IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **H. LAZZARO**

UNITED STATES

v.

Victor M. MENDOZA
Private (E-1), U.S. Marine Corps

NMCCA 200101870 Decided 31 October 2005

Sentence adjudged 10 September 1999. Military Judge: F. Delzompo. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

LAZZARO, Judge:

The appellant entered mixed pleas before a general court-martial composed of officer members. Pursuant to his pleas, the military judge found the appellant guilty of two specifications of unauthorized absence,[1] escape from confinement, and two specifications of wrongful use of a controlled substance, in violation of Articles 86, 95, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 895, and 912a. Contrary to the appellant's pleas, the members found him guilty of failure to obey a general regulation, escape from custody, wrongful distribution of methamphetamine, two specifications of wrongful possession of a controlled substance (methamphetamine and marijuana), and kidnapping, in violation of Articles 86, 92, 95, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 892, 895, and 912a, and 934. *See* footnote 1. The members sentenced the appellant to a

[1] The appellant entered a plea of guilty to one of the specifications by exceptions and substitutions; excepting out the date the absence terminated and the manner of termination being by apprehension, and substituting an earlier date of termination from that charged. The Government elected to proceed to trial on the excepted language. The members convicted the appellant as charged.

dishonorable discharge, confinement for 15 years, and total forfeiture of pay and allowances. The convening authority approved the sentence as adjudged. However, he suspended confinement in excess of 12 years for the period of confinement. There was no pretrial agreement.

We have carefully considered the record of trial, the six assignments of error[2], and the Government's response. As modified, we conclude the findings and the sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of appellant remains. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant submitted a urine sample on 2 September 1997, that tested positive for cocaine. He submitted a second urine sample on 5 March 1998 that tested positive for methamphetamine. The appellant was ordered into pretrial confinement on 20 March 1998 after his command received the results of the second urinalysis. However, the appellant fled from the custody of chasers who had been assigned to transport him to the brig, made good his escape, and was absent from his unit until he was apprehended on 13 November 1998, when a search warrant seeking drugs and other items was executed on his apartment.

On 30 October 1998, Sergeant (Sgt.) Dean Kallmyer, USMC, who was pending trial on drug distribution charges, provided Special Agent (SA) Chris Wikel of the Naval Criminal Investigative Service (NCIS) a sworn statement in which he implicated the appellant as a person who had sold controlled substances to Marines. Kallmyer agreed to be a confidential source to enhance his chance for leniency in his own pending court-martial on drug

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[2] I. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE EXTREMELY POOR QUALITY AUDIO TAPES.

II. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED A TRANSCRIPT OF AFORESAID AUDIO TAPES.

III. THE COURT COMMITTED PLAIN ERROR WHEN IT FOUND THAT APPELLANT WAS GUILTY OF INVEIGLING A BRIG CHASER WHEN ANY HOLDING OF THAT BRIG CHASER WAS INCIDENTAL TO THE CRIME OF ESCAPE, AND WAS NOT AGAINST THE CHASER'S WILL.

IV. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT REFUSED TO SUPPRESS EVIDENCE FROM APPELLANT'S APARTMENT, SEIZED PURSUANT TO A WARRANT NOT SUPPORTED BY PROBABLE CAUSE.

V. THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED EVIDENCE OF A CONFESSION OBTAINED IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL.

VI. THE COURT MARTIAL ORDER AND THE STAFF JUDGE ADVOCATE'S RECOMMENDATION ERRONEOUSLY RECITE THAT APPELLANT WAS FOUND GUILTY OF CHARGE I, SPECIFICATION 1.

charges. Kallmyer next contacted SA Wikel on 5 November 1998, and stated the appellant had agreed to deliver a quantity of methamphetamine to him at the appellant's apartment the next day.

On 6 November 1998, SA Wikel and other NCIS agents fitted Kallmyer with an audio recording device, searched his person and automobile, provided him with $50.00, and surveilled him as he entered the appellant's apartment intending to buy the methamphetamine the appellant had told him he would have available. However, the purchase did not occur because the appellant had been unable to obtain methamphetamine for Kallmyer. The appellant said he had a hard time finding drugs but somebody named Ricardo would get some the next day. He instructed Kallmyer to return the following day at which time he would be able to provide him with methamphetamine. NCIS retrieved the tape recording of this conversation.

