny)

The appellant was the staff noncommissioned officer in charge of the squadron support division (SSD) for Marine Aircraft Logistics Squadron 11 (MALS-11), Marine Aircraft Group 11. She also served as the aviation supply clerk for MALS-11 during a time period encompassing April 1999-August 2001, and her duties included making purchases for supported units using a Government purchase card (GPC).

Prior to making a purchase using a GPC, the appellant was required to follow certain procedures. First, she was required to determine if a requested item was available through the supply system. If it was not available in the supply system, then it could be purchased from a commercial vendor. When purchasing from a commercial vendor, she was required to complete a purchase order, purchase the item, then match a receipt for any item purchased from a commercial vendor with a purchase order to ensure the item was properly purchased and delivered. At the end of the month, the appellant was required to reconcile the GPC statement to ensure each purchase was properly accounted for. The reconciled statement was then reviewed by the approving official (AO), and forwarded to the agency program coordinator for eventual payment by the Defense Finance Accounting Service. Prosecution Exhibit 1 at 1-2.

During the last week of September 1999, MALS-11 had $100,000 in surplus funds available to obligate prior to the end of the fiscal year. If any of the $100,000 was not spent prior to the end of the fiscal year (30 September), it was required to be returned, commonly referred to as "use or lose." The appellant stated during the providence inquiry that she was ordered by Major Berotte, the AO, to spend as much of the $100,000 as possible. Record at 30. Thereafter, the appellant, along with Staff Sergeant (SSgt) Dominic L. Eley, the SSD accounting person, and Sergeant (Sgt) Evelyn L. Campuzano, another GPC holder, went on a two-day spending spree, purchasing numerous electronic items from local commercial vendors. *Id.* at 32. The appellant stated that she was the senior member of the group, that she was responsible for the purchased property, and estimated they were able to obligate $80,000 of the $100,000 in available funds during the two-day period.

The appellant stated that after purchasing items on the first night, she, SSgt Eley, and Sgt Campuzano agreed to store some property they purchased at SSgt Eley's house, rather than transport it that night to the supply cage on board Marine Corps Air Station, Miramar, California (MCAS Miramar). The appellant stated it was a joint decision made primarily because they did not want to transport the property to the base because of the lateness of the hour, and due to lack of lighting at the van pad. *Id.* at 31. The purchased property was transported to SSgt Eley's house in an open bed Government truck and in the appellant's van. The property in the open bed truck was removed from the truck and most of it was moved into SSgt Eley's garage to protect it from the elements. SSgt Eley, who had previously indicated a personal interest in some of the items, carried a

few of the items into his house. The appellant was aware SSgt Eley was suffering financial difficulties, knew he had expressed interest in several of the items, and saw him moving items into his house. The van, including the remaining property, was parked in front of SSgt Eley's house. The following morning, the appellant drove the van onto MCAS Miramar, unloaded the property from the van and placed it in the supply cage. Over the next several days, she transported the remaining property from SSgt Eley's garage to the supply cage on base, but made no effort to retrieve the items SSgt Eley had carried into his house.

The appellant did not complete purchase orders before purchasing any of this property, and thus was unable to match up receipts for the items purchased with properly filled out purchase orders. She stated during the providence inquiry that it was much later that she discovered that SSgt Eley took advantage of her failure to both follow procurement rules and deliver the purchased property to the supply cage on the date of purchase by stealing some of the electronic items, including two television sets, two video camera recorders, a disk changer, a fax machine, a digital camera and a laptop computer.

B. Law

Before accepting a guilty plea, the military judge must conduct an inquiry of the accused to ensure that there is an adequate factual basis for the plea. *United States v. Aleman,* 62 M.J. 281, 283 (C.A.A.F. 2006); *United States v. Care,* 40 C.M.R. 247, 253 (C.M.A. 1969). The factual circumstances as revealed by the accused must objectively support the plea. *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980). The accused must admit to each element of the offense to which she is pleading guilty. *United States v. Simmons,* 63 M.J. 89, 92 (C.A.A.F. 2006); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the guilty plea *de novo*. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008). In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *Id.*

C. Improvident Pleas

The appellant asserts that her pleas were improvident to all charges and specifications. We will analyze each charge: conspiracy to wrongfully appropriate, dereliction of duty, wrongful appropriation, and larceny separately to determine if the record supports the appellant's guilty pleas.

