

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

United States Army,
Appellee

v.

Specialist (E-4)
NATHAN C. WILSON
United States Army,
Appellant

) BRIEF ON BEHALF OF APPELLEE
)
) Crim. App. Dkt. No. 20140135
)
) USCA Dkt. No. 16-0267/AR
)
)
)
)

JOHN GARDELLA
Captain, Judge Advocate
Appellate Government Counsel
Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2014
Fort Belvoir, VA 22060
(703) 693-0786
U.S.C.A.A.F. Bar No. 36590

JOHN K. CHOIKE
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36284

A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34432

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

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**TO THE JUDGES OF THE
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Issue Presented

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

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice [hereinafter, UCMJ], 10 U.S.C. § 866(b) (2012). The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On February 24, 2014, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of two specifications of wrongful

possession of a controlled substance with intent to distribute and one specification of larceny, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a and 921 (2012). (JA 16). On February 25, 2014, a military judge convicted appellant, contrary to his plea, of one specification of housebreaking, in violation of Article 130, UCMJ, 10 U.S.C. § 930 (2012). (JA 120). The military judge sentenced appellant to be reduced to the grade of E-1, to be confined for twenty-one months, and to be discharged from the service with a bad-conduct discharge. (JA 121). The convening authority approved the sentence as adjudged. (JA 123).

On November 18, 2015, the Army Court affirmed only so much of the finding of guilty of the specification of larceny 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 affirmed the remaining findings of guilty, reassessed, and affirmed the sentence. (JA 4). The Army Court found the issue now before this Court was without merit. (JA 2). Appellant petitioned this court for review, and on May 3, 2016, this court granted appellant's petition. *United States v. Wilson*, No. 16-0267/AR (C.A.A.F. May 3, 2016) (order).

Statement of Facts

A. Background

On Sunday, October 6, 2013, appellant and Private First Class (PFC) Rashid Bradley broke into the 3rd Brigade Special Troops Battalion (BSTB) motor pool, on Fort Benning, Georgia. (JA 46). Appellant and PFC Bradley intended to steal batteries used for vehicles and generators which were inside of the motor pool. (JA 46, 77). They planned to sell them to a scrap yard, but they were interrupted. (JA 46). On the same day, Private (PVT) Jesus Garza had to perform extra duty in the motor pool. (JA 21, 26). As he walked toward the motor pool he saw appellant and PFC Bradley inside the motor pool coming from between two buildings and PVT Garza called the military police. (JA 22-23, 25). Ms. Sylvia Bodford was also in the area and saw appellant and PFC Bradley inside the motor pool and behind a truck. (JA 35, 39). When appellant and PFC Bradley realized they were seen, they ran toward the back of the motor pool, jumped over the fence, and ran to Marne Road. (JA 47). Officer MH responded to the call and saw two males running out of the wood line who fit the description of the suspects. (JA 28). Officer MH detained the suspects who were later identified as appellant and PFC Bradley. (JA 28).

B. The Motor Pool

The 3rd BSTB motor pool is on Kelly Hill adjacent to a field artillery motor pool. (JA 21-22). A fence completely surrounds the 3rd BSTB motor pool and it was locked on Sundays. (JA 74). The fence in the back of the motor pool is next to a wood line. (JA 24). Because the motor pool was locked, PVT Garza could not enter the motor pool when he first saw appellant and PFC Bradley inside. (JA 23, 25). Appellant and PFC Bradley did not enter a building to get to the batteries, but they did have to jump over a fence. (JA 46, 57). The batteries were inside the motor pool stacked on a pallet. (JA 56). The pallet was outside of a bay or a building that was also inside of the motor pool. (JA 56, 80). When PVT Garza first spotted appellant and PFC Bradley they were standing on a concrete pad inside the motor pool. (JA 25).

Inside of the motor pool there were sheds that contained POL and other products for vehicles. (JA 75). There were also CONEXs used by platoons in the unit. (JA 75). The sheds and CONEXs were secured by locks and chains. (JA 75). On the weekend, the motor pool was inspected every four hours to verify all the doors were locked. (JA 78). On Fridays, the first sergeants and sergeant major walked around the motor pool to ensure all the vehicles and CONEXs were locked. (JA 78).