On 7 November 1998, SA Wikel and other NCIS agents repeated the process of the preceding day with Kallmyer. This time, Kallmyer was successful in purchasing 0.42 grams of methamphetamine from the appellant for $50.00. Following the purchase, Kallmyer left the appellant's apartment and provided the substance to SA Wikel who field-tested it and obtained a positive indication the substance was actually methamphetamine. Again, NCIS retrieved the tape recording of this conversation.

Kallmyer conversed with the appellant one or more times between 7 and 11 November 1998, and obtained the appellant's commitment to deliver additional methamphetamine to him on 12 November 1998. Kallmyer informed SA Wikel of the conversation(s), and SA Wikel submitted an application for a search warrant to a United States magistrate judge on 12 November 1998. The magistrate judge issued a search warrant that day that authorized a search of the appellant's apartment between that date and 22 November 1998. The search warrant was executed on 13 November 1998, and marijuana, methamphetamine, and assorted drug paraphernalia were discovered in the apartment.

The appellant was present in the apartment at the time of the search and was immediately taken into custody. He was placed in pretrial confinement in the Camp Pendleton brig.

On 2 March 1999, Private Brian M. Foster, a chaser, escorted the appellant from the brig to the base hospital for a previously scheduled appointment. Upon leaving the hospital with the appellant, Foster was confronted by an impostor wearing a Marine Corps uniform and displaying the rank of a staff sergeant who ordered him to get into a van with the appellant. Foster did as ordered, and was driven with the appellant from the base. Shortly after leaving the base, Foster was forced to exit the van and the appellant made good his escape.

Motions to Suppress Evidence

We review a military judge's ruling on a motion to suppress, admit, and/or exclude evidence for an abuse of discretion. *See, e.g., United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995); *United States v. Johnston,* 41 M.J. 13, 16 (C.M.A. 1994); *United States v. Gray*, 40 M.J. 77, 80 (C.M.A. 1994). In so doing, we must determine whether the military judge's findings of fact are clearly erroneous or the conclusions of law incorrect. *Ayala*, 43 M.J. at 298. We review *de novo* the question of whether the military judge "correctly applied the law." *Id*. We are required to consider the evidence in "the light most favorable" to the "prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

Admissibility of Audio Tapes and Transcripts

The appellant asserts in his first two assignments of error that the military judge erred by denying his pretrial motion to suppress two audiotapes, and thereafter admitting, over his objection, transcripts of selected relevant portions of the conversations recorded on those audiotapes in evidence. He suggests this court should set aside the findings and the sentence.

The appellant filed a motion to suppress the tapes alleging they were so inaudible as to render them untrustworthy. He contended that a balancing test pursuant to MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), should be conducted and would result in a finding that whatever probative value the tapes had was substantially outweighed by the prejudicial effect that would result from their inaudibility.

The military judge heard the testimony of Kallmyer and SA Wikel, and listened to the tapes themselves. He thereafter issued detailed findings of fact that included the following:

> Number four, during the motions hearing in this case and in the presence of all parties, I listened to the relevant portions of the two tapes. I found the recordings generally to be of poor quality. But I, nonetheless, was able to understand clearly almost everything said by Sergeant Kallmyer, and the majority of the statements attributed to the accused.
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> Number five, those conversations, where audible and intelligible, are clearly relevant under MRE 401 to prove the offense alleged under Specification 3 of Charge IV, the wrongful distribution of methamphetamine, and therefore, are generally admissible under MRE 402.
>
> Number six. Now, tape recordings, which are only partially unintelligible are admissible unless the

> recording as a whole is rendered untrustworthy by the unintelligible portions. I find, for purposes of this motion, that the recording as a whole is not made untrustworthy. . . .
>
> . . . .
>
> Accordingly, tape recordings of the accused, both agreeing to distribute and later actually distributing methamphetamine to Sergeant Kallmyer, will add greatly to the government's case and will assist the government in corroborating Sergeant Kallmyer's testimony. Thus, I find the probative value of the recordings to be very high.
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> Number 8. Under MRE 403, I must balance that probative value against the potential dangers highlighted by the defense. After having listened to the tape, I'm confident that any danger of unfair prejudice, any confusion of the issues, or of misleading the members does not substantially outweigh that probative value.
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> The tapes are sufficiently clear for the members to hear and to understand. And rather than confusing the members, I believe the tapes will help to eliminate confusion and to clarify the issues properly before them.