1. Conspiracy to Wrongfully Appropriate Property (Charge I)

The elements of conspiracy are:

1. that the accused entered into an agreement with one or more persons to commit an offense; and

2. while the agreement was in existence, and while the accused remained a party to it, the accused or one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5b.

The facts of the plea inquiry relative to the conspiracy charge established that in the last week of September 1999, after working hours, the appellant, SSgt Eley, and Sgt Campuzanno purchased electronic items (televisions, video recorders, facsimile machines and digital cameras) on two occasions from local electronics stores. As they were leaving the store on the first night, they agreed to temporarily store the items they purchased at SSgt Eley's house, rather than transport them back to the supply cage on the base because it was late and because there was no lighting at the van pad where the property was to be unloaded. The appellant further testified her intent was to retrieve and transport the property to the base the following morning. Record at 30-37. Upon further inquiry, the appellant testified that she was suspicious when she saw SSgt Eley take some of the unloaded items into his house. However, she indicated she did not think he would steal the property and that there was no agreement that he could take the property for his temporary use. *Id.* at 55, 56.

In order for a conspiracy to exist, the minds of the parties need to arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. MCM, Part IV, ¶ 5c(2). The object of the conspiracy must involve the commission of one or more

offenses under the UCMJ. *Id.* at ¶ 5c(3). It is clear the appellant's providence inquiry does not establish an agreement between the parties to commit an offense.

The Government's theory posited at trial was that the appellant wrongfully withheld the property temporarily stored in SSgt Eley's garage by failing to account for it, thus providing SSgt Eley the opportunity to steal specific items. However, the record does not support an agreement between the parties whereby the appellant's negligence in failing to account for the property was to effectuate an agreement to let SSgt Eley steal some of the items. The appellant testified the agreement was to store some of the property at SSgt Eley's house that evening for convenience, then to transport it to the base the following morning. SSgt Eley's decision to steal some of the items was made solely on his own initiative without assent from the appellant. Thus, the record does not reflect an agreement between the appellant, SSgt Eley, and Sgt Campuzano to commit an offense.[1]

In short, we have substantial questions regarding both the factual and legal basis for this plea, and we find the military judge abused his discretion in accepting the appellant's plea to this charge. *Inabinette,* 66 M.J. at 322.

2. Larceny (Charge III, Specification 2)

The military judge put his analysis on the record regarding his rationale for accepting the appellant's plea to the larceny charge. He specifically found that:

> (1) The appellant assisted SSgt Eley in committing larceny by:
>
> > (a) storing property in SSgt Eley's garage during which SSgt Eley took some of the items into his house;
> > (b) hearing SSgt Eley indicate he would like to keep some of the items and hearing SSgt Eley state he was having money problems.
>
> (2) The appellant and SSgt Eley shared the criminal purpose of wrongful appropriation.

[1] We also note that page 5 of the stipulation of fact (PE 1) is missing from the record of trial. This page ostensibly includes the facts and details of the conspiracy.

> (3) The appellant was a principal to SSgt Eley's larceny which was the natural and probable consequence of the criminal venture of wrongful appropriation because the appellant knew SSgt Eley wanted some of the items, was experiencing money problems and took some of the items into his house. *See* MCM, Part IV, ¶ 1b(5).
>
> (4) While the appellant had the specific intent to commit the offense of wrongful appropriation, she did not have the specific intent to commit the offense of larceny, however, because the larceny was the natural and probable consequence of the conspiracy to wrongfully appropriate and the actual wrongful appropriation of the property the appellant [was] guilty of larceny.

Record at 124-25.

We disagree with the military judge's analysis. While the appellant stored some of the purchased property in SSgt Eley's garage, and witnessed him take some items into his house, the record does not establish she shared the criminal purpose of wrongful appropriation or engaged in a conspiracy to wrongfully appropriate. The appellant admitted only that the agreement to store the property in SSgt Eley's garage was one of convenience due to the logistics of transporting the property to the base that evening. She indicated she was suspicious of SSgt Eley, but repeatedly testified that she did not know he intended to steal any of the items. The available record suggests that the appellant may have provided unwitting assistance to SSgt Eley's larceny, but does not establish that the appellant either engaged in a conspiracy with SSgt Eley to wrongfully appropriate or that she shared in SSgt Eley's criminal purpose. The record does not establish that the appellant was a co-conspirator to SSgt Eley's wrongful appropriation; therefore she may not be convicted for a crime (larceny) which is a natural and probable consequence of a conspiracy that was not established.

