

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER R. STREBEL
United States Air Force

ACM 37341

23 July 2009

Sentence adjudged 11 September 2008 by GCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Lance J. Wood, Major Matthew C. Hoyer, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain John M. Simms, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of conspiracy to commit larceny of government money and benefits and one specification of larceny of government money and benefits, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881, 921. The

adjudged and approved sentence consists of a bad-conduct discharge, five months confinement, and a reduction to the grade of E-1.¹

On appeal, the appellant asks this Court to order the correction of the Court-Martial Order and to set aside the findings of guilty on Charge I and its Specification and Charge II and its Specification. The basis for his request is that he asserts: (1) the Court-Martial Order erroneously reflects he pled guilty and was found guilty of Charge III and its Specification, whereas he actually pled not guilty and was found not guilty of Charge III and its Specification; (2) his plea to the Specification of Charge I was improvident because he admitted to a conspiracy to enter into a sham marriage, not to commit larceny; and (3) the finding of not guilty for the offense of entering into a sham marriage (Charge III and its Specification) is impermissibly inconsistent with the finding of guilty for the offense of larceny (Charge II and its Specification).² While we find merit with the appellant's first issue,³ we find the appellant's second and third issue to be without merit and accordingly affirm the findings and the sentence.

Background

In June 2005, the appellant agreed with a co-worker to enter into a sham marriage with VH, a Belarus citizen and neighbor of the appellant's co-worker, so that he could move off base and receive Basic Allowance for Housing (BAH) at the dependant rate. VH agreed to the sham marriage so that she could establish in-state residency and receive in-state tuition. On 24 June 2005, the appellant and VH married and approximately four days later the appellant completed paperwork requesting Air Force entitlements for his sham marriage. As a result of his actions, the appellant received approximately \$5860 of BAH and \$2058 of Family Separation Allowance to which he was not entitled. At no time during his sham marriage did the appellant live with VH or have sexual relations with VH. The appellant's sham marriage came to light after one of VH's creditors informed the appellant's chain-of-command that VH was not paying her bills and that the appellant and VH were involved in a sham marriage.

¹ The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to a majority of the charges in return for the convening authority's promise to direct trial counsel not to offer any evidence on Charge III and its Specification and not to approve confinement in excess of six months.

² Issue III is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

³ The government concedes that the Court-Martial Order (CMO), dated 10 November 2008, is erroneous. Additionally, the Court notes that the CMO incorrectly identifies the appellant as CHRITOPHER R. STREBEL, whereas the correct spelling of the appellant's first name is CHRISTOPHER. Accordingly, we direct the promulgation of a new CMO properly reflecting that the appellant pled not guilty and was found not guilty of Charge III and its Specification, as well as properly reflecting the spelling of the appellant's first name.

Discussion

Providency of the Appellant's Plea to Charge I and its Specification

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446, 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts as revealed by the accused himself to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *Jordan*, 57 M.J. at 238).

In the case sub judice, sufficient evidence exists to support the military judge's findings that the appellant entered into a conspiracy with his co-worker and VH to steal government money and benefits. During his providency inquiry, the appellant admitted that he agreed with his co-worker and VH to enter into a sham marriage with VH in order to move off base and receive BAH at the dependant rate. The appellant's act of marrying VH was an overt act that apparently effected the commission of the intended act of larceny of government money and benefits. In other words, but for the sham marriage, the appellant would not have been allowed to move off base and would not have received the approximately \$7918 to which he was not entitled. In short, while the appellant, at this late hour, may aver he did not plead guilty to a conspiracy to steal government money and benefits, his providency inquiry supports a contrary finding. He pled and was properly found guilty of conspiring with his co-worker and VH to steal government money and benefits.

Alleged Inconsistency Between Findings of Not Guilty on Charge III and its Specification and Findings of Guilty on Charge II and its Specification

In this assignment of error, the appellant, in essence, is alleging that the evidence is legally and factually insufficient to support his findings of guilty on Charge II and its Specification – namely, since he was found not guilty of entering into a marriage for purposes of evading United States immigration laws, he therefore cannot be found guilty of larceny of government money and benefits since his sham marriage was the means by which the alleged larceny occurred. For the reasons highlighted below, we find the appellant's argument to be without merit.

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is “whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.” *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, we are “bound to draw every reasonable inference from the evidence of record in favor of the prosecution.” *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is “whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused’s guilt beyond a reasonable doubt.” *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found all of the essential elements of the larceny specification. Such is true notwithstanding the fact that the appellant was found not guilty of entering a marriage to evade United States immigration laws. First, the two findings (findings of guilty on Charge II and its Specification and findings of not guilty on Charge III and its Specification) are not inconsistent. Sufficient evidence was presented at trial, most significantly through the appellant’s in-court admission, to support a finding that the appellant entered into a marriage with a woman whom he intended to falsely hold out as his wife for the sole purpose of moving off base and receiving BAH at the dependant rate. Whether the appellant entered the marriage for purposes of evading the United States immigration laws is inconsequential in that the marriage was, by all accounts, a sham marriage and was the means by which the appellant received the government money and benefits to which he was not entitled.

Moreover, even if the findings are inconsistent, such an inconsistency is of little consequence to the findings of guilty with respect to Charge II and its Specification so long as the evidence is legally and factually sufficient to support the findings of guilty. See *United States v. Snipes*, 18 M.J. 172, 175 n.4 (C.M.A. 1984) (citing *United States v. Lyons*, 35 C.M.R. 279, 285 (C.M.A. 1965)) (noting that an inconsistent verdict is not usually a cause for relief since the court-martial may merely have given the accused a break). The military judge arguably found the appellant not guilty of entering into the marriage to evade United States immigration laws because the government, as obligated by the pretrial agreement, opted not to introduce evidence on Charge III and its Specification. Such a finding, inconsistent or not with the findings of guilty on Charge II and its Specification, is insignificant. Here, the evidence legally and factually supports a

finding that the appellant used his sham marriage to steal government money and benefits.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court