C. Trial Motions

On October 28, 2013, SPC Wilson was charged with one specification of housebreaking. (JA 10). At trial, the defense moved under Rule for Courts-Martial [hereinafter, R.C.M.] 917 for a finding of not guilty asserting that the government failed to present evidence that appellant unlawfully entered a building or structure. (JA 85-86). The military judge determined as a matter of law that a fenced enclosure such as a motor pool meets the definition of a building or structure in Article 130, UCMJ, 10 U.S.C. § 930 [hereinafter, Housebreaking]. (JA 88, 97-99). The military judge then denied the defense's motion as there was some evidence that appellant jumped the fence and entered the structure of the 3rd BSTB motor pool. (JA 99). Later, appellant was found guilty of housebreaking. (JA 120).

Granted Issue

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

Summary of Argument

The military judge did not abuse his discretion when he denied the defense motion under R.C.M. 917 as there was some evidence that appellant unlawfully entered a structure. Congress' intent to include a motor pool as a structure under

Housebreaking can be seen in: 1) the statutory interpretation; 2) the comparison of Housebreaking to the DC Code; and 3) a review of legislative history. This court has already decided that Congress intended to include an outdoor storage area within the term “structure” as used in Housebreaking. *United States v. Wickersham*, 14 M.J. 404, 407 (C.M.A. 1983)

Standard of Review

Review of a military judge’s denial of a motion under R.C.M. 917 has been treated the same as a legal sufficiency review. *United States v. Parker*, 59 M.J. 195, 201 (C.A.A.F. 2003); *United States v. Spearman*, 23 U.S.C.M.A. 31, 33, 48 C.M.R. 405 (1974). “[I]t is well established that, in applying this [legal sufficiency] test, all inferences and credibility determinations must be drawn in favor of the prosecution.” *United States v. Pritchett*, 31 M.J. 213, 216 (C.M.A. 1990). 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).

Law and Analysis

The primary issue is whether the prosecution introduced some evidence that appellant “unlawfully entered a certain building or structure of another person.” *MCM* (2012 ed.) pt. IV, ¶ 56.b.; *See United States v. Farkas*, 21 M.J. 458, 462 (C.M.A. 1989). In this case, the prosecution presented facts that described the structure of a motor pool. In order to answer the primary issue in this case this

court must decide the fundamental question of whether Congress intended the term “structure” as used in Housebreaking to include a motor pool.

A. The prosecution presented some evidence of the structure of a motor pool.

In this case, the evidence described the motor pool as being completely enclosed by a fence, but without a roof. Inside the motor pool were concrete buildings, loading bays, and vehicles. The motor pool also consisted of storage areas that could be individually locked, containing vehicle maintenance equipment.

B. Congress intended a motor pool to be included under the term “structure” in housebreaking.

Congressional intent is determined through an analysis of statutory interpretation, comparison to other federal statutes, and a review of legislative history. *United States v. Taylor*, 12 U.S.C.M.A. 44, 45, 30 C.M.R. 44 (1960); *United States v. Anderson*, 68 M.J. 378, 387 (C.A.A.F. 2010).

1. Statutory interpretation.

In defining the scope of the property included in Housebreaking, the court has looked to the explanatory language included in the Punitive Articles section of the Manual for Courts-Martial [hereinafter, *MCM*]. *United States v. Gillin*, 8 U.S.C.M.A. 669, 670, 25 C.M.R. 173 (1958). Additionally, the court has described the limits of the property included in Housebreaking as interrelated to the limits of property included in Article 134, UCMJ, 10 U.S.C. § 934 [hereinafter Unlawful Entry]. *Wickersham*, 14 M.J. at 405-407; *Gillin*, 8 U.S.C.M.A. at 670;

Taylor, 12 U.S.C.M.A. at 46. The scope of property included in Unlawful Entry is broader than the scope of property included in housebreaking. *Taylor*, 12 U.S.C.M.A. at 46; *Gillin*, 8 U.S.C.M.A. at 671.

