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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

DAVID M. ARMSTRONG
Corporal (E-4), U.S. Marine Corps

NMCCA 200400004 Decided 19 December 2005

Sentence adjudged 21 February 2003. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Headquarters Battalion, MAGTFTC, MCAGCC, Twentynine Palms, CA.

Maj EDWARD DURANT, USMCR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LtCol PAUL KOVAC, USMCR, Appellate Government Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

WAGNER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of six specifications of failure to go to his appointed place of duty and one specification of making and using a false writing for the purpose of obtaining approval of a claim against the United States, in violation of Articles 86 and 132, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 932. The military judge also convicted the appellant, contrary to his pleas, of larceny and making a false claim against the United States, in violation of Articles 121 and 132, UCMJ, 10 U.S.C. §§ 921 and 932. The appellant was sentenced to a bad-conduct discharge, reduction to pay grade E-1, and confinement for 6 months. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant’s assignments of error, and the Government's answer. The appellant asserts four assignments of error. Two allege that the evidence

was legally and factually insufficient to support findings of guilty to the contested charges alleging larceny and making a false claim. The other two assignments of error allege that the larceny specification is an unreasonable multiplication of charges with the false claim specification and that a sentence that includes an unsuspended bad-conduct discharge is inappropriately severe.

We conclude that the evidence adduced at trial was neither legally nor factually sufficient to support findings of guilt to the contested charges of larceny and making a false claim. We will take corrective action in our decretal paragraph. Following corrective action, we conclude that the remaining findings and the reassessed sentence are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, his out-of-wedlock son Jeremy, and Jeremy's mother lived together in Port Orchard, Washington, prior to the appellant's entry on active duty. The appellant acknowledged paternity and was listed as the father on Jeremy's birth certificate. The appellant provided financial support to both and shared in day-to-day parenting decisions involving Jeremy. The appellant reported, unaccompanied, to Marine Corps Recruit Training in San Diego, California on 20 November 1996 and, in February of 1997, to Basic Financial Management School at Camp Lejeune, North Carolina. The appellant was not permitted to have dependents accompany him while under instruction in North Carolina. The appellant continued to provide financial support of between $200.00 and $400.00 each month to Jeremy and his mother, who remained in the residence they had previously shared with the appellant in Port Orchard.

In April 1997, the State of Washington removed Jeremy from the home, due to parental neglect, and placed him temporarily with the appellant's mother, JA, in Tahuya, Washington. The appellant began sending his financial support for Jeremy to JA. JA had also been given temporary custody of Jeremy's brother, Edwin, who was not the biological son of the appellant.

In September 1997, the appellant reported to the Marine Corps Air Station at El Toro, California. The appellant requested base housing in El Toro, but was informed there was nothing available. He determined that he could not afford off-base housing and, in concert with JA, decided that Jeremy would be better off remaining with her and his brother, Edwin. Beginning on 15 November 1997, the appellant sent JA $350.00 per month for Jeremy. JA received financial support from the State of Washington for Edwin, but none for Jeremy.

During November 1997, the appellant made inquiries regarding the amount of Basic Allowance for Housing (BAH) he was entitled

to receive. Based on his financial support for Jeremy, the appellant began receiving partial BAH (BAH-Diff). In July 1998, the appellant again made inquiries into his BAH rate and was informed he should be receiving BAH at the higher rate for service members with dependents (BAH-I). He began receiving BAH-I on 12 August 1998. The appellant was able to obtain base housing on 17 December 1998 and stopped receiving BAH altogether. On 30 December 1998, the appellant married AA and moved Jeremy from Washington to live with them at El Toro.

On 20 April 2000, a Parenting Plan Final Order designating the appellant as the sole custodian of Jeremy was filed in the Superior Court of Kitsap County in the State of Washington. In June of 2000, a sprinkler system mishap destroyed boxes containing the appellant's personal belongings and paperwork. In April 2001, the appellant moved his family, pursuant to permanent change of station orders, to the Marine Corps Air-Ground Combat Center, 29 Palms, California.

Upon reporting to his new duty station, the appellant inquired into the possibility of claiming past BAH amounts that he should have been entitled to receive based on his status as a service member with a dependent since 1996. Essentially, the appellant wanted to retroactively claim the higher BAH-I from 20 November 1996 until 17 December 1998. He was informed he would need to submit documents demonstrating that he had provided the financial support to Jeremy during this period of time. The loss of personal documents in June of 2000 hampered the appellant's effort to comply with this requirement.

