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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Mikki E. ASHLEY
Sergeant (E-5), U.S. Marine Corps

NMCCA 9901546 Decided 26 May 2005

Sentence adjudged 26 March 1998. Military Judge: J.R. Ewers, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

Maj ANTHONY WILLIAMS, USMC, Appellate Defense Counsel
LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT LARS JOHNSON, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to her plea, of larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The appellant was sentenced to a bad-conduct discharge, a fine of $2,500.00 (or confinement for 100 days if the fine was not paid), and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

The appellant alleges that (1) the evidence is legally and factually insufficient to sustain the finding of guilty to the charge; (2) the sentence is inappropriately severe; (3) the military judge erred by not reconsidering the finding of guilty; (4) her trial defense counsel were ineffective for failing to request reconsideration; (5) the record of trial was not properly authenticated; (6) the staff judge advocate erred in the post-trial recommendation by referring to multiple offenses of which the appellant was convicted; and (7) the convening authority's action and promulgating order incorrectly identify the forum as a

special court-martial.[1] *See* Appellant's Brief and Assignments of Error of 29 May 2002.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence

The appellant contends that the evidence is insufficient to sustain her conviction for larceny. We disagree.

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. *See 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. Ct. Crim. 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. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See Reed*, 51 M.J. at 562; *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). After carefully reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty of larceny. We are also convinced that a rational trier of facts could have found the elements of the crime beyond a reasonable doubt.

The evidence at trial established that the appellant was actively involved in the "Toys for Tots" campaign in southern California for at least eight years. Record at 235. Testimony showed that strict inventory procedures were not followed for processing donated toys due to time constraints and high volume. The program, therefore, was dependent upon the integrity of the individual Marines picking up the toys from various locations. Although the standard practice was for Marines to work events or locations in teams, there were numerous occasions when the Marines would have to work alone. In those cases, more experienced and senior Marines, such as the appellant, would typically be chosen for solo assignments. Thus, the appellant had unfettered access to large numbers of donated toys through her role with the "Toys for Tots" program.

[1] The appellant requested oral argument concerning the legal and factual sufficiency of her conviction. This motion is hereby denied. On 11 May 2005, the appellant requested expedited review of her appeal. This request is granted.

Agents of the Naval Criminal Investigative Service (NCIS) searched the appellant's home as part of an investigation into the mishandling of classified material, charges for which the appellant was ultimately acquitted, and discovered a large number of children's toys. But, since the toys were not the focus of the NCIS investigation, they were not seized by the case agents. However, photographs of the toys were taken and entered into evidence. At trial, the testimony of several witnesses verified the approximate number of toys found at the appellant's residence and provided detailed descriptions of those toys. Many of the toys in the appellant's garage were stored in large barrels emblazoned with the "Toys for Tots" label, and most were still in plastic bags, consistent with packaging for "Toys for Tots" donation sites. Significantly, there were many identical items, all still in original packaging, among the nearly 500 toys stored in the appellant's garage. One photograph clearly shows at least six games of "Checkers" in the appellant's home. Prosecution Exhibit 7 at 16.

During the search of her home, the appellant spontaneously identified some of the toys in her home and garage as coming from the "Toys for Tots" program, although she claimed to have received permission to take them. We find this assertion of permission incredible under the circumstances and contradicted by the manifest weight of the evidence. Significantly, the appellant's superiors testified that, although limited permission was extended to command members to keep unsuitable toys, *i.e.*, toys containing perishable contents or offensive themes, only a small portion of the toys observed at the appellant's home were deemed unsuitable. Moreover, the command's Tots for Tots coordinator, Staff Sergeant (SSgt) "D," refuted the appellant's assertion that she was authorized to keep the toys at her home, testifying that his Marines were only authorized to store donated toys at their residence overnight. Record at 236. SSgt D also testified that the donated toys were the property of the U.S. Marine Corps, and he estimated their value at more than $3000.00. Finally, the appellant's supervisors further testified that the appellant was embittered over being passed over for promotion to Gunnery Sergeant after more than 17 years service and had made statements about "getting even." *Id.* at 197.