Record at 147-49.

Our superior court has held that "once a proper foundation is laid, 'recorded tapes of actual events, such as street drug sales, should be admissible despite audibility problems, background noises, or the lack of crystal clear conversations, since they directly portray what happened.' However, this rule is subject to the caveat that a recording is not admissible if 'the unintelligible portions are so substantial as to render the recording as a whole untrustworthy.'" *United States v. Craig*, 60 M.J. 156, 160 (C.A.A.F. 2004)(footnotes omitted).

Having reviewed the tapes and the record of trial, we are satisfied the military judge's findings of fact are not clearly erroneous, and his conclusions of law are correct. Accordingly, we conclude that the military judge did not abuse his discretion in denying the appellant's motion to suppress evidence.

Use of Audio Tape Transcripts

The military judge allowed the Government to provide the members with a transcript, prepared by Kallmyer, of relevant portions of the audiotapes. The appellant objected to admission of the transcripts based on MIL. R. EVID. 403 and his assertion that the transcripts incorrectly attributed statements to the

appellant that were actually made by other person(s) who were present in the apartment during the recorded conversations.

The military judge conducted an Article 39(a), UCMJ, session in which Kallmyer testified and laid a foundation for introduction of the transcripts. During cross-examination at this session, Kallmyer repeatedly testified he believed the transcripts to be accurate, while acknowledging it was possible he had misidentified the speaker at one minor part of the transcript. The military judge also compared the transcripts to the tapes, and specifically found that both transcripts tracked very closely to what he heard on the tapes.

In overruling the appellant's objection, the military judge balanced the probative value of the transcripts, which he found to be high, against the danger of unfair prejudice. He indicated that, having listened to the audio tapes a couple of times, the transcripts closely tracked what was on the tapes, and that the tapes would be helpful to the members in understanding what was being said. The military judge provided the following limiting instruction to the members, without objection, when the transcript of the 6 November 1998 audiotape was distributed to them:

> Gentlemen, you are going to receive these transcripts just for the purposes [sic] of assisting you while the tapes are played here in court. These exhibits are not going to be taken with you in the deliberation room. Now, as you heard, these are exhibits that've [sic] been prepared by this witness (Kallmyer), based upon his recollection of what took place during the conversation on 6 November, inside the apartment in his review of the audio tape. It's for you members to decide, what, if anything, took place inside the apartment. This transcript, the tape you are about to hear, and this witness' testimony is designed to assist you in deciding, what, if anything, was said inside the apartment. So ultimately, the transcript, if there is a deviation between the transcript and what you hear on the tape and what you decide actually occurred in the apartment. [sic] You, and not the transcript are the finders of fact here. So you must decide what, in fact, occurred. . . .

Record at 491.[3]

The military judge allowed the transcript of the 6 November tape to be published to the members while the tape was being played. After playing of the tape concluded, the military judge had the transcript retrieved from the members and allowed trial

[3] Although the instruction refers to transcripts in the plural, it is clear from the record that the tape transcripts were provided to the members separately when the individual tapes were played.

counsel to ask clarifying questions of Kallmyer. The military judge then allowed the transcript of the 7 November tape to be published to the members while the tape was played. This time, however, he allowed the members to retain the transcript while trial counsel and defense counsel asked questions of Kallmyer.

During cross-examination, defense counsel challenged Kallmyer as to the accuracy of his identity of one of the speakers on the 7 November tape and transcript, contending that it sounded like one of the other persons in the apartment on that date as opposed to the appellant. Kallmyer conceded it could have been the other person, although he maintained his belief that he had correctly identified the appellant as the speaker.