In an effort to speed the process along, the appellant altered the Parenting Plan Final Order to read as if it had been filed with the court in 1996 vice 2000, thereby covering the period in question. It is this altered court document that gives rise to the charges before the court.

At the time of trial, the Government had been recouping the BAH payment from the appellant, leaving him $344.00 per payday, and the appellant had resubmitted his claim for the past BAH, using supporting documentation he should have provided the first time. At the time of trial, the claim was not yet processed.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

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, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

1. False Claim

The elements of the offense of making a false claim alleged in Specification 1 under Charge II are:

(a) That the appellant made a claim for $12,744.00 of unpaid BAH-I and Family Separation Allowance against the United States;

(b) That the claim was false and fraudulent in that the appellant did not have a dependent residing with him during the time period claimed; and

(c) That the appellant knew that the claim was false and fraudulent in that the appellant did not have a dependent residing with him during the time period claimed.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 58b(1).

The military judge considered two appellate exhibits on the merits with the consent of the parties. Appellate Exhibit IV is a part of Chapter 26 of the Defense Financial Management Regulation (DoDFMR), Volume 7A, Change 03-02, dated 9 January 2002. It states, in pertinent part, that when a service member claims BAH for an illegitimate child not in his or her custody, the case is treated in accordance with the rules for BAH-Diff vice BAH-I. Appellate Exhibit V is Military Pay Advisory 54/00 of 24 July 2000. It states that the term "custody" as used in the DoDFMR refers to "legal custody" vice "physical custody" and a case involving a service member who maintains legal custody over an illegitimate child should be processed as a claim for BAH-I vice BAH-Diff. The advisory goes on to state: "If the member has not relinquished legal custody of the child(ren), then the member would be entitled to BAH-I vice BAH-Diff." Appellate Exhibit V.

The only evidence presented on the merits by the Government was Prosecution Exhibit 1, a stipulation of fact with five attachments. The attachments included two differently altered copies of the Parenting Plan, a copy of the unaltered Parenting Plan, the Pay Authorization for the $12,744.00 payment, and the sworn statement of the appellant taken before trial. The appellant testified in his own defense. None of the evidence before the court establishes beyond a reasonable doubt that the appellant's dependent was required to live with the appellant in order for him to be entitled to BAH-I. In addition, there is no evidence that the appellant ever claimed that his dependent son was residing with him during the period of time he was seeking back payment of BAH-I. There is no evidence that the appellant

ever relinquished legal custody of the child and, by the plain language of the pay advisory (Appellate Exhibit V), was entitled to BAH-I vice BAH-Diff. In short, we agree that the evidence was not sufficient to support a finding of guilty to making a false claim as this offense was charged at trial. We find that the evidence is neither factually nor legally sufficient.

2. Larceny

The elements of the offense of larceny alleged in the specification under Charge I are:

(a) That the appellant wrongfully obtained by false pretense U.S. currency from the possession of the United States;

(b) That the currency belonged to the United States;

(c) That the currency was of a value of $12,744.00;

(d) That the obtaining by the appellant was with the intent permanently to deprive the United States of the use and benefit of the currency or permanently to appropriate the currency for the use of the appellant; and

(e) That the currency was military property.

MCM, Part IV, ¶ 46b(1).

The appellant admitted during cross-examination that he had obtained U.S. currency that was the property of, and in the possession of, the United States. He also admitted that he obtained the currency from the United States by altering the copy of the Parenting Plan Final Order and thereby falsifying the facts as to the date on which the Plan was filed with the court. The appellant admitted that the currency was of a value of $12,744.00. He went on to admit that he did not intend to return any of the currency to the United States and that he spent the currency for his own personal use.

The appellant argues, in support of his contention that the evidence is legally and factually insufficient to support the finding of guilty of larceny, that the evidence establishes the affirmative defense of mistake of fact in that the appellant believed he was entitled to the money, citing *United States v. Binnegar,* 55 M.J. 1, 4 (C.A.A.F. 2001). This argument holds no merit. At the time he filed the claim for back payment of BAH-I, the appellant believed he was entitled to BAH-I from the time he came on active duty in November 1996 because he provided support to his dependent son and had not relinquished legal custody at any time. The evidence supports this belief. Based solely on the evidence adduced at trial, the appellant was, in fact, entitled to receive BAH-I from the time he entered onto active duty. There appears to be no dispute that the appellant was entitled to receive the higher BAH rate and that he would

rightfully and lawfully receive the $12,744.00 in back BAH upon presenting a valid claim. The appellant was not mistaken about any fact. He simply and intentionally falsified the documentation provided in support of the otherwise valid claim in order to speed the process along because of the difficulty caused by the loss of personal documents in an unfortunate flooding incident.

