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

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEVEN WILSON, JR.
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 200800878
SPECIAL COURT-MARTIAL

Sentence Adjudged: 10 September 2008.
Military Judge: Maj Glen Hines, USMC.
Convening Authority: Commanding Officer, 3d Battalion, 8th Marine Regiment, 2d Marine Division, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol W.G. Perez, USMC.
For Appellant: LT Heather Cassidy, JAGC, USN; Capt Michael Berry, USMC.
For Appellee: LCDR Frank L. Gatto, JAGC, USN; Capt Geoffrey S. Shows, USMC.

17 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Chief Judge:

A military judge sitting as a special court-martial convicted the appellant, contrary to his pleas, of making a false official statement and two specifications of larceny, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921. The approved sentence was confinement for 75 days, forfeiture of $360.00 pay per month for

a period of three months, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant raised three assignments of error. The first and second averments involve the factual sufficiency of the evidence relating to the false official statement specification and the specification alleging larceny of $360.00. The third assignment of error contests the legal sufficiency of the remaining larceny specification involving the victim's automatic teller machine (ATM) card.

We have examined the record of trial and the pleadings of the parties. The Government concedes the appellant's third assignment of error which alleged that there was no evidence presented at trial proving that the appellant intended to retain the victim's ATM card permanently as opposed to temporarily. We agree and will take appropriate action in our decretal paragraph. Following our corrective action, we conclude that the findings and approved sentence are now correct in law and fact and that no error materially prejudicial to the appellant's substantial rights remains. Arts. 59(a) and 66(c), UCMJ.

Factual Sufficiency

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear 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); *see also* Art. 66(c), UCMJ. We review the factual sufficiency of the evidence *de novo*. *Turner*, 25 M.J. at 324. Reasonable doubt does not mean that the evidence must be free of conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

The appellant acknowledges that he used Private First Class (PFC) Mathews' ATM card and PIN to withdraw the charged amount of money from PFC Mathews' Marine Federal Credit Union account.[1] He asserts, however, that the withdrawal was made as a favor to and at the specific request of PFC Mathews. He also asserts

[1] As charged, Article 107 (false official statement) has the following elements: (1) that the accused made a certain official statement; (2) that the statement was false in certain particulars; (3) that the accused knew it to be false at the time of making the statement; and (4) that the false statement was made with intent to deceive. As charged, Article 121 (larceny) has the following elements: (1) that the accused wrongfully took, obtained, or withheld $360 from the possession of the owner; (2) that the $360 belonged to PFC Mathews; (3) that the money had a value of $360; and, (4) that the taking was with the intent to permanently deprive PFC Mathews of the $360.

that all the money withdrawn from PFC Mathews' account was, in fact, given to PFC Mathews in a timely manner.

On appeal, the appellant asserts that his conviction was based entirely on now Lance Corporal (LCpl) Mathews' testimony which, the appellant avers, was so "illogical and unreasonable" that it lacked the credibility necessary to prove the appellant's guilt beyond a reasonable doubt. Having carefully reviewed the record of trial, we disagree with the appellant's assessment.

LCpl Mathews and the appellant were temporary roommates for approximately six weeks beginning in November 2007. Each was attending a supply-related training course at Marine Corps Combat Service Support School, Camp Johnson, North Carolina. While they had previously met during initial training, the two men were not social friends and did not go on liberty together. The appellant and LCpl Matthews shared a room with two other Marines who were not implicated in the theft.

LCpl Mathews testified that he had his ATM card and a paper with his PIN in his wallet which he imprudently left in his trousers which were draped over a chair by his bunk. On 17 December 2007, LCpl Mathews, intending to withdraw money from an ATM, discovered that his ATM card was missing from his wallet. Believing he might have misplaced it, he continued with his training and upon his return to the barracks after class, he spent the remainder of the day searching through his locker and belongings. He did not locate the missing card.

The following morning, LCpl Mathews went to remove a dollar from his wallet to pay for a beverage only to discover his ATM card had been returned. He then went to a nearby ATM to see if any money was missing. He discovered there was "roughly $300" missing from his account. He testified that he had never given anyone permission to remove money from his account. Later that day, LCpl Mathews mentioned the missing funds to his class leader, Corporal (Cpl) Smith. Cpl Smith advised the appellant to notify the bank and report the loss, which LCpl Mathews immediately did using the Cpl's cell phone. Talking with the bank representative, LCpl Mathews was advised that photos were available for all transactions. LCpl Mathews arranged to obtain photos from the contested withdrawals. Some days later, the credit union supplied copies of the photos and LCpl Mathews immediately recognized the appellant. The victim then reported the theft to security.

On appeal, the appellant asserts that LCpl Mathews changed his story during various interviews to make it more believable. Specifically, the appellant points to minor ambiguities and inconsistencies. For example, LCpl Mathews told Cpl Smith that his card had been missing "for awhile." LCpl Mathews said he intended this to mean less than a day. Cpl Smith testified that LCpl Mathews never clarified what his rather amorphous term meant in terms of hours or days. Failure to resolve an unimportant ambiguity or to clarify it at a later date does not, in our minds, amount to changing his story to make it more believable. The two Marines' focus at the time was on the fact that the card and money were missing and that the victim had not yet reported it to the credit union.

With regard to motive, the evidence revealed no particular anger or disagreement between the appellant and LCpl Matthews that would lead LCpl Matthews to lie to his class leader, to an investigator, to his credit union and finally under oath at trial. The appellant generically asserts that LCpl Mathews' motivation to lie was tied to his getting $360 from the ATM and then having the credit union refund the money. We are not persuaded. Cpl Smith testified that LCpl Mathews' eyes were welling up with tears as he described the financial loss he'd discovered. She also testified that LCpl Mathews apparently had no intention to call the credit union to get the money back until she suggested it.

We are at a clear disadvantage insofar as we were unable to observe the demeanor of Cpl Smith, LCpl Mathews, and the appellant at trial. Based on the written record, however, we are satisfied beyond a reasonable doubt that the victim's testimony was far more credible than the appellant's. The appellant's story that the victim asked him on multiple occasions beyond the two at issue to get money from LCpl Matthews' account seems implausible in light of the fact that the appellant acknowledges that he was not particularly good friends with the victim and that, according to the appellant, the victim actually made repeated racial slurs against the appellant and his family. We are unpersuaded by the appellant's claim that he just shook the racial comments off as an attempt at humor.

Considering the entire record, we find beyond a reasonable doubt that the appellant is guilty of the charged larceny. For the same reasons cited above, we are equally persuaded beyond a reasonable doubt that the appellant knowingly and willfully made a false official statement when he tried to convince an

investigator that LCpl Mathews asked him to take the money out of the LCpl Matthews' account.

Conclusion

The findings of guilty to Charge I and the specification thereunder are affirmed. The findings of guilty to Specification 1 of Charge II and to Charge II are affirmed. In light of the Government's concession, the finding of guilty to Specification 2 of Charge II is disapproved but a finding of guilty to the lesser included offense of wrongful appropriation is affirmed.

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *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). We are satisfied that our action has not substantially affected the sentencing landscape and that the adjudged sentence for the appellant’s misconduct would have been at least the same as that adjudged by the military judge and approved by the convening authority. The approved sentence is, therefore, affirmed.

Senior Judge BOOKER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court