

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
COOK, TELLITOCCHI, and HAIGHT  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant DEREK J. FORTIN**  
**United States Army, Appellant**

ARMY 20140848

Headquarters, 7th Infantry Division  
Jeffery D. Lippert, Military Judge  
Colonel Robert F. Resnick, Staff Judge Advocate

For Appellant: Major Amy E. Nieman, JA; Captain Payum Doroodian, JA.

For Appellee: Pursuant to A.C.C.A Rule 15.2, no response filed.

7 April 2015

-----  
SUMMARY DISPOSITION  
-----

Per Curiam:

A military judge sitting as a general court-martial convicted appellant, consistent with his plea, of absence from his unit without leave, in violation of Article 86, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 886. The military judge sentenced appellant to a bad-conduct discharge, confinement for 105 days, and reduction to the grade of E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the adjudged sentence as provided for a bad-conduct discharge, confinement for 100 days, and reduction to the grade of E-1.

This case is before us for review pursuant to Article 66, UCMJ. Appellant submitted the case upon its merits. However, we find an issue that, though not raised, merits discussion and relief.

## FACTS

In the Specification of Charge I, appellant was charged with desertion. Appellant pleaded guilty to the lesser-included offense of absence without leave.

Appellant was specifically charged with and, in pertinent part, pleaded guilty to leaving his unit which was “B Troop, 1st Squadron, 14th Cavalry Regiment, 3rd Stryker Brigade, 2nd Infantry Division located at Joint Base Lewis-McChord, Washington.”

During the providence inquiry, appellant and the military judge engaged in the following colloquy:

MJ: [I]n the stipulation of fact it states that you were to sign-out of--you signed out of [Joint Base Lewis-McChord] on or about the eleventh of June 2011, and you were supposed to report to Fort Bragg and sign in there to your next unit on the ninth of August.

Is that right?

ACC: Yes, sir.

Later on, appellant explained to the military judge:

When I signed out [on] leave for 60 days out of Joint Base Lewis-McChord, I had PCS orders to Fort Bragg. I signed out . . . . [and] drove cross country. I actually got an apartment in the Fort Bragg area, I never went on post but I did get an apartment down there. On the report date of 9 August 2011, I didn't sign in. I left and went back home to Massachusetts and got a job up there and didn't come back until the sixth of June this year.

## LAW AND DISCUSSION

We conclude the military judge abused his discretion in accepting appellant's plea to the Specification of Charge I and will grant relief in our decretal paragraph.

A military judge's acceptance of an appellant's guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). “A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea—an area in which we afford significant deference.” *Id.* (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Ultimately, this court applies the “substantial basis test: Does the record as a whole show a substantial basis in law and fact for questioning the guilty plea[?]” *Id.* (internal quotation marks and citation omitted).

*Organization From Which Appellant Was Absent*

“Under military law, the Government must establish not only that an accused has been absent without leave but also the organization from which he was absent.” *United States v. Bowman*, 21 U.S.C.M.A. 48, 50, 44 C.M.R. 102, 104 (1971) (citations omitted). In pleading an absence offense, “the naming of a particular organization as the accused’s unit of assignment serves both to identify and limit the offense charged.” *United States v. Dewey*, ARMY 20110983, 2012 LEXIS CCA 393, at \*5 (Army Ct. Crim. App. 15 Oct. 2012) (summ. disp.) (quoting *United States v. Walls*, 1 M.J. 734, 737 (A.F.C.M.R. 1975)). While we note that one can be absent without leave from an entire armed force, this is not how the government charged appellant’s absence. See *United States v. Vidal*, 45 C.M.R. 540 (A.C.M.R. 1972).

Here, the government charged appellant with specifically absenting himself from B Troop, 1st Squadron, 14th Cavalry Regiment, 3rd Stryker Brigade, 2nd Infantry Division located at Joint Base Lewis-McChord, Washington. However, during the providence inquiry, appellant repeatedly set up a matter inconsistent with his plea of guilty to the offense as charged. While appellant initially admitted he absented himself from the charged unit, he later admitted he was in receipt of valid orders reassigning him to a unit at Fort Bragg, NC, and was rightfully en route to his assigned unit at Fort Bragg when he absented himself. Therefore, the information provided during the providence inquiry shows that appellant was absent from an entirely different unit than that alleged in the specification.

The *Manual for Courts-Martial* discusses this very scenario and provides, “a person undergoing a transfer between activities is ordinarily considered to be attached to the activity to which ordered to report.” *Manual for Courts-Martial, United States* (2008 ed.), pt. IV, ¶ 10.c.(7). See also *United States v. Pounds*, 23 U.S.C.M.A. 153, 154, 48 C.M.R. 769, 770 (1974) (having received orders to report elsewhere, accused no longer had any duty to remain at or to return to losing unit. His place of duty was at his gaining unit and, on his failure to report, he was “absent from *there and there alone*”) (emphasis added); Army Reg. 630-10, Absence Without Leave, Desertion, and Administrative Personnel Involved in Civilian Court Proceedings, paras. 2-2 and 2-3 (13 Jan. 2006) (the unit of assignment of a soldier who goes AWOL while in transit is the gaining unit, and that unit is responsible for reporting the soldier as AWOL). Accordingly, the military judge abused his discretion in not identifying and resolving the inconsistency regarding appellant’s unit. See UCMJ art. 45.

As a result, we must set aside the findings of guilty and dismiss without prejudice the Specification of Charge I and Charge I. A new trial upon another absence charge involving the same period of time but alleging appellant’s correct unit or organization is not barred. See *United States v. Holmes*, 43 C.M.R. 446, 447 (A.C.M.R. 1970).

## CONCLUSION

The finding of guilty and the sentence are set aside. A rehearing may be ordered by the same or a different convening authority. All rights, privileges, and property, of which appellant has been deprived by virtue of the findings and sentence, hereby set aside by this decision, are ordered restored. *See* UCMJ arts. 58b(c) and 75(a).



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.", is written over the printed name.

MALCOLM H. SQUIRES, JR.  
Clerk of Court