UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain CHARLES C. ARMSTRONG
United States Air Force

ACM 37130

10 February 2009

Sentence adjudged 18 February 2007 by GCM convened at Kunsan Air Base, Republic of Korea. Military Judge: Eric L. Dillow.

Approved sentence: Dismissal, confinement for 14 days, and a reprimand.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to his pleas, a panel of officers sitting as a general court-martial convicted the appellant of one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907.[1] The adjudged and approved sentence consists of a dismissal, 14 days confinement, and a reprimand. On appeal, the appellant asserts that the military judge erred by failing to give a mistake of fact instruction on the

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[1] The members found the appellant not guilty of another false official statement specification and not guilty of a larceny specification.

specification of which he was convicted. We agree and set aside the findings of guilt and the sentence.

Background

In February 2005, the appellant was reassigned on a remote tour to Kunsan Air Base, Republic of Korea. Upon his arrival at Kunsan Air Base, the appellant completed a Basic Allowance for Quarters (BAQ) application indicating that his wife resided in Redwood City, California. At the time the appellant completed the BAQ application his wife was residing in Phoenix, Arizona. On 26 October 2005, the Air Force Audit Agency conducted an audit of members assigned to Kunsan Air Base who were receiving stateside Basic Allowances for Housing (BAH). Through this audit, the appellant was identified as someone who was possibly receiving more BAH than he was entitled.

The Air Force Audit Agency contacted the appellant's wife and verified she was residing in Phoenix, Arizona. After verifying that the appellant was receiving BAH at the much higher Redwood City, California rate than at the lower Phoenix, Arizona rate, the Air Force Audit Agency notified the Air Force Office of Special Investigations (AFOSI).

On 11 January 2006, the appellant was notified that he was being reassigned to Luke Air Force Base, Arizona. In accepting the reassignment, the appellant completed a Permanent Change of Station (PCS) worksheet indicating that his wife and children resided in Palo Alto, California but would be relocating to Phoenix, Arizona.

As a result of his actions, the federal government overpaid the appellant approximately $20,000 in BAH allowances. The military judge gave mistake of fact instructions on the two specifications of which the appellant was acquitted but did not give a mistake of fact instruction on the specification of which the appellant was convicted.

Discussion

Mistake of Fact Instruction

Whether a military judge properly instructed a panel is a question of law this Court reviews de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003) (citing *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002)). A military judge is required to instruct the members on "any special defense under [Rule for Courts-Martial] R.C.M. 916 in issue." R.C.M. 920(e)(3).

> [I]t is a defense to an offense that the accused held, as a result of . . . mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be

> guilty of the offense . . . . If the . . . mistake goes to an element requiring . . . specific intent . . . or knowledge . . . [the] mistake need only have existed in the mind of the accused.

R.C.M. 916(j)(1). "A matter is considered 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose." R.C.M. 920(e) Discussion, *quoted in United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007). The evidence to support a mistake of fact instruction can come from evidence presented by the defense, the prosecution, or the court-martial. *United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

The false official statement offense of which the appellant was convicted required the members, inter alia, to find beyond a reasonable doubt, that the appellant: (1) *knew* his statement as to the location of his wife and children was false when he made it and (2) made the false statement with the *intent* to deceive. *Manual for Courts-Martial, United States*, Part IV, ¶ 31.b. (2005 ed.).[2] Thus a mistake of fact defense on these elements would only require that the appellant had an honest mistake as to the statement he made on the PCS worksheet, namely an honest mistake as to location he was required to indicate for his wife and children.

Was there "some evidence" that the appellant was mistaken as to the location he was required to indicate for his wife and children at the time he made the false statement on the PCS worksheet? We find the answer to this question to be "yes." The appellant not only testified that he misinterpreted the PCS worksheet, he also testified that he was confused about the term "current location" on the worksheet. In response to trial counsel's question as to what confused him about the words "current location," the appellant testified "[I]t was the closest way I think to reality of what they [his wife and children] are actually doing . . . . It is a mistake, that is all there is to it." The appellant also testified that the words "current location" did not appear simple to him at the time he wrote the location of his wife and children on the PCS worksheet. Moreover, when trial counsel asked the appellant if he, the appellant, "somehow got the addresses crossed up or somehow that's how Palo Alto, California got put down as [his] current address," the appellant testified in the affirmative.

Additionally, in response to questions about his statements on the PCS worksheet, the appellant testified: "I was just careless with it at a--simple as that;" "I've never made so many mistakes about one thing that could actually be on paper look like a crime;" "I mean it's just that that form baffles my mind. I don't know how I could have filled it out that way;" and "I mean, I know that this was all, I mean, this is a huge mistake." The sum of the appellant's testimony, both under direct and cross-examination, is that there

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[2] The 2008 edition has the same requirements, but the 2005 edition was controlling at the time of the appellant's court-martial.

was "some evidence" that at the time the appellant made the false statement on the PCS worksheet, he was mistaken as to the location he was required to indicate for his wife and children. As such, the military judge was obliged to instruct the members on a mistake of fact defense, as that defense applied to this specification. His failure to do so constitutes error.

However, this does not end the inquiry. We must now determine whether this error was harmless. The test for determining whether this error was harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. DiPaola*, No. 08-0200/NA, slip op. at 10-11 (C.A.A.F. 18 Dec 2008) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Alternatively stated, "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Id.* slip op. at 11 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)).

Given the evidence and the outcome on the other specifications, we cannot say that the military judge's error was harmless beyond a reasonable doubt. We note that trial counsel specifically argued against mistake of fact on this specification when he rhetorically asked the members, "How could it be a mistake?" Moreover, trial defense counsel specifically invoked the mistake of fact defense when he argued that the Palo Alto, California address the appellant wrote on the PCS worksheet was "a mistake."

More importantly, the military judge gave a mistake of fact instruction on the other specifications and the members found the appellant not guilty of those specifications. Such is an indication that the missing instruction deprived the appellant of a defense and contributed to his finding of guilt. *See id.* slip op. at 12 (quoting *United States v. Lewis*, 65 M.J. 85, 89 (C.A.A.F. 2007)) (holding that appellate courts can look to the findings on other specifications of which a mistake-of-fact instruction was given to determine whether a failure to give a mistake-of-fact instruction is harmless). In short, the military judge erred in failing to instruct the members on the affirmative defense of mistake of fact and that error *was not* harmless beyond a reasonable doubt.

Conclusion

Accordingly, we set aside the findings of guilt and the sentence. The record is returned to the Judge Advocate General of the Air Force.

A rehearing on Specification 2 of Charge I is authorized.

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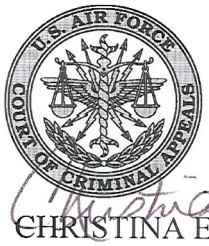

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court