In *Gillin*, the court looked to the property listed in the model specifications of both Housebreaking and Unlawful Entry and provided insight into the court's reasoning why the scope is broader for Unlawful Entry. *Gillin*, 8 U.S.C.M.A. at 671. The court stated, that the "obvious difference between these offenses is that housebreaking is a specific intent crime." *Id.* The court went on to say, "it is difficult to conceive of a housebreaking conviction being predicated upon a breaking into an unfenced vegetable garden." *Id.*

In looking at the similarities of these offenses, the court analyzed the properties included in the model specifications of each of these offenses and explained the properties in Housebreaking were similar to the properties in Unlawful Entry in that "the buildings, structures, and places mentioned in [Housebreaking] bear similarity to those stated in [Unlawful Entry] in that all provisions and forms seem to protect real property and areas used for storage or habitation." *Gillin*, 8 U.S.C.M.A. at 671. The court then determined that an automobile was outside of the classes of property intended to be the subject for both housebreaking and unlawful entry because it was not "real property or to such

form of personal property as is usually used for storage or habitation.” *Gillin*, 8 U.S.C.M.A. at 671-672.

Although the description “real property of another or certain personal property of another which amounts to a structure usually used for habitation or storage” is now one of the elements of Unlawful Entry, this court has never used this description for distinguishing properties that can be the subject of Unlawful Entry from those that can be the subject of Housebreaking. *MCM* (1984 ed.), pt. IV, ¶ 111b (The elements of Unlawful Entry were not added to the *MCM*, until the 1984 edition. *MCM* (1984 ed.), App. 21, A21-105.); *See Wickersham*, 14 M.J. at 406. To the contrary, proceeding from *Gillin*, this court has used this description in both cases involving crimes of Housebreaking and Unlawful Entry to explain the classes of the property that can be the subject of either of these offenses. *Taylor*, 12 U.S.C.M.A. at 46; *United States v. Breen*, 15 U.S.C.M.A. 658, 659, 36 C.M.R. 156 (1966); *Wickersham*, 14 M.J. at 406.

2. Other federal statutes.

“Perhaps the best source for determining the intent of Congress is the enactments proscribing the crimes in the District of Columbia.” *United States v. Gillin*, 8 U.S.C.M.A. at 671. The current version of Housebreaking was originally enacted in 1951. Article 130, UCMJ, 10 U.S.C. § 930 (1951); *See Gillin*, 8 U.S.C.M.A. at 671. At that time, the District of Columbia (DC) statute regarding

housebreaking enumerated the property included 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.” *Gillin*, 8 U.S.C.M.A. at 671; District of Columbia Code, Title 22, § 22-1801 (1951 ed.).

3. Review of legislative history.

The Ninety-Third Article of War originally defined housebreaking by stating that common law did not proscribe housebreaking but the offense is recognized in the penal code of the District of Columbia (DC) and that was the offense made punishable under The Ninety-Third Article of War. *MCM* (1921 ed.), Ninety-Third Article of War, ¶ 443 V. The Ninety-Third Article reflected the DC Code verbatim. *Id.*; *Wickersham*, 14 M.J. at 406-407. In 1949, housebreaking was defined as “unlawfully entering the building of another with intent to commit a criminal offense therein.” *MCM* (1949 ed.), pt. IV, ¶ 180e. This court has noted, from the Hearings before the House Armed Services Committee, that the present Housebreaking statute “represents an enlargement in the scope of the offense of housebreaking in that the words ‘or structure of another’ were included.” *Taylor*, 12 U.S.C.M.A. at 45. This court has also recognized that Congress’ inclusion of the word “structure” demonstrated an intention to return the scope of Housebreaking to the broad position that it had in Article of War 93 in 1920,

enacted on the basis of the housebreaking section of the D.C. Code (1901).

Wickersham, 14 M.J. at 406-407.

C. A motor pool may lawfully be the subject of Housebreaking.

After analyzing the Congressional intent behind Housebreaking, this court determined that “a storage area of the United States Air Force may lawfully be the subject of [Unlawful Entry].” *Id.* at 405 (quotations omitted). The court cited the principle from *Gillin* and *Breen* that “unlawful entry is limited to real property, and the sort of personal property which amounts to a structure used for habitation or storage.” *Wickersham*, 14 M.J. at 406. The storage area was equated to the language in the DC Code, “any yard where [property] is deposited and kept.” *Id.* at 407 (quoting the DC Code). The court never distinguished the storage area as property that could only be the subject of the more expansive Unlawful Entry offense, but not Housebreaking. The court went through this analysis to determine the congressional intent behind Housebreaking and concluded that a storage area was included in the term “structure” as used in Housebreaking. *Id.* The court then stated that because the storage area could be the subject of a Housebreaking it could also be the subject of Unlawful Entry, because the properties subject to Unlawful Entry are more expansive than those in Housebreaking. *Id.*

