

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

**BEFORE**

**E.E. GEISER**

**F.D. MITCHELL**

**J.G. BARTOLOTTA**

**UNITED STATES**

**v.**

**Sean C. SNYDER  
Airman (E-3), U.S. Navy**

NMCCA 200602367

Decided 7 June 2007

Sentence adjudged 27 June 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.

Maj RICHARD BELLISS, USMC, Appellate Defense Counsel  
LT MARK HERRINGTON, JAGC, USN, Appellate Government Counsel  
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A general court-martial with enlisted members convicted the appellant, pursuant to mixed pleas, of attempted drunk on duty, wrongful use of methamphetamine, and wrongful distribution of methamphetamine, in violation of Articles 80 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 912a. The appellant was sentenced to a bad conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged.<sup>1</sup>

We have examined the record of trial, the appellant's three assignments of error,<sup>2</sup> the Government's answer, and the

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<sup>1</sup> The appellant's request for oral argument is denied.

<sup>2</sup> I. The Specification under the Additional Charge fails to state an offense for attempted drunk on duty in violation of Article 80, Uniform Code of Military Justice (UCMJ). The appellant's argument focuses on the fact that the specification fails to allege that the appellant specifically intended to be "found" drunk or incapacitated while on duty.

appellant's reply. We conclude the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant.<sup>3</sup> Arts. 59(a) and 66(c), UCMJ.

### Background

The appellant was stationed onboard USS ABRAHAM LINCOLN (CVN 72). He was assigned to the Operations Department, specifically the Inport Security Force (ISF). In November, 2005, multiple Sailors from USS ABRAHAM LINCOLN tested positive for methamphetamine after a urinalysis. The appellant did not test positive for methamphetamine but was identified as a suspect during a subsequent investigation of illegal drug use aboard the USS ABRAHAM LINCOLN. Record at 279-86.

The appellant was interviewed as part of the investigation and during the interview he confessed to using methamphetamine in order to stay awake while serving as part of the ISF. The appellant admitted to being intoxicated<sup>4</sup> as a result of ingesting methamphetamine while standing an armed watch. Prosecution Exhibit 2.

The appellant's trial commenced on 26 June 2006. Ship's Serviceman Seaman Recruit (SHSR) Fredrick Taylor testified as a Government witness under a grant of immunity. He stated that he and the appellant used methamphetamines provided by the appellant on multiple occasions in the appellant's apartment during the relevant time periods. Record at 326-29. Additionally, he testified that he used methamphetamine with the appellant on multiple occasions onboard USS ABRAHAM LINCOLN. *Id.* at 328-30. The members ultimately found the appellant guilty of distribution of methamphetamine and of attempting to stand armed ISF watches while impaired by methamphetamines, but not guilty of using methamphetamine onboard USS ABRAHAM LINCOLN. *Id.* at 428.

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II. The members' finding of guilty to the sole specification of the Additional Charge should be set aside because the evidence was both factually and legally insufficient to sustain a finding of guilty to attempted drunk on duty in violation of Article 80, Uniform Code of Military Justice (UCMJ). The appellant's argument focuses on the lack of evidence that he specifically intended to be "found" drunk or incapacitated while on duty.

III. The military judge materially prejudiced appellant's substantial rights when he failed to instruct the members during presentencing to consider the mitigating effects of appellant's pleas of guilty.

<sup>3</sup> Although we agree with counsel's decision not to raise this as an assignment of error, we note that the court-martial promulgating order incorrectly adds the words "on divers occasions" to Specification 3 under the Charge. The appellant does not assert and we do not find prejudice from this scrivener's error. The appellant is, however, entitled to accurate records of his court-martial. We will order appropriate action in our decretal paragraph.

<sup>4</sup> The term "intoxicated" as used herein includes being impaired by a substance described in Article 112a. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 35c(6).

During an Article 39(a) session held prior to sentencing, the military judge discussed proposed sentencing instructions with counsel. Each counsel was provided a draft copy of the military judge's proposed instructions and given the opportunity to comment or object. Neither counsel objected to the proposed instructions. *Id.* at 432. Additionally, the military judge inquired if either counsel wanted to request any additional specific instructions. Neither counsel offered any additional instructions. *Id.* at 433. The military judge gave the agreed upon instructions at the appropriate point in the proceedings, without objection. *Id.* at 474-86. The members deliberated and sentenced the appellant to a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to pay grade E-1.

