UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman GEORGE GUTIERES
United States Air Force

ACM 34450

18 July 2002

Sentence adjudged 18 January 2001 by GCM convened at Luke Air Force Base, Arizona. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Captain Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison.

Before

BURD, ROBERTS, and PECINOVSKY
Appellate Military Judges

PER CURIAM:

In a trial before military judge alone, the appellant pled guilty to one specification each of marijuana possession, marijuana use, and larceny from the base exchange (BX) in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921. The military judge accepted the appellant's plea and sentenced him to a bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the entire sentence except for the period of confinement, which was reduced to 10 months in accordance with a pretrial agreement. The appellant now asserts, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his conviction for larceny should be reduced to a conviction for attempted larceny due to the fact that the goods charged as stolen, remained unconcealed and within the confines of the BX. We are not persuaded by his argument and affirm.

Background

After basic training, the appellant was assigned to Luke Air Force Base (AFB) as a student in the Mission Ready Airman Program. In the fall of 2000, the appellant and Airman (Amn) Lancaster developed a plan to shoplift compact disks (CDs) and Sega Dreamcast game cartridges from the BX. According to the plan, the two would both gather the desired items and put them into a basket. Next, the appellant was to exit the store while Amn Lancaster would proceed to the garden center. The two were to meet up on opposite sides of the garden center fence through which the items were to be passed. The appellant would then leave with the stolen merchandise after placing the items into a duffle bag he had brought with him. On 6 November 2000, they went to the BX and attempted to execute their plan.

Unfortunately for the two airmen, the staff of the BX noticed their actions. The appellant left the store but was confronted by a store security officer before reaching the fence. The appellant presented his military identification card and revealed the identity of Amn Lancaster once he was informed that the security forces had been called. The security forces arrested Amn Lancaster and the appellant shortly after Amn Lancaster had put one CD through the garden center fence.

Analysis

The appellant claims, contrary to his plea before the military judge, that the facts of the case and the applicable law justify only a conviction for attempted larceny, rather than for the completed offense. To overturn a military judge's acceptance of a guilty plea, the record must show a substantial basis in law and fact for rejecting the plea. *United States v. Faircloth*, 45 M.J. 172, 174 (1996) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The record provides no basis in law or fact for rejecting the plea.

The military judge made the proper inquiries of the defendant, as required by *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), to ensure the providence of his guilty plea. The appellant indicated to the military judge that he believed himself guilty and that the facts of the case as he described them supported the findings of guilty. We therefore find that the appellant's plea was provident. Article 45, UCMJ, 10 U.S.C. § 845.

The statements made by the appellant during the *Care* inquiry describe the commission of the completed offense of larceny, rather than attempt. Commission of the crime of larceny requires a wrongful taking of property with intent to permanently either appropriate the property for one's own use or deprive another person of its use. Art. 121,

UCMJ. "As a general rule, any movement of the property or any exercise of dominion over it is sufficient if accompanied by the requisite intent." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶46.c.(1)(b)(2000 ed.).

The military judge relied on both *United States v. Klink*, 14 M.J. 743 (A.F.C.M.R. 1982) and *United States v. Tamas*, 20 C.M.R. 218 (C.M.A. 1955) in finding that the appellant's actions amounted to larceny. The appellant now claims that, contrary to the opinion expressed by his defense counsel at trial, the judge erred in his reliance on *Tamas.* Citing *Tamas*, 20 C.M.R. at 224, the appellant states that the *Tamas* court relied on concealment along with movement to find asportation, apparently suggesting that *Tamas* established a requirement of concealment for larceny cases where the goods in question were moved only within the place that the accused found them. We disagree, although we understand how one could mistakenly reach the appellant's conclusion. The passage cited by the appellant reads:

> When we consider the facts of this case, in the light of what we believe to be sound principle, we conclude there was sufficient evidence of asportation, for the accused accepted the pistol . . . secreted it on his person, *and he was not apprehended until after the weapon had been well concealed*. For a measurable period of time, however slight, the accused had full possession of, and actual dominion over, the pistol.

Id. (Emphasis added). The *Tamas* court relied on concealment in order to find dominion over the stolen item. However, as the *Tamas* court acknowledged, 20 C.M.R. at 224, the *Manual* refers to a taking as "any movement of . . . *or* . . . any exercise of dominion over" the property in question. (Emphasis added). *MCM*, Part IV, ¶ 46.c.(1)(b).[1] Therefore, concealment was important to a finding of dominion and control based on the particular facts of *Tamas,* i.e., where the accused took a stolen pistol from a government decoy before concealing it on his person. *See Tamas*, 20 C.M.R. at 222. This part of the *Tamas* opinion is not applicable to the present case, where the appellant himself participated in the movement of goods.