We find that there is a substantial basis in law and fact to question the appellant's guilty plea to larceny.

3. Wrongful Appropriation (Charge III, Specification 1)

The appellant admitted she wrongfully appropriated military property which was intended for use in a combined arms exercise (CAX) scheduled for mid-September 2000. Specifically, the

appellant admitted gathering the specified property from the supply cage for her unit's use in the CAX. The property was still in the original boxes and the appellant marked the boxes in black marker with the lettering CAX. She then loaded the boxes in her van and transported them to her garage at her off-base Government quarters. The appellant testified her intent was to ensure that the property would be available to her unit during the CAX. She also testified that she had previously marked and set aside similar gear in an area of the supply cage, but that someone had nonetheless issued it out. Record at 41-42.

Toward the end of August or early September 2000, the appellant received short fuse orders to attend the Defense Equal Opportunity Management Institute School. She testified that she did not have time to return the CAX items to the supply cage prior to her departure, but indicated she thought she told one of the Marines in the unit where the property was located. She also testified that she left a note on her desk on 1 September 2000 indicating the property for the CAX was stored in her garage, and to contact her husband to retrieve the property. When the appellant returned from school in mid-December the property was still in her garage; she immediately returned it to the supply cage.

The property involved is Government property, and a wrongful taking occurs if the taking is not authorized by the Government or unit that has possession or lawful custody of the property. *See United States v. McGowan,* 41 M.J. 406, 413 (C.A.A.F. 1995). However, the taking must be accompanied by a specific intent to temporarily deprive or defraud or appropriate to one's own use. *Id.* Of concern here is whether the plea inquiry establishes sufficient facts to conclude that the appellant intended to temporarily deprive the Government of the property. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002).

The appellant testified her criminal state of mind in taking the property, was "to temporarily deprive the [G]overnment of the use of its property." Record at 90. Generally, a conclusion of law elicited from an accused is not sufficient to provide a factual basis for a guilty plea. *Id.* (citing *United States v. Outhier,* 45 M.J. 326, 331 (C.A.A.F. 1996)). Further, the appellant testified her purpose in transporting the property to her garage was for a legitimate Government purpose, that being, the upcoming CAX. *See United States v. Sluss,* 34 C.M.R. 18, 171 (C.M.A. 1964); *see also*

United States v. Satey, 36 C.M.R. 256 (C.M.A. 1966). The appellant did not indicate she intended to temporarily use the property for her own purpose.

The appellant did admit her actions were wrong, and that she did not have express permission or legal justification to take the property to her garage. However, the record lacks a factual basis to conclude that the appellant possessed the specific intent to temporarily deprive the Government of the property.

We find that there is a substantial question regarding the factual and legal basis for the appellant's plea. *Inabinette,* 66 M.J. at 322.

4. Dereliction of Duty (Charge II)

We find the record adequately supports the appellant's plea to willfully failing to follow proper procedures in ordering supplies and failing to adequately safeguard supplies. Record at 58-86, 118-19; PE 1 at 1-4.

D. Material Breach of the Pretrial Agreement
Facts

The appellant's post-trial affidavit asserts that her agreement to plead guilty was conditioned on the Government deferring automatic forfeitures for her family's benefit. She claims her understanding of the automatic forfeiture provision of the PTA was that her pay of $2379.60 would be directed to her spouse, as long as she initiated and maintained an allotment for that amount. She states that she submitted paperwork to initiate the allotment, and resubmitted the paperwork a second time when a problem arose with the initial paperwork. However, fourteen days after sentencing, the appellant was reduced to pay grade E-1 pursuant to the statutory mandate of Article 57, UCMJ. This made it impossible to fund the allotment in the specified amount of $2379.60 since the appellant was now receiving pay at the E-1 pay grade.[2] The appellant was the sole financial provider for her family, and asserts she would not have signed a PTA that did not provide for their economic welfare. Affidavit

[2] During the providence inquiry the military judge asked the appellant if she understood when the sentence would become effective [referencing Article 57, UCMJ]. The appellant replied affirmatively. However, the military judge did not explain that Article 57, UCMJ, mandates that an adjudged reduction take effect 14 days after sentence by operation of law. Record at 129.

of Emilia J. Smith of 2 Apr 2008 at ¶¶ 2, 3, 4; Clemency Request of 19 Sep 2003 at enclosures 9 and 10.

