IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	) FINAL BRIEF OF BEHALF OF) APPELLANT
v.	) Crim. App. Dkt. No. 20140135
	) USCA Dkt. No. 16-0267/AR
Specialist (E-4) **NATHAN C. WILSON,** United States Army, Appellant	)

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Presented

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR APPROPRIATE RELIEF UNDER RULE FOR COURT-MARTIAL 917 WHERE THE MILITARY JUDGE IMPROPERLY APPLIED ARTICLE 130, HOUSEBREAKING, TO A MOTOR POOL.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On December 23, 2013 and February 8, 24, and 25, 2014, at Fort Benning, Georgia, a military judge sitting as a general court-martial convicted Specialist (SPC) Nathan C. Wilson, pursuant to his pleas, of possession with intent to distribute schedule IV and V controlled substances and larceny of military property of a value greater than $500, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a and 921 (2012). The military judge convicted SPC Wilson, contrary to his plea, of one specification of housebreaking, in violation of Article 130, UCMJ, 10 U.S.C. § 930 (2012). The military judge sentenced SPC Wilson to reduction to E-1, twenty-one months confinement and a bad-conduct discharge. On June 17, 2014, the convening authority approved the sentence as adjudged.

On November 18, 2015, the Army Court affirmed only so much of the finding of guilty of the Specification of the Additional Charge as finds that:

> [Appellant], U.S. Army, did, at or near Fort Benning, Georgia, between on or about 1 August 2013 and on or about 6 October 2013, steal batteries, military property, of a total value greater than $500, the property of the U.S. Army.

(JA 4). The Army Court found the issue now before this Court was without merit and affirmed the remaining findings of guilty and sentence. (JA 2, 4). Specialist Wilson was subsequently notified of the Army Court's decision and petitioned this

Court for review on January 7, 2016. On May 3, 2016, this Honorable Court granted appellant's petition for review.

Statement of Facts

The 3rd Brigade Special Troops Battalion (3rd STB) motor pool on Fort Benning, Georgia is completely surrounded by a fence and contains removable items belonging to the unit. (JA 74). On October 6, 2013, the motor pool was locked because it was a Sunday. (JA 74). That afternoon, SPC Wilson and Private First Class (PFC) Rashid Bradley climbed over the fence of the 3rd STB motor pool because the front gate was locked with a chain, intending to steal batteries and sell them to a scrap yard. (JA 46-47). The batteries were located on a pallet behind one of the bays in the motor pool, on the outside of the building. (JA 54). At no time while in the motor pool did SPC Wilson and PFC Bradley enter any covered building or structure or break any locks. (JA 49). Specialist Wilson and PFC Bradley never took batteries from the motor pool because they saw two soldiers, aborted their plan, ran toward the back of the motor pool, jumped over the fence, and continued running to Marne Road. (JA 47).

Private First Class Jesus Garza testified that as he was walking up to the motor pool, he saw two black males inside on the concrete pad. (JA 22-23, 25). The two individuals started running toward the back of the motor pool once they saw PFC Garza. (JA 24). He did not see them coming from any type of building

or structure. (JA 25). Mrs. Sylvia Bodiford testified that around the same time, she saw at least one black male in the motor pool. (JA 36). She saw the individual behind a truck, not in the vicinity of a building. (JA 39). Military police officers testified there was no evidence any locks had been cut, buildings tampered with, or windows broken on October 6, 2013. (JA 34, 62, 81).