A transcript of an audio recording may be used at a court-martial once a proper foundation is laid and appropriate procedural safeguards are put in place. *Craig*, 60 M.J. at 160. The mere fact that the portions of the taped conversation may be inaudible and/or difficult to understand does not render a transcript of the taped conversation inadmissible. Our superior court has indicated that at least four procedural protections should be employed when the government offers a transcript in a criminal case: "(1) the trial judge should 'review[] the transcript for accuracy'; (2) the defense counsel should be 'allowed to highlight alleged inaccuracies and to introduce alternative versions'; (3) the jury should be 'instructed that the tape, rather than the transcript, was evidence'; and (4) the jury should be 'allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations.'" *Id*. at 161 (quoting *United States v. Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004)).

As to the first step, the military judge reviewed each transcript, compared them to the tapes, and specifically found they closely tracked what he heard on the tapes. Defense counsel was allowed to cross-examination Kallmyer on the accuracy of the transcripts he prepared, and obtained a concession from the witness as to one of the statements that it was possible he had misidentified the speaker, thus complying with the second procedural protection to be employed. Regarding the third step, while the military judge's limiting instruction was not a model of clarity, it was given without objection, and adequately placed the members on notice of the proper use and weight to be given to the transcripts.

Finally, as to the fourth step, the members were provided with copies of the transcript to compare with the tapes as they were being played during the trial. Trial counsel did not mention the transcripts during closing arguments, but instead relied upon the content of the tapes themselves and the members' recollection of what was on the tapes. Defense counsel did make reference to the transcripts during closing argument and used the concession he obtained from Kallmyer as to the possible

misidentification of the person speaking at one point to attack Kallmyer's overall credibility.

We are satisfied the military judge did not abuse his discretion in admitting the transcripts and allowing the members to use them to assist in understanding the contents of the audio tapes of the conversations as they were played in court.

Lawfulness of Search of the Appellant's Apartment

The appellant next asserts the military judge erred in denying the motion to suppress evidence seized from his apartment pursuant to the execution of a search warrant issued by a federal magistrate judge. The appellant contends the warrant was fatally defective due to the warrant application's failure to detail information known to the affiant that would have mitigated against finding probable cause to search appellant's apartment. The appellant asks this court to reverse the military judge's denial of the motion to suppress evidence, and set aside the findings and sentence.

In November 1998, SA Wikel had been an NCIS special agent for approximately 13 months. He had previous experience as a criminal investigator with the Marine Corps for about four years, and approximately nine years total law enforcement experience. As a law enforcement officer, he had participated in about 120 narcotic investigations, including approximately 70 that entailed purchases of controlled substances.

In his 30 October 1998 sworn statement, Kallmyer averred he had seen the appellant sell methamphetamine to Marines between 15-20 times, the last time being in late May 1998. Kallmyer stated the appellant sold methamphetamine from his apartment, although he did not indicate how many of the estimated 15-20 sales occurred in the apartment. Kallmyer then contacted SA Wikel on or about 5 November 1998, and told him that the appellant was supposed to have methamphetamine available to sell to Kallmyer on 6 November 1998.

Based on the information he received from Kallmyer, SA Wikel began an investigation that included verifying the appellant's address, motor vehicle registration, and his active military and deserter status. Wikel obtained the audiotapes discussed earlier of what occurred on 6 and 7 November 1998, and received from Kallmyer the substance he purchased from the appellant on 7 November 1998, which a field test indicated was methamphetamine.

SA Wikel testified he spoke with Kallmyer one or two times between 7 and 11 November 1998, and was informed by Kallmyer that the appellant said he would get him more drugs on 12 November 1998. Kallmyer testified at the hearing on the motion to suppress as follows:

Q. Now, during – after the controlled buy between the 7th of November and the 13th of November, did you make any calls to Private Mendoza to try and get some drugs?
A. Not that I recall, sir.

Q. Did you call or talk to him at all during that week?
A. I think may be [sic] on the telephone, sir. I believe he called. We just talked a little bit about nothing but I didn't go over to his house.

Q. This was just casual conversation?
A. Yes, sir.

Q. Was there any discussion about drugs at all?
A. I don't think so.

Q. You remember testifying at the Article 32 hearing?
A. Yes, sir.

Q. And do you recall saying at that time that you had casual conversation that had nothing to do with drugs?
A. Yes, sir.

Q. To the best of your recollection; is that true?
A. Yes, sir.

Record at 128-29.

Wikel conducted further investigation in preparation for requesting a search warrant, including obtaining an exact location and description of the appellant's apartment and a diagram of the apartment's floor plan. Wikel began drafting a search warrant application on 11 November 1998.

