

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

**Before
J.A. MAKSYM, L.T. BOOKER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DARRYL D. CURRY
AVIATION BOATSWAIN'S MATE (FUELS) AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000190
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 November 2009.

Military Judge: CDR Tierney Carlos, JAGC, USN.

Convening Authority: Commanding Officer, USS THEODORE ROOSEVELT (CVN 71).

Staff Judge Advocate's Recommendation: LCDR D.J. Jones, JAGC, USN.

For Appellant: LT James Head, JAGC, USN.

For Appellee: Capt Mark Balfantz, USMC.

9 November 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A special court-martial, with enlisted representation, convicted the appellant, by exceptions and substitutions¹ and contrary to his pleas, of having stolen military property of a value of over \$500.00 from August 2006 to the time of his court-martial, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to a bad-conduct discharge and a reduction in pay grade to E-1. The

¹ The findings of the court-martial, accepted by the military judge as a matter of minor variance, found the appellant guilty of larceny of marital allowances for a period of time five months in excess of the period appearing in the specification under the charge.

convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed.

The appellant alleges that the evidence was legally and factually insufficient to sustain a finding of guilt as to the charge of larceny as the Government did not prove beyond a reasonable doubt that the appellant knew he was not entitled to Basic Allowance for Housing (BAH) at some point prior to submitting his valid marriage certificate to the Personnel Support Detachment (PSD). The Government proceeded on a theory of a fraudulent marriage as a basis to commit larceny by trick. The court held oral argument in this case and specified two additional issues to the parties.² Additional pleadings were later filed.³

After carefully considering the record of trial and the pleadings of the parties, we decide this case based solely on the assigned error and conclude that the evidence was factually insufficient to sustain the finding of guilt as to the charge of larceny, either on the proffered theory of larceny by trick or under a possible theory of wrongful withholding.

Background

The appellant, then a 20-year-old E-3 with a high school education, originally met his future spouse, M, in August 2003 at the Military Entrance Processing Station (MEPS) in Chicago. Record at 207. Almost two years later, they met again in Norfolk, Virginia, where both their respective ships were stationed. *Id.* at 207-09, 257. On 3 August 2006, after some eight months of dating, the appellant and M were married before a Marriage Commissioner in Norfolk, Virginia. Defense Exhibit A. The marriage was plagued with arguments and the appellant eventually began living at a relative's house in the same local area. Record at 272. During the marriage, the appellant and M, also a Sailor, were each under way at various times. After one such under way period the appellant returned from sea to learn that his wife had been administratively separated from the Navy. Prosecution Exhibit 3.

² The two specified issues were: I. WHETHER THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANT, IN INSTRUCTING THE MEMBERS UPON PERMISSIBLE INFERENCES BASED UPON THE APPELLANT'S STATEMENT TO NCIS? RECORD AT 372-73. II. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ACCEPTING THE FINDINGS OF THE COURT-MARTIAL, AS EXCEPTED AND SUBSTITUTED - IN THAT THE FINDINGS RETROACTIVELY EXTENDED THE PERIOD OF THE APPELLANT'S PURPORTED MISCONDUCT FROM JANUARY 2007 BACK TO AUGUST 2006, A PERIOD NOT SPECIFIED IN THE REFERRED CHARGE?

³ On 28 September 2010, the appellant submitted a non-consent motion to raise a supplemental assignment of error, out of time. The deadline for a Government pleading in opposition passed on 5 October 2010. The decision in this case renders the supplemental assignment of error motion moot and all outstanding motions in this case are hereby denied.

Incident to the marriage and with a lag time of some weeks, the appellant began receiving BAH at the single rate after he presented his marriage certificate and a copy of a lease to PSD. The appellant's wife was separated from the Navy in December 2006. The appellant received a copy of her DD-214 almost 8 months after her separation, turned it in to PSD, and began receiving full BAH at the married rate. By this point, the couple became or remained estranged. The record amply demonstrates the appellant taking on spousal and marital debt, including establishing a pay allotment for his spouse. This case is distinguishable from allowance larceny situations where a properly payable allowance is unlawfully withheld by the servicemember, depriving his dependents of same. See generally *United States v. Antonelli*, 43 M.J. 183 (C.A.A.F. 1995). Indeed, when the appellant stopped the allotment to his wife, she contacted his command. Record at 119. The frequency of such occurrences raised command interest and the appellant's Master Chief inquired why the appellant was no longer supporting his wife. *Id.* at 120. The appellant responded that he no longer wanted to pay his wife's debts because they had never lived together. *Id.* at 120-21. An investigation and the instant charges ensued.

Discussion

In examining the factual sufficiency of the evidence, this court must be convinced beyond a reasonable doubt of the appellant's guilt. We do so mindful of the fact that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

To convict the appellant of larceny as alleged in the sole specification of the charge, the Government was required to prove, *inter alia*, that the appellant knew that the obtaining was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 46(c)(1)(e).

It is uncontroverted that the appellant and his wife were lawfully married by proper authority in Virginia. Generally, the question of whether or not a marriage is valid is a factual question left to state law, but that fact is not determinative when the issue is whether the servicemember has entered into a sham marriage in furtherance of a conspiracy to defraud the Government. *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000) (citing *Lutwak v. United States*, 344 U.S. 604, 611 (1953)). Rather, the Court of Appeals for the Armed Forces has noted that the test is whether the "two parties have undertaken to establish a life together and assume certain duties and obligations." *Id.* (citation and internal quotation marks omitted).

At trial, the Government relied on statements made by the appellant to his Master Chief and to a Naval Criminal Investigative Service (NCIS) special agent. When questioned about supporting his wife, the appellant told the Master Chief

that he had never lived with his wife and the longest they had lived together was 2-3 weeks. Record at 120-21, 126. Then, in his written statement to NCIS, the appellant stated that they "made an agreement to get married with the sole purpose of being able to obtain basic allowance for housing (BAH) payments from the Navy." Prosecution Exhibit 3 at 1.

However, the latter assertion is squarely contradicted by other evidence, which demonstrates that the appellant and his wife did make an effort to establish a life together and assume certain duties and obligations. The couple had met years earlier and dated for several months prior to marriage. They testified to a common story regarding the awkwardness of the appellant's efforts to propose. They entered a lease together. The Government's evidence, specifically regarding the lease on the marital residence, supports the existence of a valid marriage. The signature of the appellant and his wife both appear on that one year agreement. PE 5. They lived together after marriage, however briefly. The appellant listed his wife as the beneficiary on his Servicemember's Group Life Insurance and considered her to be his dependent. He unquestionably took responsibility for paying spousal debt. While this record does not paint a picture of marital bliss, it likewise does not convince us, beyond a reasonable doubt that the appellant intended to steal military property.

Conclusion

The finding and the sentence are set aside. The charge and its specification are dismissed.

For the Court

R.H. TROIDL
Clerk of Court