

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.A. WAGNER

R.E. VINCENT

E.B. STONE

UNITED STATES

v.

**Brandon K. BARROW
Culinary Specialist Seaman (E-3), U. S. Navy**

NMCCA 200601268

Decided 27 March 2007

Sentence adjudged 26 April 2006. Military Judge: D.J. Sherman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel
LT JESSICA M. HUDSON, JAGC, USN, Appellate Government Counsel,
LT R.W. SARDEGNA, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, pursuant to his pleas, of unauthorized absence and missing movement through design in violation of Articles 86 and 87, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 887. Contrary to his pleas, the members convicted the appellant of missing movement through neglect, also in violation of Article 87, UCMJ. The appellant was sentenced to confinement for nine months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

The appellant's sole assignment of error contends that, in taking his action, the convening authority disapproved the finding of guilty to Additional Charge II. We have carefully reviewed the record of trial, the appellant's sole assignment of error, and the Government's response. Although not raised as an assignment of error, we have determined that the evidence at trial was not legally and factually sufficient to support a conviction to Additional Charge II. Accordingly, we will dismiss

Additional Charge II and its specification. We note that our decision renders the appellant's assignment of error moot.

Following our corrective action, we conclude that the remaining findings are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ. As a result of our action on the findings, we will also reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Facts

The appellant pled guilty to commencing a period of unauthorized absence from his unit, USS ABRAHAM LINCOLN (CVN 72), on 18 October 2005 and remaining absent without authority until he was apprehended by civilian law enforcement on 9 January 2006. He also pled guilty to missing the ship's 19 October 2005 movement through design. Contrary to his pleas, the appellant was also convicted of missing the ship's movement on 5 January 2006 through neglect.

At trial, Master-At-Arms First Class (MA1) Chad Bearden, USN, testified generally about the ship's processes, including Captain's Call and quarterly announcements, by which information concerning the ship's schedule was disseminated to the crew. He also stated that information was passed to the crew via the chain of command and indicated that the crew had "general knowledge" about the ship's pre-deployment movements. Record at 205-07, 215-16.

Concerning the 5 January 2006 ship's movement, MA1 Bearden testified that the crew was informed months in advance that there would be a ship's movement in January 2006. *Id.* at 206, 216. He further testified that in October 2005, he knew that the ship would be underway that month. Although he also testified that he knew the ship would be underway in January 2006, he does not specifically state when he was informed of this fact. *Id.* at 207. Finally, he testified that he and the appellant were not in the same chain of command, he never informed the appellant about the 5 January 2006 movement, and he had "no idea" whether the appellant knew about it. *Id.* at 216-17.

Personnel Specialist First Class (PS1) Angelo D'Andrea, USN, testified that Prosecution Exhibit 5 was Navy Personnel Form 1070/613, a page 13 administrative remarks page that was prepared on 15 January 2006 to record that the appellant missed the ship's 5 January 2006 movement. *Id.* at 258-59. He further testified that he was not aware if the appellant knew about the ship's 5 January 2006 movement and indicated that he did not know the appellant. *Id.* at 259-60. We note that during an earlier Article 39(a), UCMJ, session addressing the admissibility of

Prosecution Exhibit 5, the military judge correctly noted the exhibit "does not go to knowledge of the accused." *Id.* at 101.

Elements of the Offense of Missing Movement

The offense of missing movement requires proof of four elements beyond a reasonable doubt, including the element "[t]hat the accused knew of the prospective movement of the ship, aircraft, or unit". *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2005 ed.), Part IV, ¶ 11b. In order to be guilty of this offense, "the accused must have actually known of the prospective movement that was missed. Knowledge of the exact hour or even of the exact date of the scheduled movement is not required. It is sufficient if the approximate date was known by the accused as long as there is a casual connection between the conduct of the accused and the missing of the scheduled movement. Knowledge may be proved by circumstantial evidence." *MCM*, Part IV, ¶ 11c(5).

Approximately fifty-five years ago, we noted that "[t]he date of the sailing or movement is of the essence of the offense" of missing movement, whether by design or neglect. *United States v. Nunn*, 5 C.M.R. 334, 339 (N.B.R. 1952). We held that, at a minimum, an accused must know the "approximate date" of the ship's movement and the evidence to prove knowledge should not be "vague and indefinite." *Id.*

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether after weighing the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562.

We note that the testimonial and documentary evidence adduced at trial did not provide any evidence that the appellant had knowledge of the approximate date of the ship's 5 January 2006 movement. As a matter of fact, the Government's own witness, MA1 Bearden, did not even testify that he knew the approximate date of the ship's movement. Rather, he testified that he and the ship's crew knew that there would be a ship's movement in January 2006. Record at 206-07, 216. Accordingly, at best, the

Government provided circumstantial evidence that the appellant had knowledge that the ship would move in January 2006. In following our holding in *Nunn*, we have consistently held that knowledge of the month of the prospective movement was vague and uncertain and does not constitute knowledge of the approximate date. *United States v. Lee*, No. 200001079, 2001 CCA Lexis 116, unpublished op. (N.M.Ct.Crim.App. 12 Apr 2001); *United States v. Hogans*, No. 893360, 1991 CMR Lexis 762, unpublished op. (N.M.Ct.Crim.App. 29 May 1991).

Applying the legal sufficiency test, we conclude that, even considering the evidence in the light most favorable to the Government, no rational trier of fact could have found that the appellant knew of the ship's 5 January 2006 movement. Applying the factual sufficiency test, we are not convinced of the appellant guilt beyond a reasonable doubt.

Conclusion

The findings as to Additional Charge II and its specification are set aside and Additional Charge II is dismissed. The remaining findings are affirmed. We have reassessed the sentence in accordance with the principals set forth in *Moffeit*, *Cook*, and *Sales*, and affirm only that portion of the approved sentence that extends to confinement for eight months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

Chief Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court