The weight of military precedent suggests that the course of action the appellant undertook in moving items to be stolen into a shopping basket qualifies as "movement" and therefore meets the asportation element of larceny. *See Tamas*, 20 C.M.R. at 224; *Klink*, 14 M.J. at 744 n.2 (A.F.C.M.R. 1982) ("Any movement of the property . . . accompanied by the requisite intent, is sufficient to find the element of asportation . . . ."). More recently, our colleagues in the Navy-Marine Corps Court of Criminal Appeals cited *Tamas* for the proposition that the mere removal of items from an exchange shelf accompanied by the requisite intent is larceny. *See United States v. Watkins*, 35 M.J.

[1] This passage reads the same in the current edition of the *Manual* as it did in the 1951 edition cited by the *Tamas* court.

709, 712 n.2 (N.M.C.M.R. 1992). Even if the appellant's movement of the items into the shopping basket did not qualify as asportation, Amn Lancaster's movement of the CD to, and then through the garden center fence provides the necessary asportation, therefore, constitutes larceny, making the appellant liable as a principle under Article 77, UCMJ, 10 U.S.C. § 877.

The appellant cites *United States v. Sneed*, 38 C.M.R. 249 (C.M.A. 1968) for the proposition that one must exercise dominion and control over the property in question to be convicted of larceny instead of attempted larceny. *Sneed* was primarily concerned with the issue of whether the acts of government decoys who remain in possession of property can be imputed to a defendant accused of larceny of that same property. *Id.* at 250. Sneed had told others (who were actually working with criminal investigators at the time) to load the items to be stolen into a truck and drive it away. *Id.* at 251. The appellant in the present case was not the subject of any such sting operation. He did not merely tell Amn Lancaster to move all the goods. Rather, he himself moved some of the goods into the shopping basket. *Sneed* was based on an issue too narrow and on a fact set too limited to be applied to the present case where no decoys were involved and movement of the property was performed entirely by the perpetrators.

Civilian legal sources are also unhelpful to the appellant's cause. Citing a Virginia Court of Appeals case, *Welch v. Commonwealth*, 425 S.E.2d 101 (Va. App. 1992), the appellant claims that the military judge failed to recognize the special nature of a self-service retail store. The appellant quotes a passage reading "[r]etailers implicitly grant bona fide customers the privilege to move goods offered for sale, *in order for customers to accumulate all the goods desired and to transport them to a designated area for payment.*" *Id.* at 522 (emphasis added). It must be pointed out that the appellant and Amn Lancaster were moving goods in order to *steal* them, not to *pay* for them. *See C.E. v. State*, 342 So. 2d 979, 980 (Fla. Dist. Ct. App. 1976) (customers of a self-service store generally have the license to move goods around a store, but this license is contingent on their intent to buy, rather than steal, the goods being moved). And, as the *Welch* court itself later explained:

> [W]hen an individual harbors the requisite intent to steal and permanently deprive the owner of property, acts on such intent by taking possession of the property *even for an instant*, and moves the targeted property, larceny has been committed. *The slightest asportation is sufficient*, even though the property may be abandoned immediately.

Id. at 522-23 (emphases added). A number of other state and federal appeals courts' opinions have shown acceptance of this basic principle. For a number of citations to such cases, see 2 Wayne R. LaFace & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.3(b) n.10 (1986). Additionally, scholarly authority suggests that "so long as the defendant

moves every part of [the property], it is not necessary to move it away from the owner's premises or from his presence." *Id.* § 8.3(b).

The principle that courts enjoy broad authority to find the presence of asportation in cases where the least movement of the property in question has occurred is supported by analogy in a number of federal appeals court decisions. *See, e.g., Smith v. United States*, 291 F.2d 220, 221 (9th Cir. 1961) (treating larceny as a component of robbery and finding with regard to asportation that "[t]he degree of the taking is immaterial, the least removing of the thing taken from the place it was before with intent to steal it being sufficient.") (quoting *Rutkowski v. United States*, 149 F.2d 481, 483 (6th Cir. 1945)). *See also Rainwater v. United States*, 443 F.2d 339, 340 (5th Cir. 1971) (per curiam) (in a case involving theft of government property, "*[a]ny appreciable change of the location* of the property with felonious intent, whether there is actual removal of it from the owner's premises or not, constitutes asportation.") (citing *United States v. Brown*, 285 F.2d 528 (4th Cir. 1961) (per curiam)) (emphasis added).

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court