

**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.

**SHANE R. MESSIAS
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201000223
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 November 2009.

Military Judge: Maj Stephen F. Keane, USMC.

Convening Authority: Commanding Officer, 3d Assault Amphibian Battalion, Marine Corps Base, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Capt K.T. Lyster, USMC.

For Appellant: CDR Howard A. Liberman, JAGC, USN.

For Appellee: Capt Mark V. Balfantz, USMC.

26 August 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, violation of a lawful general regulation, and wrongful possession of approximately five ounces of marijuana aboard Marine Corps Base Camp Pendleton, in violation of Articles 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 912a. The appellant was sentenced to confinement for six months, forfeiture of \$863.00 pay per month for six months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, pursuant to a pretrial agreement,

suspended all confinement in excess of sixty days for the period of confinement served plus twelve months.

The appellant raises a single assignment of error,¹ averring that an insufficient factual basis exists to sustain the appellant's guilty plea to the specification under Charge II.

We agree. Following our action below, we conclude that the remaining findings and sentence 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.

Improvident Plea

We review a military judge's decision to accept a guilty plea for an abuse of discretion. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008).

While the providence inquiry establishes facts sufficient to demonstrate that the appellant drove on base and that he believed the driving to be wrongful, there are no facts developed which establish either the invalidity of the appellant's license, if any, or in the alternative, his failure to have a valid license in his possession. We cannot infer either eventuality from this record. We are left with a substantial basis in fact to question this plea and conclude the military judge abused his discretion in accepting this plea on these facts.

Conclusion and Sentence Reassessment

The findings of guilty to Charge II and its specification are set aside. Because of our action on these findings, we must reassess the sentence in accordance with the principles set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438, (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986). A "dramatic change in the penalty landscape" gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)).

We note that the appellant remains convicted of a nearly four-month period of unauthorized absence from a combat arms unit and possession of a substantial quantity of marijuana aboard a Marine Corps base. We are satisfied beyond any reasonable doubt that the sentencing landscape, now devoid of the motor vehicle operator's license violation, has not substantially changed.

¹ "WHETHER THE MILITARY JUDGE'S PROVIDENCE INQUIRY INTO CHARGE II SUFFICIENTLY ESTABLISHED A FACTUAL BASIS TO FIND THAT APPELLANT VIOLATED A LAWFULL [SIC] GENERAL REGULATION WHERE APPELLANT WAS NEITHER ASKED WHETHER NOR DID HE STATE THAT HE DID NOT HAVE A VALID STATE DRIVER'S LISCENCE [SIC]."

The remaining findings of guilty and the sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court