On the merits, the defense presented further testimony from SSgt D, who opined that the appellant had not done anything to lead him to conclude that she was not an honest, law-abiding person. Record at 443-44.

We are convinced that the value of the stolen toys is well in excess of $100.00. We are likewise satisfied, as was the military judge who made specific findings on the record, that the circumstantial evidence of the appellant's guilt was compelling. Considering the evidence as a whole, we are convinced beyond a reasonable doubt that the appellant stole hundreds of toys from the U.S. Marine Corps' Toys for Tots program. Thus, we conclude

that the evidence is both factually and legally sufficient to sustain the appellant's conviction.

Sentence Appropriateness

The appellant contends that a punitive discharge is inappropriately severe for her offense. We disagree.

Sentence appropriateness involves the *individualized* consideration of the particular accused on the basis of the nature and seriousness of the offense and character of the offender. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(citing *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After carefully considering the evidence introduced at trial on the merits, evidence in aggravation and mitigation, including the appellant's unsworn statement, and the briefs of counsel, we conclude that the appellant's sentence is not inappropriately severe. Art. 66(c), UCMJ. Courts of criminal appeals are tasked with determining sentence appropriateness as opposed to bestowing clemency, which is the prerogative of the convening authority. *See United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003)(citing *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)). Therefore, a sentence should not be disturbed on appeal unless the harshness of the sentence is so disproportionate as to "cry out for sentence equalization." *United States v. Usry*, 9 M.J. 701, 704 (N.C.M.R. 1980).

The appellant abused a position of considerable trust and stole large numbers of toys intended for underprivileged children. She took advantage of a program with inadequate inventory controls, which was particularly vulnerable to abuse by an "insider." Moreover, the appellant specifically requested a punitive discharge in lieu of confinement. Record at 489-90. Although a bad-conduct discharge "may not be adjudged solely because an accused requests one," such a request is a significant factor for a military judge to consider. *United States v. Evans*, 35 M.J. 754, 761 (N.M.C.M.R. 1992). We also note that the maximum authorized punishment included, among others, a dishonorable discharge and confinement for up to 5 years. Thus, we find that the adjudged and approved sentence, which consisted only of a bad-conduct discharge, reduction to pay grade E-1, and a fine of $2,500.00, is not inappropriately severe for this appellant and her offense.

Reconsideration of Verdict/Ineffective Assistance of Counsel

The appellant, in two summary assignments of error, maintains that the military judge erred by refusing to reconsider his guilty findings sua sponte, and that her trial defense counsel team was ineffective by failing to request reconsideration. We disagree as to both contentions.

In her unsworn statement during the sentencing proceedings, the appellant denied any wrongdoing. She claimed to have purchased the multitude of toys seized from her home at a flea market from a man with a semi-trailer full of toys. Record at 490-91. She further claimed that her mother had reimbursed her for the toys, and her mother planned to give them to her grandchildren. *Id*. at 491. The appellant did not present any such evidence on the merits.

We begin by noting that a military judge "may reconsider any finding of guilty at any time before announcement of sentence[.]" RULE FOR COURTS-MARTIAL 924(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). In this case, the military judge appeared to misunderstand the application of this provision. During the Government's case in rebuttal on sentencing, the following exchange occurred:

> TC: At this time, sir, there has been some testimony presented from--in the unsworn statement of the accused that her money--excuse me, her mother had this amount of income where she could afford to send to Sergeant Ashley for the purchase of the -- the toys allegedly. The government just has one document that we would like to introduce in rebuttal to that, which--in fact, as recently as '94, Sergeant Ashley was listing her mother as a dependent. I don't know if it's already in that--
>
> MJ: It's too late, I--I--I'm not authorized to reconsider my verdict, at this point. It's a done deal. Let's--let's move on. You got anything else? I mean--
>
> TC: This is just in rebuttal to her unsworn statement.
>
> MJ: I know but her rebuttal [sic] was an attack on the verdict. The verdict's a done deal.

Record at 493.