The only term from the required elements that remained at issue following the presentation of evidence was whether the obtaining of the currency by the appellant was wrongful. All other terms and elements were clearly proven beyond a reasonable doubt.

In order for an obtaining to be wrongful, it must be done either without the consent of the rightful owner or by the use of false pretense. MCM, ¶ 46c(1)(d). In the present case, the owner, the United States Government, consented to the obtaining of the currency by approving the claim and submitting the payment to the appellant. The critical question, then, is whether the appellant obtained the money by false pretense.

False pretense may be made by means of an act, word, symbol, or token. MCM, ¶ 46c(1)(e). The representation must be false at the time of the taking and the appellant must have known that it was false. In this case, the facts establish that the appellant's claim for the back BAH was not false, but rather, the document he provided in support of the claim was false.

The current offense of larceny under Article 121, UCMJ, incorporates within it the common law crime of obtaining by false pretense. MCM, ¶ 46c(1)(a). Typically, the false pretense is a ruse or misrepresentation of fact that fools the rightful owner into voluntarily giving over property on the false belief that the property is lawfully due to the thief. In other words, where a service member falsely claims to have a dependent for the purpose of obtaining BAH-I when, in fact, he or she does not, the obtaining of BAH-I is a violation of Article 121, larceny, as a wrongful obtaining through false pretense. In this classic case, the thief has no valid entitlement to the money, creating a false entitlement as the means of obtaining payment from the Government. Although the pretense need not be the sole cause inducing the owner to part with the property, it must be an effective and intentional cause of the obtaining. MCM, ¶ 46c(e).

This form of larceny through false pretense in the arena of allowances for housing has been held to include those instances where a service member has dependents, but, while drawing BAH-I based on those dependents, does not provide financial support to them. *United States v. Bulger*, 41 M.J. 194, 196 (C.M.A. 1994).

In the classic scenarios, the thief keeps the money for his own personal use and the *mens rea* of the larceny is established in the thief's intention to permanently deprive the Government of

funds intended to provide support for dependents with no belief that he or she is actually entitled to those funds, either because there are no real dependents to support or because no actual support is sent on to the dependents. The Government must prove the wrongfulness of the obtaining by showing that the obtaining occurred not through valid entitlement, but only through the false pretense.

Article 121, UCMJ, did not make criminal any conduct not previously recognized as criminal under the common law of larceny, larceny by false pretenses, or embezzlement. *United States v. Mervine*, 26 M.J. 482, 483 (C.M.A. 1988); *United States v. Neff*, 34 M.J. 1195, 1199 (A.F.C.M.R. 1992). Conviction of the crime of false pretenses requires a showing that certain false representations were made which were relied upon by the victim and that there was a causal relation between the representation made and the delivery of the property. *United States v. Hildebrand*, 2 C.M.R. 382, 384 (A.B.R. 1952). As a statute consolidating common law crimes, Article 121, UCMJ, must be strictly construed and limited to its purpose. *Mervine*, 26 M.J. at 484 n1.

In the instant case, the appellant was entitled to claim the back BAH-I based on his factual assertion that he was providing support for his dependent. There is no evidence that the appellant ever had any intent to obtain any funds in excess of those to which he was rightfully entitled by virtue of that support. Construing the larceny statute strictly to its purpose, there exists no *mens rea*, and therefore, no wrongfulness in the appellant's obtaining of the back BAH-I. There is ample evidence, as the appellant readily admits, that he falsified a writing in support of an otherwise meritorious claim in violation of Article 132, UCMJ. The evidence is neither factually nor legally sufficient to support the mens rea for larceny by false pretenses.[1]

Conclusion

The findings of guilty to the sole specification under Charge I and Specification 1 of Charge II are set aside. The remaining findings of guilty, as approved by the convening authority, are affirmed. Because of our action on the findings, we must reassess the sentence in accordance with the principles set forth in *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). Only so much of the approved sentence as includes

[1] Our decision in the present case is not inconsistent with our past treatment of obtaining through false pretenses under Article 121, UCMJ. In *United States v. Vorda*, 34 M.J. 725 (N.M.C.M.R. 1991), we concluded that an appellant who knew that the price marked on a box containing a camera was incorrect and lower than the actual price did not have the requisite mens rea to commit the offense of wrongful appropriation of the camera when he purchased it at that lower price. *Id.* at 727.

confinement for 6 months and reduction to pay grade E-1 is affirmed. The remaining two assignments of error are made moot by our action on the findings and sentence.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court