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed a case in which an appellant challenged his plea to Housebreaking. *United States v.*

Elliott, NMCAA 200500591, 2006 CCA LEXIS 251, *3-4 (N.M. Ct. Crim. App. Oct. 24, 2006). The appellant testified that he entered the property of a construction company through a hole cut in the fence. *Id.* The NMCCA found that “entering a storage area by climbing over a fence has previously been held by our superior court to be the subject of Housebreaking.” *Id.*

The motor pool is part of the same class of properties as the storage areas in *Wickersham* and *Elliott*—they were outdoor storage areas enclosed by a fence. The boundaries of the motor pool were clearly marked by a fence like the boundaries of the outdoor storage areas. Therefore, the motor pool is very different from the unfenced vegetable garden the court determined could only be the subject of the more expansive Unlawful Entry. *See Gillin*, 8 U.S.C.M.A. at 671.

The definition of “structure” in the *MCM* was never meant, as appellant asserts, to be limited to property with walls and a roof. (Appellant’s Br. 10); *MCM*, pt. IV, ¶ 56.c.(4). This court has never interpreted the term “structure” so simplistically. In *Gillin*, the court determined that a car was intentionally left out of the definition of a “structure” as other forms of transportation were included. *Gillin*, 8 U.S.C.M.A. at 671. In *Taylor*, the court determined that the term “structure” did not include a large aircraft because, like an automobile, it is ordinarily used as a conveyance not as storage or habitation. *Taylor*, 12

U.S.C.M.A. at 46. In *Hall*, the court determined that a railroad freight car was included in the term “structure” because it was used for the storage of goods. *Breen*, 15 U.S.C.M.A. at 659 (citing *United States v. Hall*, 12 U.S.C.M.A. 374 , 30 C.M.R. 374 (1961)). In each of these cases, this court used the description “real property or to such form of personal property as is usually used for storage or habitation,” to determine if the property was within the classes of property included in the term “structure” in Housebreaking. *Gillin*, 8 U.S.C.M.A. at 670-671; *Taylor*, 12 U.S.C.M.A. at 46; *Breen*, 15 U.S.C.M.A. at 659.

The description of the motor pool supports a finding that it is both real property *and* that it is used for storage. Therefore, like the storage areas in *Wickersham* and *Elliot*, the motor pool is included in the term “structure,” and within the classes of property that can be the subject of either Housebreaking or Unlawful Entry. A motor pool fits easily into the types of property included in the housebreaking statute in the DC Code as a yard where property is kept. Considering that the congressional intent behind the addition of the term “structure” to the Housebreaking statute was to expand the types of properties in the statute, it is appropriate for this court to determine that a motor pool may lawfully be the subject of Housebreaking.

Finally, there was plenty of evidence in this case to demonstrate that the 3rd BSTB motor pool was a storage area with a clear boundary as the motor pool was

enclosed with a fence. The evidence also showed that appellant jumped over that fence when he broke into the motor pool. Therefore, drawing all inferences from the evidence in favor of the prosecution, the military judge did not abuse his discretion when he denied the defense motion under R.C.M. 917.

Conclusion

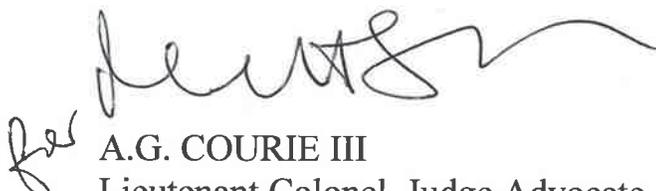
WHEREFORE, the Government respectfully requests this Honorable Court affirm the decision of the Army Court.



JOHN GARDELLA
Captain, Judge Advocate
Appellate Attorney, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36590



For JOHN K. CHOIKE
Major, Judge Advocate
Branch Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36284



for A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 36422



MARK H. SYDENHAM
Colonel, Judge Advocate
Chief, Government
Appellate Division
U.S.C.A.A.F. Bar No. 34432

CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on June 3^d, 2016.



DANIEL L. MANN

Lead Paralegal Specialist
Office of The Judge Advocate
General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822