The Government asserts that the appellant failed to abide by her commitment to maintain an allotment in the amount of $2379.60, but that, nevertheless she still received her benefit of the bargain as the CA deferred and waived automatic forfeitures as required by the PTA.[3] The Government argues that the appellant's expectation that her family would receive the specified monthly allotment is without support in the record and contradicted by the plain language of the PTA which provides for a reduction in pay grade as adjudged. Appellate Exhibit VI at ¶ 4.

Discussion

The interpretation of a pretrial agreement is a question of law, which we review *de novo. United States v. Acevedo,* 50 M.J. 169, 172 (C.A.A.F. 1999). Whether the Government has complied with the material terms and conditions of an agreement presents a mixed question of law and fact. *United States v. Lundy,* 63 M.J. 299, 301 (C.A.A.F. 2006)(citations omitted). Generally courts look to all the facts and circumstances for this determination, and the inquiry is generally considered a question of fact. *Id.* (citations omitted). The appellant bears the burden of establishing that a term or condition of the pretrial agreement was material to her decision to plead guilty, that the Government failed to comply with that term or condition, and therefore that her plea was improvident. *Lundy,* 63 M.J. at 302. "It is fundamental to a knowing and intelligent plea that where an accused pleads guilty in reliance on promises made by the Government in a pretrial agreement, the voluntariness of that plea depends on the fulfillment of those promises by the Government." *United States v. Perron,* 58 M.J. 78, 82 (C.A.A.F. 2003)(citing *Santobello v. New York,* 404 U.S. 257, 262 (1971)). Where there is a mutual misunderstanding regarding a material term of a PTA that results in the appellant not receiving the benefit of her bargain, her pleas are considered involuntary, and therefore improvident. *Perron,* 58 M.J.at 82.

[3] Although the staff judge advocate's recommendation of 12 August 2003 indicates automatic forfeitures were not deferred, the appellant concedes the CA did defer automatic forfeitures while she was confined. Motion to Correct Errata of 2 Jul 2008.

The Government offers no evidence to contradict the appellant's affidavit claiming that she bargained for her family to receive $2379.60 a month until the CA's action thus we accept the assertion as true. *Scalarone,* 52 M.J. at 543. The fact that this specific figure is mentioned in the sentencing limitation portion of the PTA lends further credence and support to the appellant's claim. The Government's argument that any reduction in pay grade was as adjudged is factually accurate, but fails to explain how the appellant could maintain an allotment of $2379.60, when reduced to pay grade E-1, or why this specific figure is listed in the PTA, if not bargained for. In other words, for the appellant to maintain an allotment in the monthly amount of $2379.60 necessarily required that the adjudged reduction in pay grade be deferred prior to the CA acting.[4] Otherwise, the specific dollar figure is rendered meaningless, because it was impossible for the appellant to provide that amount to her family after being reduced to the E-1 pay grade.[5]

We find, based on the facts before us, that there was a mutual misunderstanding regarding a material term of the PTA, resulting in the appellant not receiving the benefit of her bargain. We will order relief in our decretal paragraph.

Conclusion

The record of trial is returned to the Judge Advocate General for remand to an appropriate CA. The sentence and the findings of guilty of Charges I and III and their specifications are set aside with a rehearing authorized. With respect to Charge II and its specification, the CA may set aside the findings or, if he orders a rehearing, the appellant may withdraw her pleas to that offense. If a rehearing is authorized and any findings of guilty are not disapproved by the CA, the record shall then be returned to this court for further

[4] The appellant was released from confinement prior to the CA taking his action.

[5] Paragraph 19 of the PTA provides that all provisions of this agreement are material.

review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review,* 28 M.J. 181 (C.M.A. 1989).

Senior Judge VINCENT and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court