Taken in context, we do not find any indication that anyone, including the appellant, requested reconsideration. Accordingly, we find that the issue is forfeited on appeal. Nor do we interpret the military judge's remarks as in any way desiring to reconsider his findings based upon the appellant's unsworn statement. Rather, the military judge was simply expressing his view that further Government rebuttal regarding the merits of the larceny offense was unnecessary, notwithstanding the appellant's unsworn statement. To the extent the military judge incorrectly or inartfully described the reconsideration process, we find any such error to be harmless. *See* Art. 59(a), UCMJ.

We find nothing in the record that would have obligated the military judge to reconsider his findings *sua sponte*. "In order

that a court's fact-finding function may be carried out in an orderly, informed manner, it is imperative that all facts pertaining to the accused's guilt or innocence be presented to the court before it is called upon to decide the issue. An accused is entitled to one trial on the merits, not two." *United States v. Lewis*, 34 M.J. 745, 752 n.14 (N.M.C.M.R. 1991). The appellant cannot use her unsworn statement as a basis to impeach the findings of the military judge, nor are we aware of any authority requiring a military judge to reconsider the findings of a court merely because an accused continues to maintain his or her innocence on sentencing after a contested trial. *Cf. United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999)(holding that a plea of guilty must be set aside if an accused sets forth a matter inconsistent with the plea). The authorities cited by the appellant in her brief, all of which deal with newly discovered evidence or a military judge's authority to set aside a members' verdict, are inapplicable to the present case. *See United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989); *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988); *United States v. Brikey*, 16 M.J. 258 (C.M.A. 1983); *United States v. Witherspoon*, 16 M.J. 252 (C.M.A. 1983).

In light of the foregoing, we also decline to find deficient performance by the appellant's trial defense counsel based upon their failure to request reconsideration of the findings. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). To show ineffective assistance, an appellant must "surmount a very high hurdle," which this appellant clearly has not done. *See United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997). To the contrary, we find that the appellant's trial defense counsel team mounted a vigorous defense at each stage of the proceedings, and the appellant's acquittal on the serious charges involving mishandling classified information bears out this conclusion.

We believe that the appellant's highly implausible story about purchasing a very large number of toys from a man with a semi-trailer at a flea market, even if it had been considered on the merits, would not have altered the findings. In fact, such an assertion directly contradicts the appellation's assertions to the NCIS agents that searched her home that she had received permission to take the toys.

To constitute prejudicial error, counsel's deficient performance must render the result of the proceeding "unreliable" or "fundamentally unfair." *See United States v. Ingham*, 42 M.J. 218, 223 (C.A.A.F. 1995)(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). We do not believe the failure to request reconsideration in this case comes close to approaching this threshold. We decline to find ineffective assistance of counsel under these circumstances.

Authentication of the Record

In a summary assignment of error, the appellant contends that the record of trial was not properly authenticated. She is incorrect. After reviewing the entire record on file with this court, we are satisfied that it was properly signed by both military judges who presided over all the sessions of the court. Record at 9, 499. Thus, we find that this summary assignment of error is without merit.

Errors in Post-Trial Document

The appellant correctly notes two errors in the post-trial documents attached to the record. First, the addendum to the Staff Judge Advocate's recommendation refers to the "offenses" of which the appellant was convicted, even though there was a finding of guilty to only a single offense (*i.e.,* larceny). Addendum Staff Judge Advocate Recommendation of 13 Oct 1998 at 2. Second, the combined promulgating order and convening authority's action incorrectly refers to the forum of the court as a special court-martial in the document's "header" on pages 2-5. General Court-Martial Convening Authority Action and Order No. 7-98 of 13 Oct 1998.

Both of these errors are clearly typographical mistakes. The SJAR and action correctly set forth the pleas and findings on all the charges, and correctly state the forum. While we do not condone the inattention to detail reflected in the preparation of these documents, we find no possibility of prejudice as a result of these administrative errors. Art. 59(a), UCMJ.

Conclusion

Accordingly, the findings of guilty and sentence, as approved by the convening authority, are affirmed.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court