On October 28, 2013, SPC Wilson was charged with one specification of housebreaking the 3rd BSTB motor pool. (JA 10). At trial, the defense moved for a finding of not guilty under Rule for Courts-Martial [hereinafter R.C.M.] 917 because the government failed to present evidence SPC Wilson unlawfully entered a building or structure. (JA 85-86). The military judge recognized before ruling on the R.C.M. 917 motion, he had to first determine as a matter of law whether an enclosed or fenced motor pool meets the definition of a building or structure in Article 130. (JA 88). He permitted both parties an opportunity to submit citations of authority to support their positions and adjourned the court-martial until the next morning. (JA 88). The government cited *United States v. Wickersham*, 14 M.J. 404 (C.M.A. 1983) and *United States v. Elliott*, NMCCA 200500591, 2006 LEXIS 251 (N-M. Ct. Crim. App. Oct. 24, 2006), which followed *Wickersham.* (JA 091-092). The defense relied upon *United States v. Gillin*, 8 U.S.C.M.A. 669, (C.M.A. 1958) and *United States v. Taylor* 12 U.S.C.M.A. 44 (C.M.A. 1960), to support its position. (JA 95).

The military judge, relying upon *Wickersham* and *Elliott*, found Article 130, housebreaking, can apply to fenced enclosures such as a motor pool or storage yard. (JA 98). The military judge then denied the defense's R.C.M. 917 motion based on evidence SPC Wilson "did jump the fence, or did enter the structure, of the 3rd BSTB motor pool." (JA 99). The military judge later found SPC Wilson guilty of housebreaking. (JA 120).

Summary of Argument

The military judge erred when he concluded a building or a structure for purposes of housebreaking under Article 130, UCMJ includes an outdoor, enclosed motor pool. . The military judge then abused his discretion by denying the defense's motion for a finding of not guilty on the Specification of Charge I under R.C.M. 917 because he applied this erroneous view of the law. The legislative intent behind the housebreaking statute, its plain meaning and the Presidential explanation of "building" and "structure," and this Court's binding precedent dictate Article 130 cannot apply to the motor pool in this case.

Argument

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR APPROPRIATE RELIEF UNDER RULE FOR COURT-MARTIAL 917 WHERE THE MILITARY JUDGE IMPROPERLY APPLIED ARTICLE 130, HOUSEBREAKING, TO A MOTOR POOL.

Standard of Review

Questions of statutory construction are questions of law this Court reviews de novo. *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008). The question of whether a specification states an offense is a question of law, which this Court reviews de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A military judge's denial of a motion for a finding of not guilty under R.C.M. 917 is reviewed for an abuse of discretion. *United States v. Felix*, 25 M.J. 509, 512 (A.F.C.M.R. 1987). A ruling based on an erroneous view of the law constitutes an abuse of discretion. *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (citing *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003)).

Law and Argument

Article 130, UCMJ, states, "[a]ny person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct." 10 U.S.C. § 930 (2012). The elements of this offense are:

> (1) That the accused unlawfully entered a certain building or structure of another person; and
>
> (2) That the unlawful entry was made with the intent to commit a criminal offense therein.

Manual for Courts-Martial, United States (2012 ed.), [hereinafter M.C.M.] pt. IV, ¶ 56.b. The maximum punishment for a conviction for housebreaking is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. M.C.M. pt. IV, ¶ 56.e.

Even before ruling on the defense's R.C.M. 917 motion, the military judge erred as a matter of law by finding the 3rd BSTB motor pool is a structure as defined in Article 130, UCMJ, paragraph a(4). The military judge improperly relied upon dictum and an unpublished Navy-Marine Corps Court of Criminal Appeals opinion to come to this erroneous conclusion. In light of the congressional intent when enacting the housebreaking statute, the statute's plain meaning, Presidential explanations of the statute, and this Court's prior holdings, an outdoor, fenced motor pool is not a structure as defined in Article 130, UCMJ. While the 3rd BSTB motor pool qualifies as a structure under Article 134, UCMJ, unlawful entry, because it is "usually used for habitation or storage," it does not qualify as a structure under Article 130 housebreaking. Thus, the military judge abused his discretion when he denied the defense's motion under R.C.M. 917 because he was influenced by an erroneous view of the law. Finally, as SPC Wilson could not commit an Article 130 violation by unlawfully entering the motor pool, his conviction is not legally sufficient and must be set aside and dismissed.