### **Attempted Drunk On Duty**

In his first assignment of error the appellant contends that the sole specification under the Additional Charge alleging that he attempted to be drunk on duty fails to state an offense. The appellant correctly asserts that to state an offense a specification must assert every element of the charged offense either expressly or by implication.<sup>5</sup> An "attempt" offense under Article 80, UCMJ, requires the Government to allege and prove: (1) an overt act; (2) a specific intent to commit a certain offense under the code; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense.<sup>6</sup>

The appellant also correctly asserts that in order to be found guilty of attempting a particular offense, an accused must be found beyond a reasonable doubt to have specifically intended to commit every element of the particular offense. The attempt at issue is a violation of Article 112, UCMJ (drunk on duty). The elements of Article 112 are that an accused: (1) was on a certain duty; and (2) was found drunk while on that duty.<sup>7</sup>

The appellant's argument focuses on the second element of the offense. Specifically, the appellant asserts that the language of the specification fails to allege that he "somehow attempted to have another person find him impaired by methamphetamines while he stood his ISF watch." Appellant's Brief and Assignment of Errors of 29 Jan 2007 at 5-6. We disagree.

In *United States v. Wiggins*, 35 M.J. 597 (N.M.C.M.R. 1992) this court addressed the word "found" and its meaning and

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<sup>5</sup> RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

<sup>6</sup> MCM, Part IV, ¶ 4b.

<sup>7</sup> MCM, Part IV, ¶ 36b.

significance within the context of Article 113, UCMJ. In *Wiggins*, the appellant was not actually found by anyone to be sleeping on his post, but did admit to being asleep when questioned by the military judge as part of the providence inquiry. This court reasoned in pertinent part that:

(W)ere we to give literal effect to the word "found," such that appellant's conduct would not be criminal unless he were discovered sleeping on post by another, the criminality of the appellant's conduct would be governed, not by his conduct, but rather by the manner in which military authorities learned of the conduct.

*Id.* at 600. The Court further held that the manner in which a sentinel is discovered sleeping on post is not an element of Article 113, UCMJ. *Id.*

More specifically, this court also addressed the meaning of the word "found" within the context of an Article 112, UCMJ, offense such as the one at bar. In *United States v. Raymer*,<sup>8</sup> we held that the manner of discovery of the appellant's being drunk on duty is not an element of the offense of being drunk on duty. In the instant case, therefore, we find that the absence of language alleging a specific intent to be "found" drunk on duty is not an element of the offense and, therefore, not a fatal omission. To hold otherwise would be to adopt form over substance. In view of our finding above, the appellant's second assignment of error alleging the absence of evidence that the appellant intended to be "found" incapacitated for duty is also without merit.<sup>9</sup>

#### **Failure To Instruct**

In his final assignment of error the appellant contends that the military judge prejudiced his substantial rights by failing to instruct the members during presentencing to consider the mitigating effects of his pleas of guilty. We disagree.

In *United States v. Fisher*,<sup>10</sup> our superior court held that while an instruction on the mitigating effects of a guilty plea would have been appropriate, in the absence of a defense objection or a request to instruct, the failure of the military judge to give the instruction does not constitute reversible

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<sup>8</sup> *United States v. Raymer*, No. 200401858, 2006 CCA LEXIS 69, unpublished op. (N.M.Ct.Crim.App. 30 Mar 2006).

<sup>9</sup> Although not specifically raised by the appellant, we specifically find that the appellant's inculpatory admission that he used crystal methamphetamines numerous times just prior to standing an armed watch onboard ship was sufficiently corroborated by the testimony of SHSR Taylor. See *Opper v. United States*, 348 U.S. 84 (1954); *United States v. Rounds*, 30 M.J. 76 (C.M.A. 1990); *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988).

<sup>10</sup> *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

error. In the instant case, the appellant neither requested such an instruction nor objected to its absence. Therefore, the appellant's substantial rights were not materially prejudiced and the failure of the military judge to instruct does not constitute reversible error.

The appellant also encourages this court to exercise its extraordinary Article 66(c), UCMJ, powers to modify the appellant's sentence to ensure no prejudice. The appellant relies on *United States v. Haley*,<sup>11</sup> an unpublished decision of the Air Force Court of Criminal Appeals to support this proposition. In *Haley*, the court, utilizing its powers under Article 66(c), UCMJ, provided sentence relief when the military judge failed to provide an instruction pertaining to the mitigating effects of a guilty plea.

Of particular note, however, is the fact that in *Haley*, the appellant's counsel specifically requested and was promised a guilty plea mitigation instruction and the military judge for whatever reason failed to follow through with the promised instruction. The Air Force court found that the failure of the military judge to give the promised instruction warranted some form of relief. *Id.* In the case before us, the appellant's counsel did not request the instruction and the military judge did not fail to follow through on a promise to give the instruction. We decline to provide sentence relief under Article 66(c), UCMJ.

### Conclusion

The approved findings and sentence are affirmed. The supplemental convening authority's action will correctly reflect the appellant's pleas and the findings of the court.

Judge MITCHELL and Judge BARTOLOTTO concur.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>11</sup> *United States v. Haley*, No. 29197, 1992 CMR LEXIS 200, unpublished op. (A.F.C.M.R. 19 Feb 1992).