

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MULLIGAN, HERRING, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant MARZETTE C. MILLER
United States Army, Appellant

ARMY 20140429

Headquarters, III Corps and Fort Hood
Rebecca K. Connally, Military Judge
Colonel Tania M. Martin, Staff Judge Advocate (pretrial)
Colonel Ian J. Corey, Staff Judge Advocate (post-trial)

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA; Captain Payum Doroodian, JA (on brief).

For Appellee: Major A.G. Courie, III, JA; Major Steven J. Collins, JA; Captain Anne C. Hsieh, JA (on brief).

21 December 2015

SUMMARY DISPOSITION

Per Curium:

A military judge sitting as a special court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to sell military property without authority; one specification of unauthorized sale of military property of a value greater than \$500.00; and one specification of larceny of military property of a value greater than \$500.00 in violation of Articles 81, 108, and 121, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 881, 908, 921 (2012). The military judge sentenced appellant to a bad-conduct discharge, confinement for 145 days, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

This case is before the court for review pursuant to Article 66, UCMJ. Appellant raises one assignment of error which requires discussion and relief. We

also find that one matter raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) warrants discussion and relief.

LAW & DISCUSSION

A. Sale of Military Property of a value of more than \$500.00

During the providence inquiry concerning the Specification of Charge II, appellant admitted to selling various items of military property on divers occasions. Appellant admitted that the total value of all of the items he sold exceeded \$500.00. He also admitted to stealing military property of a value of over \$500.00. The stipulation of fact stated that the approximate value of the military property stolen and sold was \$10,000.00.

Appellant avers that the military judge abused her discretion by accepting his plea of guilty to the specification of Charge II without determining whether the property sold on divers occasions each had a value of greater than \$500 or the value of all items sold at any one time or place had a value greater than \$500. Appellant asks that we strike the aggravating element (value greater than \$500) from this specification and reassess the sentence. After review of the entire record, we find a substantial basis in law and fact to question appellant's plea of guilty to the "on divers occasions" language in the Specification of Charge II (unauthorized sale of military property of a value greater than \$500.00 on divers occasions). We will provide relief in our decretal paragraph.

In cases of larceny, the value of the property controls the maximum punishment which may be adjudged. *Manual for Courts-Martial, United States* [hereinafter *MCM*] (2012 ed.), pt. IV, ¶ 46.e.(1). If multiple items are stolen "at substantially the same time and place," it is proper to aggregate the value of those items and charge the theft in one specification. *United States v. Hines*, 73 M.J. 119, 123 (C.A.A.F. 2014) (quoting *MCM* (2008 ed.), pt. IV, ¶ 46.c.(1)(h)(ii)); *see also MCM* (2012 ed.), pt. IV, ¶ 46.c.(1)(i)(ii). For an accused to be convicted of larceny of property of a value greater than \$500.00, "the record must show either that one item of the property stolen has such a value or that several items taken at substantially the same time and place have such an aggregate value." *United States v. Harding*, 61 M.J. 526, 528 (Army Ct. Crim. App. 2005) (quoting *United States v. Christensen*, 45 M.J. 617, 619 (Army Ct. Crim. App. 1997)). Our court has applied the same value aggregation principle to the unauthorized sale of military property under Article 108, UCMJ. *See United States v. Fiame*, 74 M.J. 585 (Army Ct. Crim. App. 2015).

We now turn to our review of the providence inquiry in appellant's case. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Schell*, 72 M.J. 339, 345 (C.A.A.F. 2013) (citing *United*

States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008)). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *Inabinette*, 66 M.J. at 322). The court applies this “substantial basis” test by determining whether the record raises a substantial question about the factual basis of appellant’s guilty plea or the law underpinning the plea. *Inabinette*, 66 M.J. at 322; *see also* UCMJ art. 45(a); Rule for Courts-Martial [hereinafter R.C.M.] 910(e); *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012) (“It is an abuse of discretion for a military judge to accept a guilty plea without an adequate factual basis to support it . . . [or] if the ruling is based on an erroneous view of the law.”). In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit “factual circumstances as revealed by the accused himself [that] objectively support that plea” *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980).