1. Congress intended for Article 130 to protect a narrow class of property.

In *Gillin*, this Court examined, as a matter of statutory construction, whether an automobile can be considered a structure, building, place, or property which can be the object of the crime of unlawful entry. 8 U.S.C.M.A. at 670. This Court used the legislative history and intent behind enacting separate housebreaking and unlawful entry statutes in the District of Columbia to guide its analysis because it found the drafters of the Manual for Courts-Martial were generally following the District of Columbia code. *Id.* at 672. This Court found the housebreaking statute explicitly enumerated protected property as a dwelling, bank, store, warehouse, shop, stable, apartment, room, steamboat, canal boat, vessel, other watercraft, railroad car, lumber yard, coal yard or any other yard where goods are kept for storage in trade. *Id.* at 671. In contrast, the lesser offense of unlawful entry broadened the coverage to property other than dwellings and buildings, to create the offense of "trespass on open areas, such as yards, gardens, and automobile parking lots." *Id.* at 672 (citing 98 Cong Rec 2062 (1952)). The Court held an automobile is not subject to an unlawful entry charge because the legislative intent of the statute was to limit the protection to real or personal property primarily used for storage or habitation. *Id.*

Although nearly sixty years old, the discussion of legislative intent in *Gillin* is still relevant to the issue presented. Congress initially intended housebreaking to

only apply to the types of property listed in the D.C. Code. *Id.* at 671. Congress specifically enacted the lesser offense of unlawful entry to prohibit trespass onto more expansive parcels of real property not covered by the housebreaking statute. *Id.* at 672. Even if Congress intended to return to a broader scope in enacting Article 130, the 3rd BSTB motor pool is not similar to any of the structures enumerated in the housebreaking statute to reasonably conclude Congress intended it be protected. *Wickersham*, 14 M.J. at 407.

2. The plain meaning and Presidential explanation of "building" and "structure".

Article 130, UCMJ, requires an accused unlawfully enter a building or structure to satisfy the first element of a housebreaking charge. 10 U.S.C. § 930 (2012). A building is defined as "a structure with walls and a roof, especially a permanent structure." *Black's Law Dictionary* 222 (9th ed. 2009). A structure is "any construction, production, or piece of work artificially built up or composed of parts purposefully joined together." *Id.* At 1559. The explanation listed under the President's authority in the M.C.M. states:

> "Building" includes a room, shop, store, office, or apartment in a building. "Structure" refers only to those structures which are in the nature of a building or dwelling. Examples of these structures are a stateroom, hold, or other compartment of a vessel, an inhabitable trailer, an inclosed truck or freight car, and a houseboat. It is not necessary that the building or structure be in use at the time of entry.

M.C.M. pt. IV, ¶ 56.c.(4).

Applying the plain meaning and Presidential explanation, a structure must be in the nature of a building or dwelling and have walls and a roof to be subject to Article 130. Although the manual's explanations of offenses are not binding on this Court, they are generally treated as persuasive authority, to be evaluated in light of this Court's precedent. *United States v. Miller*, 67 M.J. 87, 89 (C.A.A.F. 2008) (citing *United States v. Miller*, 47 M.J. 352, 356 (C.A.A.F. 1997); *United States v. Hemingway*, 36 M.J. 349, 351-52 (C.M.A. 1993)).

3. Structures subject to Article 130 are enclosed, covered, and used for habitation or storage.

This Court has determined whether various types of property are a building or structure under Article 130. *See United States v. Love*, 4 U.S.C.M.A. 260 (C.M.A. 1954) and *United States v. Crunk*, 4 U.S.C.M.A. 290 (C.M.A. 1954) (holding a tent is a building or structure for both housebreaking and unlawful entry); *United States v. Hall*, 12 U.S.C.M.A. 374 (C.M.A. 1961) (a railroad car can be subject to housebreaking if it is performing the function of storage or being utilized as a living space when the breaking and entering occurs); *but see United States v. Taylor* 12 U.S.C.M.A. 44 (C.M.A. 1960) (a C-123 military aircraft is not properly the subject of housebreaking); *United States v. Sutton*, 21 U.S.C.M.A. 344 (C.M.A. 1972) (for purposes of Article 130, housebreaking a track vehicle does not state an offense).

