

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

BEFORE

Charles Wm. DORMAN

C.A. PRICE

E.B. STONE

UNITED STATES

v.

**Francisco J. CUARTAS
Builder Constructionman (E-3), U.S. Navy**

NMCCA 200400710

Decided 13 October 2005

Sentence adjudged 16 December 2003. Military Judge: J.A. Maksym. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

LT STEPHEN C. REYES, JAGC, USNR, Appellate Defense Counsel
PAUL D. KOVAC, USMCR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

DORMAN, Chief Judge:

The appellant was tried before a general court-martial. Consistent with his pleas, the appellant was convicted of three specifications of wrongful appropriation, and a single specification of shipping in foreign commerce a 9mm Beretta pistol and 10 rounds of ammunition, knowing that the pistol and the ammunition were stolen. Contrary to his pleas, the military judge convicted the appellant of single specifications of stealing a single round of 5.56mm ammunition, and then shipping the round in foreign commerce. The appellant's crimes violated Articles 121 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921 and 934, and 18 U.S.C. §§ 922(i) and 924(a)(2). The adjudged and approved sentence consists of a dishonorable discharge, confinement for 28 months, forfeiture of all pay and allowances, and reduction to pay grade E-1. In taking action the convening authority suspended confinement in excess of 24 months and the forfeiture of pay and allowances for a period of 24 months from the date of sentencing. The convening authority also deferred and waived automatic forfeiture of pay and allowances. The suspension, deferral and waiver were ordered in compliance with the terms of the negotiated pretrial agreement.

In his single assignment of error, the appellant asserts that the evidence is both legally and factually insufficient to sustain his conviction of the larceny and shipment of a single stolen round of ammunition for the M-16 rifle. The Government concedes that the evidence is both legally and factually insufficient. While we are not required to accept a Government concession, we do so in this case. We have also found other errors that merits relief. Following our corrective actions, we conclude that the findings and sentence are correct in law and fact and that no error remains that materially prejudices the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

Facts

While stationed in Kuwait in January 2003, the appellant devised a scheme to avoid being sent into a combat environment in what he believed would be a war in Iraq. During the providence inquiry he informed the military judge that he was familiar with the postal procedures for shipment of packages from Kuwait back to the United States. He stated that he knew that packages leaving Kuwait were subjected to x-ray examination. Knowing that, the appellant wrongfully appropriated a loaded 9mm Beretta pistol from his unit's armory and mailed it to his wife in Florida. The appellant mailed the pistol, which was loaded with ammunition, along with items of personal property, as well as two other items of military property -- a pair of binoculars and a gas mask. The gas mask was issued to all personal serving with his unit in Kuwait at that time. The binoculars were issued to the appellant during periods of time that he was standing security duty. The appellant insured the package to ensure it would be easy to determine who had sent the package.

The pistol was apparently discovered when the package reached the United Arab Emirates. Upon discovery, the pistol was removed from the package, however the remaining items where allowed to continue their journey to the appellant's wife in Plantation, Florida. Rather than a regular postal delivery, the package was tracked to south Florida and then delivered to the appellant's wife by a U.S. Postal Inspector and an agent of the Naval Criminal Investigative Service. Upon delivery, the appellant's wife authorized a search of the package at which time the binoculars and the gas mask were seized. Additionally, a single round of 5.56mm ammunition was also seized. This ammunition was the type ammunition that could be fired by the appellant with the weapon he was issued in Kuwait, an M-16 rifle.

Sufficiency of Evidence

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v.*

Virginia, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. Based on that review, we find that the evidence is both legally and factually insufficient to support the appellant's conviction of stealing a single round of M-16 ammunition and shipping that one round to his wife.

We will briefly state why the Government failed to meet its burden of proof in this case. In order to convict the appellant of the theft of the single round of ammunition, the Government was required to prove that the appellant took, obtained or withheld the single round; that the single round was the military property of the United States; that it was worth \$0.20, or had some value; and that the appellant intended to permanently deprive the government of the use and benefit of the single round of ammunition. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2002 ed.), Part IV, ¶ 46b.

