

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RYAN T. SPENCER
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201100136
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 2 December 2010.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding Officer, 1st Marine Corps District, Eastern Recruiting Region, Garden City, NY.

Staff Judge Advocate's Recommendation: LtCol E.R. Kleis, USMC.

For Appellant: LT Daniel Napier, JAGC, USN; LT Jentso Hwang, JAGC, USN.

For Appellee: Capt Robert Eckert, USMC.

20 December 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 military judge sitting as a special court-martial convicted the appellant, pursuant to his plea, of one specification of violating a general order by wrongfully using a government cell phone for personal use, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. A panel

of members with enlisted representation convicted the appellant, contrary to his pleas, of violating a general order by wrongfully using a government vehicle for unauthorized purposes and wrongfully committing adultery with a woman not his wife, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934.¹ The members sentenced the appellant to 90 days confinement and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant has submitted four assignments of error. He first asserts that Charge III, alleging adultery, fails to state an offense for want of the terminal element. He also avers that he did not receive a fair trial because of unlawful command influence; that his convictions under Charge I, Specification 1 and Charge III are factually and legally insufficient due to a misapplication of instructions by the military judge; and that the military judge improperly failed to suppress the search of the appellant's government cell phone.

After careful consideration of the record of trial and the pleadings submitted by the parties, we conclude that the appellant's conviction of Charge III and its specification must be set aside. The remainder of the findings are correct in law and fact. Following our corrective action on findings, we reassessed the sentence and concluded that no errors materially prejudicial to the substantial rights of the appellant remain. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a Marine Corps staff sergeant concluding three years of duty as a canvassing recruiter at a Recruiting Sub-Station in eastern Pennsylvania. He was issued a government cell phone for limited use in the performance of his duties. He utilized the phone to send a nude photo of male genitalia to a female high school student he met in the context of attempting to recruit her brother. The matter, immediately reported by the student, was expeditiously addressed by her mother, the high

¹ On the charges then before the court, and on evidence presented, the members also found the appellant guilty of a Charge II and its specification of sodomy, in violation of Article 125, Uniform Code of Military Justice, 10 U.S.C. § 925. The military judge dismissed this charge upon motion from the appellant. The members also acquitted the appellant of a second specification under Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892.

school administration, and a command investigation. The investigation revealed additional allegations of misconduct, to include the appellant's misuse of his government vehicle, emblazoned with official advertisements in support of the recruiting mission, for sexual encounters with a female acquaintance. The appellant was married to another woman at all pertinent times.

Failure to State an Offense

The appellant argues that the sole specification of Charge III, alleging adultery, fails to state an offense. We agree. There are two pertinent elements to the Article 134 offense alleged here: 1) the accused did or failed to do certain acts, and 2) under the circumstances, the conduct was prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. In this case, the Government alleged that the appellant was a married man who wrongfully had sexual intercourse with a woman not his wife. The specification under Charge III did not allege that the conduct was prejudicial to good order and discipline or service discrediting. There is no greater amplification in the wording of the specification to necessarily imply that this specific act of adultery was contextually an unambiguous military crime. The Court of Appeals for the Armed Forces has resolved a similar manifestation of this issue in favor of an appellant in *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), holding that in contested cases, a specification alleging adultery under Article 134 fails to state or necessarily imply an offense when it omits notice of the second element. We find no compelling basis to distinguish the instant case from *Fosler*. Accordingly, we follow it and set aside the finding of guilty to Charge III and its specification.

Remaining Assignments of Error

As summarized above, the appellant has raised three additional assignments of error with citation to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), upon which the parties have joined issue. The matters raised were thoroughly litigated at trial, resulting in some instances in partial relief to the appellant. The military judge played an active role in the taking of testimony in support of the motions, researched the applicable law, and issued exhaustive rulings. Reviewing these matters *de novo* and as styled on appeal, we find no remaining errors or entitlement to relief for the appellant. *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987).

Sentence Reassessment

Because we have set aside the members' finding of guilty with respect to the adultery charge, we next analyze the case to determine whether we can reassess the sentence in accordance with the principles set forth in *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), and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We conclude that we can. While our action on findings ostensibly changes the sentencing landscape, the change is in no way so dramatic as to gravitate away from our ability to reassess. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). By the sentencing stage of this court-martial, the gravamen of the misconduct had, as a practical matter, been distilled down to misuse of government property by a recruiter, under factual circumstances which provided whatever context or aggravation the members may choose to find. As for the cell phone, the appellant's own plea and words tell us that it was used to send a picture of male genitalia to a high school student. As for the vehicle, it was proven to have been misused to conduct sexual liaisons, the testimony surrounding which concomitantly attested to the now-dismissed adultery charge and a consensual sodomy charge dismissed at trial. The same corpus of evidence was before the members and we are satisfied beyond a reasonable doubt that, even without the additional Article 134 charge addressing the adultery aspect as a stand-alone offense, the members would have levied at least as severe a sentence on the appellant.

Conclusion

The findings of guilty of Charge III and its specification are set aside and Charge III and its specification are dismissed. The remaining findings and reconsidered sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court