In this case, the providence inquiry and the stipulation of fact clearly establish that the total value of the items stolen and sold by appellant exceeded \$500.00. However, the only evidence to establish that these items were sold “on diverse occasions” was the appellant’s response, “yes ma’am” when asked by the military judge if he sold military property on more than one occasion. The charged time period in the specification of Charge II is “between on or about 1 September 2013 and on or about 31 October 2013.” The stipulation of fact narrows that time frame to “September 2013.” Furthermore, the stipulation of fact describes a single sale of military property at a single location, rather than multiple sales over a period of time. It is also important to note that the Specification of Charge III (stealing military property of a value greater than \$500.00) did not include the “on divers occasions” language.

On the basis of this evidence there is a substantial basis in law and fact to question the providence of appellant’s plea to the unauthorized sale of military property of a value greater than \$500.00 “on divers occasions.” Either there was a single sale or multiple sales at substantially the same place and time as to support the application of the value aggravation principle.

B. Dilatory Post-trial Processing

Appellant raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431, (C.M.A. 1982), one which merits discussion and relief. Appellant’s court-martial concluded on 21 May 2014. On 27 May 2014, the defense submitted a request for speedy post-trial processing. In his R.C.M. 1105 matters the appellant raised the issue of dilatory post-trial processing. The staff judge advocate (SJA) responded in the Addendum that he “disagreed” with this assertion by the appellant without offering any explanation as to why it took over 180 days to process a very simple 81 page record of trial.

In *United States v. Moreno*, our superior court established timeliness standards for various stages of the post-trial and appellate process. 63 M.J. 129, 142-43 (C.A.A.F. 2006). The *Moreno* standard applicable in this case is that a convening authority should take action within 120 days after the trial is completed. *Id.* at 142. Failure to satisfy this standard creates a “presumption of unreasonable delay,” prompting this court to apply and balance the four factors set out in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), in order to determine whether appellant’s due process rights were violated by the delays. *See Moreno*, 63 M.J. at 136.

Taking over 180 days to process appellant’s case from trial completion to action is presumptively unreasonable and violates the standard for timeliness for trial to initial action. *Id.* at 142. This facially unreasonable delay triggers our review of the remaining *Moreno* factors: reasons for the delay; timely assertion of the right to speedy post-trial review; and prejudice. *Id.* at 135-36.

The government provided no explanation for the delay in this case. Therefore, this factor weighs in favor of appellant. The third *Moreno* factor also weighs in favor of the appellant as he asserted his right to speedy post-trial processing within a week of the conclusion of the trial and again in his R.C.M. 1105 submission. Turning to the fourth *Moreno* factor, appellant fails to demonstrate prejudice. Although we find no prejudice after consideration of the *Moreno* factors, we review the appropriateness of the sentence in light of the unjustified dilatory post-trial processing. UCMJ art. 66(c). *See Moreno*, 63 M.J. at 138-42; *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). After consideration of the entire record, we conclude appellant’s case warrants relief in the form of a thirty-day reduction in confinement under Article 66(c), UCMJ, for the unreasonable and unexplained post-trial delay. *See Tardif*, 57 M.J. at 224.

CONCLUSION

We affirm only so much of the Specification of Charge II as provides:

In that, [appellant] did, at or near Killeen, Texas, between on or about 1 September 2013 and on or about 31 October 2013, without proper authority, sell to Mr. N.N. (a.k.a. “Mike”) some SureFire lights, some Oakley Lenses, and some ink toner cartridges, of a value of more than \$500.00, military property of the United States.

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and applying the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A.

1986) and the factors set forth in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we AFFIRM only so much of the sentence as provides for a bad conduct discharge, confinement for 115 days, and reduction to the grade of E-1.

There is no change in the penalty landscape or exposure. *See Winckelmann*, 73 M.J. at 15-16. The gravamen of the offenses has not changed. *Id.* at 16. The total value of the military property stolen and sold remains the same and was admissible as aggravation evidence before the military judge. *Id.* Finally, this court reviews the records of a substantial number of courts-martial involving larceny and the sale of military property, and we have extensive experience with the level of sentences imposed for such offenses under various circumstances. *Id.* All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored. See UCMJ arts. 58a(b), 58b(c), and 75(a).



FOR THE COURT:

A handwritten signature in black ink, appearing to read "John P. Taitt".

JOHN P. TAITT
Deputy Clerk of Court