The Government failed miserably in its efforts to prove each element of the charged offence of the theft of one round of M-16 ammunition, in this poorly prosecuted and overcharged case. Significantly, no evidence was presented that the round found in the package the appellant shipped home was Government ammunition. While it is possible to prove ownership of Government ammunition through the use of lot numbers stenciled around the firing pin, no such evidence was presented. Additionally, no evidence was presented that the appellant took the ammunition. No witness was called who could testify that when the appellant checked in his assigned rifle and ammunition that he ever failed to return the proper number of rounds that had been assigned to him. Additionally, the Government offered no evidence concerning the value of a round of ammunition. Concerning the element of intent, even if the appellant intentionally shipped the single round of M-16 ammunition, it was found in a box that the appellant had mailed home which contained a pistol. Since the appellant believed the pistol would be detected by the mail security system, and that items in the box that belonged to the Government would then be returned, the Government failed to prove that the appellant intended to permanently deprive the Government of the use and benefit of this one round of ammunition. Finally,

the Government alleged and the military judge found that this theft occurred on 19 January 2003, while the Government's own evidence shows that the box was mailed on 14 January 2003. Since the Government failed to prove that the one round was stolen, we must set aside the appellant's conviction for larceny. Additionally, since the offense concerning mailing the single round of ammunition required knowledge that the round was stolen; we must also set aside that specification.¹

Wrongful Appropriation of Multiple Items

Although not raised as error by the appellant, we find that the providence inquiry and stipulation of fact concerning Specifications 2 and 3 of Charge I support only a single offence of wrongful appropriation. The providence inquiry and the appellant's stipulation of fact reveal that he committed a withholding type wrongful appropriation of a pair of binoculars and a gas mask. This occurred when the appellant packaged up the items, along with the pistol that he had earlier wrongfully appropriated, and mailed them all to his wife. The Manual for Courts-Martial specifically provides that "[w]hen a larceny of several articles is committed at substantially the same time and place, it is a single larceny" MCM, Part IV, ¶ 46c(1)(h)(ii). Accordingly, the appellant is guilty of only one wrongful appropriation with respect to the binoculars and gas mask. See *United States v. Lepresti*, 52 M.J. 644, 653 (N.M.Ct.Crim.App. 1999). Since the Beretta was wrongfully appropriated from the armory prior to it being packaged up and mailed back to Florida, the same rationale does not apply to that offense. We will take corrective action on the findings in our decretal paragraph.

Conclusion

Consistent with this opinion, we dismiss Specification 4, of Charge I, and Specification 3 of Charge II. Additionally, we order the merger of Specifications 2 and 3 of Charge I, by adding the language, "and a pair of black Fujimon Inc. binoculars, military property, of a value of about \$344.00, both" after the figure \$275.00" in Specification 3 of Charge I. Following merger, Specification 2 of Charge I is dismissed. As modified, the findings are affirmed.

¹ We have repeatedly referred to one round of ammunition to highlight the relative insignificance of this offense with respect to the other offenses to which the appellant had already admitted his guilt. The litigation of the appellant's guilt or innocence of the theft of this one round of ammunition, allegedly worth twenty cents, runs for nearly 200 pages in the appellant's record of trial. While convening authorities have the discretion to prosecute any offense they deem appropriate, we feel obligated to point out that in this case the Government, through the convening authority, the staff judge advocate and the trial counsel, misused limited judicial resources. Even if the Government had been successful in the prosecution of the theft of a twenty-cent round of ammunition in this case, the prosecution was pointless, and squandered the public trust of limited fiscal assets.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 437-38 (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). Upon reassessment of the sentence, we affirm only so much of the sentence as extends to a bad-conduct discharge, confinement for 20 months, forfeiture of all pay and allowances, and a reduction to pay grade E-1. The supplemental court-martial order shall accurately state the appellant's offenses.

Senior Judge PRICE and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court