The common characteristic each structure in the cases cited above shared was they were each contained by walls and covered by a roof. However, this factor alone is not dispositive. This Court has instead drawn the housebreaking delineation on whether the structure is primarily intended for storage or habitation. *Taylor*, 12 U.S.C.M.A. at 46 (stating the presence of parachutes, seat belts or litters within an aircraft does not indicate storage any more than a spare tire would be considered "stored" in the trunk of any auto). So, although the aircraft in *Taylor* and track vehicle in *Sutton* were both enclosed and covered, the Court held they were not subject to Article 130 because they were not also primarily used for storage or habitation.

In *Wickersham*, this Court held "a storage area of the United States Air Force may lawfully be the subject of an unlawful entry charge." 14 M.J. 404, 405 (C.M.A. 1983). This Court stated in dictum, "we believe that Congress in enacting Article 130 and including the term 'structure' intended to return to this broad position as to the scope of the housebreaking offense." *Id.* at 407. The Court then went on to hold "a storage area of the United States Air Force is such a structure because it can reasonably be considered a yard where property of the United States Government is deposited and kept." *Id.* The Court affirmed the appellant's conviction for unlawful entry, under Article 134. *Id.*

The military judge's reliance upon *Wickersham* and *Elliott* was erroneous for numerous reasons. First, this Court's statement that an Air Force storage area is a structure under the scope of Article 130 was only dictum because the issue under review was whether the storage area may be the subject of unlawful entry under Article 134. *Id.* at 404-405. The military judge recognized this statement was not controlling, yet still applied it to his ruling. (JA 97-98). Second, the 3rd BSTB motor pool is much more than just an area used for storage. As the defense counsel argued, it is a "center of gravity" for unit functions such as formations, ceremonies, and inspections. (JA 96). Storage is simply an additional function of the motor pool, like it was for the aircraft in *Taylor*. Third, as the dissent in *Wickersham* highlighted, "once we go beyond a building or structure as the object of the unlawful entry . . . there is no logical stopping point." *Id.* at 408 (Everrett, C.J. dissenting). Applying Article 130 to an outdoor fenced area where some property is kept goes beyond Congress' intent to criminalize the entry into a building or structure. The issue then becomes the type of enclosure or fence which is sufficient to support a housebreaking charge. Expanding this definition will require courts to engage in needless fact-finding to weigh factors such as the height, material, and ease of access of the fence in question.

Despite the passing comment in *Wickersham*, this Court's precedent dictates a building or structure can only be the subject of housebreaking under Article 130

if it is enclosed by walls, covered by a roof, and primarily used for habitation or storage. Congress did not intend to criminalize the act of jumping into a fenced yard as an offense under Article 130, choosing to criminalize such conduct under Article 134 as unlawful entry. Accordingly, Congress limited the maximum punishment to only a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months for this lesser offense. M.C.M. pt. IV, ¶ 111.e. To avoid future confusion regarding Article 130, this Court should clarify its prior decisions and reiterate that conviction for housebreaking under Article 30 requires a structure be enclosed, covered, and used primarily for habitation or storage.

4. The military judge abused his discretion in denying the R.C.M. 917 motion.

The military judge abused his discretion because his decision to deny the R.C.M. 917 motion was based on the erroneous view of the law that a motor pool was a structure under Article 130. Using the same logic, SPC Wilson's conviction under Article 130 is legally insufficient because no rational fact-finder could have found the government satisfied the first element beyond a reasonable doubt because it did not present any evidence SPC Wilson unlawfully entered a building or structure. Therefore, this Court must set aside and dismiss SPC Wilson's conviction for housebreaking under Article 130 in the Specification of Charge I.

Conclusion

WHEREFORE, based on the foregoing considerations, SPC Wilson respectfully requests this Honorable Court grant the requested relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Wilson,* Army Dkt. No. 20140135, USCA Dkt. No. 16-0267/AR, was electronically filed with the Court and Government Appellate Division on June 1, 2016.

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