The search warrant application detailed Wikel's law enforcement experience, a description of the premises he sought to search, and information about the appellant, including the appellant's deserter status. The application included Kallmyer's claim to have seen the appellant sell methamphetamine to several Marines in the past, and that on 6 November 1998, the appellant stated he would have methamphetamine available for Kallmyer the following day and was going to obtain additional methamphetamine for distribution to several other Marines. Wikel also described in the application the sale of methamphetamine to Kallmyer by the appellant that occurred on 7 November 1998.

The warrant application did not include any information about the failed attempt to purchase methamphetamine from the appellant at his apartment on 6 November 1998. The warrant application described Kallmyer as a cooperating witness, without explaining that he was providing information to Wikel in the hopes of obtaining leniency in the case pending against him. The application did not notify the magistrate judge that May 1998 was the last time before the 7 November 1998 sale when Kallmyer

claimed to have seen the appellant sell drugs. There is no mention in the warrant application of the conversations between Kallmyer and the appellant in which the appellant indicated he would have drugs available on 12 November 1998.

SA Wikel obtained the assistance of a federal prosecutor in preparing the application for a search warrant and presented the application to a United States magistrate judge on 12 November 1998. SA Wikel did not speak with the magistrate judge, and no information other than what was contained in the application was provided to her. The magistrate judge issued the search warrant on 12 November 1998, and authorized the search to be conducted on or before 22 November 1998. Wikel did not request the ten-day window during which the warrant could be executed, but instead the magistrate judge provided the ten-day period as standard procedure.

Prior to actually executing the warrant, SA Wikel and another agent escorted Kallmyer to his room to have him call the appellant to make sure the appellant actually had drugs in his apartment. However, before Kallmyer could make the call, the appellant called Kallmyer and asked if he was coming to get the drugs. The warrant was executed on 13 November 1998, and the items the appellant sought to suppress were seized from within his apartment.

The military judge made detailed findings of fact that, although inaccurate in one instance,[4] were not clearly erroneous. He concluded the search warrant was supported by probable cause based upon the appellant's past sales of methamphetamine, SA Wikel's ability to corroborate information supplied to him by Kallmyer, the recorded conversations, including the appellant's statement that he would be acquiring drugs to distribute to other Marines,[5] and the sale of methamphetamine to Kallmyer on 7 November 1998. The military judge specifically concluded it was reasonable to assume from the information contained in the application for a search warrant that the appellant would have methamphetamine in his apartment for some period of time (and that 6 days was not outside that time period), and that the appellant was involved in an ongoing drug operation.

"A military judge's determination of whether probable cause existed to support a search authorization is reviewed for an

[4] The military judge found that the appellant sold methamphetamine between 15 and 20 times from his apartment. However, while the evidence supports findings that 1) the appellant sold methamphetamine between 15 and 20 times, and 2) he sold methamphetamine from his apartment, there is no evidence to support the finding that all sales occurred at the appellant's apartment.

[5] Although this statement cannot be discerned on the audio tapes and is not contained in either transcript, SA Wikel testified he was aware of this information, and it is very conceivable, considering the quality of the tapes, that it was made during one of the unintelligible sections of the tape recordings.

abuse of discretion. 'The duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for . . . concluding that probable cause existed.'" *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005)(footnotes omitted). "'In reviewing probable cause determinations, courts must look at the information made known to the authorizing official at the time of his decision. The evidence must be considered in the light most favorable to the prevailing party.'" *Id*. (quoting *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)). "A probable cause determination is a 'practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

"The Supreme Court has emphasized that 'probable cause is a flexible, common-sense standard.' A probable cause determination merely requires that a person 'of reasonable caution' could believe that the search may reveal evidence of a crime; 'it does not demand any showing that such belief be correct or more likely true than false.'" *Id.* (emphasis in original)(footnotes omitted). "So even though 'people often use "probable" to mean "more likely than not," probable cause does not require a showing that an event is more than 50% likely.'" *Id.* (quoting *United States v. Olson*, No. 03-CR-51-S, 2003 U.S. Dist. LEXIS 24607, at *16 (W.D. Wis. Jul. 11, 2003)).

