

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

BEFORE

C.L. CARVER

D.A. WAGNER

J.F. FELTHAM

UNITED STATES

v.

**Lindsey S. JOYNER
Airman (E-3), U.S. Navy**

NMCCA 200401552

Decided 29 September 2005

Sentence adjudged 17 June 2004. Military Judge: J.W. Rolph.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial
convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

CAPT STEPHEN WHITE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence for 20 months and wrongful appropriation of \$27,900.00 in pay and allowances collected during the period of unauthorized absence, in violation of Articles 86 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 921. The appellant was sentenced to a bad-conduct discharge, a \$25,000.00 fine, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged, but suspended all but \$4,000.00 of the fine contingent on continued collection of the Government debt from the appellant. The pretrial agreement had no effect on the sentence.

We have carefully examined the record of trial, as well as the appellant's sole assignment of error asserting that his guilty plea was improvident because the appellant was not under a specific, identifiable fiduciary relationship that required him to take some action to stop his receipt of pay and

allowances during the period of time he was in an unauthorized absence status. We have also considered the Government's answer. We conclude that the findings must be modified and the sentence reassessed. We find that the remaining findings of guilt and the sentence after reassessment, to be 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.

Background

The appellant failed to report to his gaining command on 29 June 2002. Instead, the appellant remained at his home of record. The appellant knew that he was commencing a period of unauthorized absence by failing to report. He terminated his absence voluntarily by surrendering to military authorities on 20 February 2004.

The appellant stated during the military judge's inquiry into the providence of his guilty pleas that he expected his pay and allowances to stop after the first 24 hours of his absence. When they did not, he did nothing and spent the money that was being automatically deposited in his bank account. Twice during the time he was absent, the appellant changed bank accounts, notifying the Defense Finance and Accounting Service (DFAS) via the DFAS website of the change in his direct deposit. Otherwise, the appellant made no representations or took any other measures to ensure that his pay and allowances continued during his absence.

The appellant agreed with the military judge that he knew at the time that he was not entitled to receive pay and allowances while in an unauthorized absence status. He also agreed with the military judge's characterization of his submitting information to DFAS to change bank accounts as representing to the United States Navy that he was authorized to continue to receive pay and allowances via direct deposit. No facts were elicited regarding these two legal conclusions, however.

Improvident Plea

In his sole assignment of error the appellant asserts that his plea to wrongful appropriation was improvident because the military judge failed to establish facts sufficient to support his guilty plea. Specifically, the appellant claims that there must be some evidence that he had a fiduciary duty to take

affirmative steps to stop the flow of pay and allowances to his account or that he took some measure to deceive the Government or to falsely perpetuate his entitlement. We agree.

We note at the outset that "a provident plea of guilty is one that is knowingly, intelligently and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders*, 33 M.J. 1026 (N.M.C.M.R. 1991)). Also, "the accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. A factual basis is required for a military judge to accept an accused's guilty plea and the military judge is required to question an accused to establish this factual basis. *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 1995).

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Rejection of the plea "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs." *United States v. Dawson*, 50 M.J. 599 (N.M.Ct.Crim.App. 1999)(citing R.C.M. 910(j) and Art. 59(a), UCMJ).

In our review of the record, we find that the military judge accurately listed the elements and defined the terms contained in the elements of the offenses to which the appellant pled guilty. We also find that the appellant indicated an understanding of the elements of the offenses and the legal definitions, and stated that they correctly described the offenses he committed.

The appellant, however, merely acquiesced to the military judge's statement of legal conclusions on two salient points. First, that he was not entitled to his pay and allowances while in an unauthorized absence status. Second, that he represented to the United States Navy that he was entitled to pay and allowances by notifying DFAS of his change in bank accounts. There is no factual predicate establishing that the appellant was not entitled to his pay and allowances, even while absent, until DFAS terminated his direct deposit. Likewise, there is no

evidence that the appellant changed his bank accounts in order to defraud or trick DFAS into continuing the direct deposit. On the contrary, it is entirely possible that the appellant was placing the automatic deposit at risk by changing his information and drawing attention to his account.

This court and our sister courts have historically held that there is no inherent legal duty to make an accounting for property erroneously transferred to an individual. *United States v. Sundeen*, 45 M.J. 508, 511 (Army Ct.Crim.App. 1996)(citing *United States v. Castillo*, 18 M.J. 590, 593 (N.M.C.M.R. 1984); *United States v. Viverito*, 34 M.J. 872 (A.C.M.R. 1992); *United States v. Neff*, 34 M.J. 1195 (A.F.C.M.R. 1992)). The record before us does not provide a factual basis to establish such a duty. Therefore, under the circumstances of this case, we conclude that the military judge failed to elicit sufficient facts to support the appellant's guilty plea.

Conclusion

Charge II and its sole specification are set aside. The remaining findings, as approved by the convening authority, are affirmed. Accordingly, we have reassessed the sentence and affirm only so much of the sentence as provides for a bad-conduct discharge, \$4,000.00 fine, and reduction in rate to E-1.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court