

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JONATHAN E. LONSFORD
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100022
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 25 September 2010.

Military Judge: CAPT J.K. Waits JAGC, USN.

Convening Authority: Commanding Officer, Marine Fighter
Attack Squadron 251, Marine Aircraft Group 31, 2d MAW, U.S.
Marine Corps Forces Command, MCAS, Beaufort, SC.

Staff Judge Advocate's Recommendation: Capt G.T. Funk,
USMC. **Addendum:** Col S.C. Newman, USMC.

For Appellant: LT Jentso J. Hwang, JAGC, USN.

For Appellee: LT Ritesh Srivastava, JAGC, USN.

30 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of one specification of wrongful distribution of a controlled substance and two specifications of adultery in violation of Articles 112(a) and 134 of the Uniform Military Code of Military Justice, 10 U.S.C. §§ 912 and 934. The appellant was sentenced to confinement for 5 months, reduction to pay grade E-1,

forfeiture of \$984.00 pay per month for a period of 5 months, and a bad-conduct discharge. The convening authority approved the sentence, and ordered it executed.¹

Background

Lance Corporal (LCpl) M, belonged to the same squadron as the appellant and considered the appellant to be a mentor and his best friend. On 28 March 2009, LCpl M officiated at the appellant's marriage to LCpl L, another member of their squadron.

Also in March 2009, the appellant reconnected with an on-again, off-again girlfriend, H, and maintained regular contact with her via phone text messaging, emails, and telephone calls. Approximately a month after his marriage to LCpl L, the appellant met up with H and had consensual sexual intercourse with her. The appellant continued this sexual relationship with H over the next five months.

About three months after the appellant's nuptials, he and his wife began to have problems. LCpl M invited the appellant to move in to his on-base residence with him and his wife, S. Shortly after the appellant moved in, LCpl M deployed for a training exercise. While LCpl M was gone, S celebrated her nineteenth birthday by holding a party at their residence. By the end of the night the appellant shared his prescription medication, Lortab, a Schedule III substance, with S and the two ended up having consensual sexual intercourse. About a week after this liaison, the appellant and S had sexual intercourse once again while LCpl M was working on the night shift.

Discussion

The appellant was charged with adultery in violation of Article 134, UCMJ. There are two elements to Article 134 offenses: 1) the accused did or failed to do certain acts, and 2) under the circumstances, the accused's conduct was either: a) prejudicial to good order and discipline in the armed forces; b) of a nature to bring discredit upon the armed forces; or c) a

¹ Although not assigned as error, we note that the convening authority's action seeks on its face to execute the bad-conduct discharge. While the staff judge advocate's recommendation noted that the bad-conduct discharge could not be executed, the action purports to do so. This language is a legal nullity as a bad-conduct discharge may not be executed until completion of appellate review. Art. 71, UCMJ; *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

noncapital crime or offense. In the appellant's case, both specifications alleged the appellant was a married man who wrongfully had sexual intercourse with a woman not his wife; neither specification alleged this conduct was prejudicial to good order and discipline, service discrediting, or a noncapital crime or offense. The appellant's sole assigned error contends that both specifications for adultery fail to state an offense due to the Government's failure to allege the second element of the offense. The Court of Appeals for the Armed forces resolved this issue in favor of the appellant in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) by holding that a specification alleging an Article 134 offense fails to state an offense when it omits any variant of the second element. Accordingly, the findings of guilty to Charge II and both of its specifications are set aside.

Due to our action on findings, we consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006)(quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). This case was an adultery case which included an incidental social distribution of prescribed medication between the two adulterers. Our action on findings dramatically changes the penalty landscape and we cannot reliably determine what sentence the members would have imposed. *Buber*, 62 M.J. at 479-80. The "only fair course of action" is to have the accused resentenced at the trial level. *Id.* at 480.

Conclusion

The findings to Charge II and both specifications are set aside. The remaining findings are affirmed. The sentence is set aside. The record is returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing on sentence authorized.

For the Court

R.H. TROIDL
Clerk of Court