"' [A] determination of probable cause by a neutral and detached magistrate is entitled to substantial deference.'" *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004)(quoting *United States v. Maxwell*, 45 M.J. 406, 423 (C.A.A.F. 1996)). "'Resolution of doubtful or marginal cases . . . should be largely determined by the preference . . . (for) warrants. . . . Close calls will be resolved in favor of sustaining the magistrate's decision.'" *Id.* (quoting *United States v. Monroe*, 52 M.J. 326, 331 (C.A.A.F. 2000)).

Having considered the evidence in the light most favorable to the Government, and giving deference to the magistrate judge's determination of probable cause, we are satisfied the military judge did not abuse his discretion in denying the motion to suppress evidence acquired by execution of the search warrant on 13 November 1998.

Sufficiency of Evidence of Unauthorized Absence

Although not assigned as error, we will discuss the sufficiency of the evidence of unauthorized absence under Charge I, Specification 1. Because the Government did not disprove beyond a reasonable doubt a defense of mistake of fact, we conclude that the evidence is factually insufficient. Art. 66(c), UCMJ.

Specification 1 of Charge I alleges that the appellant absented himself from his unit without authority from on or about 20 March 1998 until he was apprehended on or about 13 November 1998. The appellant pled guilty only to unauthorized absence for a shorter period from 20 March 1998 until 23 April 1998. After the military judge accepted that plea, the Government successfully went forward to prove the charged time frame and apprehension.

During the providence inquiry, the appellant told the military judge that he left his unit without authority on about 20 March 1998 as charged. On about 23 April 1998, he called his unit and talked with his platoon commander, Staff Sergeant (SSgt) Herrerra, who informed him that he had been "BCD'd in lieu of trial." Record at 180. When asked for clarification, the appellant explained that SSgt Herrerra told him he had already been discharged in lieu of trial with a bad-conduct discharge for a pending drug charge. The appellant understood from his platoon commander that the discharge certificate would be mailed to him. Finally, the appellant said that, based on that conversation, he thought his unauthorized absence ended on 23 April 1998.

On the merits, the only evidence relevant to the issue of early termination was SSgt Herrerra's testimony. During direct examination by the trial counsel, he corroborated the appellant's statement in the providence inquiry by testifying that he told the appellant he was already being processed for a BCD. During cross-examination, he testified that he told the appellant he had been "BCD'd out of the Marine Corps." *Id.* at 338. Based on a member's question, this exchange followed:

> MJ: The things you said to him, and the way you said it, and his responses was from what you heard talking to him, his understanding was, I'm out, I don't need to come back?
> W: Yes, sir.

Id. at 341. We note that, at one point, the military judge remarked that, "evidently there was confusion in his mind" as to whether the appellant thought he was in an unauthorized absence status or not. *Id.* at 340.

Based on the foregoing, we conclude that the defense of mistake of fact as to active duty status was raised. The military judge thought so as well, since he correctly instructed the members that an honest and reasonable mistake was a complete defense. RULE FOR COURTS-MARTIAL 916(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.); *see United States v. Timmins*, 45 C.M.R. 249 (C.M.A. 1972); *United States v. Holder*, 22 C.M.R. 3 (C.M.A. 1956).

We must then decide whether the Government disproved this defense beyond a reasonable doubt. The appellant and SSgt Herrerra testified with remarkable consistency that they had a

telephone conversation that included some reference to a bad-conduct discharge or processing for a bad-conduct discharge. Based on what he saw and heard in the courtroom, the military judge opined that the appellant was apparently confused about his military status. Given the fact that the appellant was a private with less than one year on active duty, we are not surprised that he was confused. We conclude that the Government failed to disprove this defense beyond a reasonable doubt. Therefore, the evidence is factually insufficient.

Conclusion

We have carefully considered the remaining assignments of error and find them to be lacking in merit. In Specification 1 of Charge I, we except the words and figures, "until he was apprehended on or about 13 November 1998," and substitute therefor the words and figures, "until on or about 23 April 1998." The excepted words and figures are dismissed. With that modification, the findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having done so, we affirm the sentence as approved by the convening authority. As reassessed, we conclude that the sentence is not only appropriate but also no greater than that which would have been imposed at trial if the prejudicial error had not been committed.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court