

swearing can be predicated upon giving a false answer to such an investigator while under oath.

No. 16,354

December 21, 1962

On petition of the accused below. ACM 18069, not reported below. Affirmed.

Colonel Joseph E. Krysakowski and Major Charles K. Rush for Appellant, Accused.

Lieutenant Colonel Emanuel Lewis was on the brief for Appellee, United States.

Opinion of the Court

KILDAY, Judge:

Tried by general court-martial, accused pleaded guilty to false swearing, in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934, and other offenses. He was duly convicted and sentenced, and intermediate appellate authorities thereafter affirmed. We granted his petition for review in order to consider the same issue raised in *United States v Whitaker*, 13 USCMA 341, 32 CMR 341.

Our decision in the last mentioned

case is dispositive of the question here involved.

The decision of the board of review, therefore, is affirmed.

Chief Judge QUINN concurs.

FERGUSON, Judge (dissenting):

For the reasons set forth in my separate opinion in *United States v Whitaker*, 13 USCMA 341, 32 CMR 341, I would reverse the decision of the board of review, and order the charge of false swearing dismissed.

UNITED STATES, Appellee

v

ROBERT H. HIRT, Private, U. S. Army, Appellant

13 USCMA 420, 32 CMR 420

Charges and specifications § 45 — pretrial advice — sufficiency.

1. A staff judge advocate's pretrial advice which was complete except for the omission of a summary of the evidence was sufficient where the convening authority was fairly referred to the attached report of investigation for this information.

Evidence § 124 — confessions — corroboration.

2. An accused may not be convicted on his uncorroborated confession and corroboration must take the form of some evidence, either direct or circumstantial, that the offense has probably been committed by someone. [See 20 Am Jur, Evidence § 1242.]

Larceny § 57 — wrongful appropriation of vehicle — sufficiency of corroboration of confession.

3. Evidence that a truck used for delivering parts to the flight line at an air base was parked in its normal place near the flight line one afternoon, that the truck was used on a twenty-four hour basis and about fifteen people operated it, that it was seen several hours later being driven

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at a high rate of speed down a street paralleling the flight line, that it went into a ditch and turned over, that nobody was seen leaving it, and that the accused was picked up about five minutes later some fifteen blocks away in an injured and intoxicated condition, was insufficient to corroborate the accused's confession to wrongful appropriation of the truck since it does not establish the probability that the truck was wrongfully taken by any person.

Larceny § 57; Loss, damage, etc military property § 49 — wrongful appropriation and negligent operation of vehicle — corroboration of confession.

4. Since the accused's confession made him known as the driver of the truck, a conviction of negligent operation can be affirmed because use without authority is not an element of that offense, but the statement may not be used to aid in establishing the probability that the truck was being operated without authority, which factor is an element of wrongful appropriation, for it cannot serve to corroborate itself.

No. 16,000

December 28, 1962

On petition of the accused below. CM 407020, not reported below. Reversed.

Captain Ronald L. Gainer argued the cause for Appellant, Accused. With him on the brief were *Lieutenant Colonel Ralph Herrod*, *Captain David M. Gill*, and *Captain Thomas Stapleton*.

Captain Harvey L. Zuckman argued the cause for Appellee, United States. With him on the brief was *Major Francis M. Cooper*.

Opinion of the Court

FERGUSON, Judge:

Upon his trial by general court-martial, accused pleaded not guilty to charges of wrongful appropriation of a motor vehicle belonging to the United States, in violation of Uniform Code of Military Justice, Article 121, 10 USC § 921, and negligently damaging the same vehicle, in violation of Code, supra, Article 108, 10 USC § 908. He was nonetheless found guilty and sentenced to dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for one year, and reduction to the lowest enlisted grade. The convening authority approved the sentence, and the board of review affirmed without opinion. We granted accused's petition for review upon issues relating to the sufficiency of the pretrial advice of the staff judge advocate to the convening authority and whether the evidence *aliunde* accused's confession established a basis for admission of that statement

with relation to the offense of wrongful appropriation.

I

At the trial, defense counsel moved for appropriate relief on the basis that the staff judge advocate's pretrial advice was inadequate. He based his objection on the fact that it contained no summary of the evidence and "just . . . a certain rote recitation of facts." The law officer denied the motion, stating that he felt "this borderlines onto being barely adequate."

The document in question, included in the record as Defense Exhibit A, consists of a two-page mimeographed form which has been appropriately completed. It refers to the accused's name, rank, and organization, and commences with a notation that the staff judge advocate has "examined the attached charge(s) and Report of Inves-