

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

**Before  
L.T. BOOKER, J.K. CARBERRY, D.R. LUTZ  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BENNY NORWOOD, JR.  
FIRST SERGEANT (E-8), U.S. MARINE CORPS**

**NMCCA 201000495  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 30 April 2010.

**Military Judge:** LtCol David M. Jones, USMC.

**Convening Authority:** Commanding General, 3d Marine  
Logistics Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol J.J. Murphy  
III, USMC.

**For Appellant:** Maj Jeffrey Liebenguth, USMC.

**For Appellee:** Maj Elizabeth Harvey, USMC.

**5 May 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

CARBERRY, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of attempted adultery, conspiracy to obstruct justice, making a false official statement and, contrary to his pleas, conspiracy to commit an indecent act and indecent acts in violation of Articles 80, 81, 107, and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 907, and 920. The approved sentence included confinement for 14 months, reduction to pay grade E-5, and a bad-conduct discharge.

The appellant raises the following assignments of error, asserting that: (1) the attempted adultery and conspiracy to obstruct justice specifications each failed to state an offense; (2) the military judge abused his discretion by failing to obtain an adequate factual basis to support the appellant's guilty pleas to attempted adultery and conspiracy to obstruct justice; and (3) this court is unable to conduct its Article 66 review of the attempted adultery and conspiracy to obstruct justice specifications because it is impossible to determine whether the military judge found that appellant's conduct was prejudicial to good order and discipline or conduct that was service discrediting.

We have carefully examined the record of trial and the pleadings of the parties, and conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 17 April 2009, the appellant and his unit were participating in a command function at a resort in Okinawa, Japan. At the time of the offense, the appellant was the company First Sergeant. One night during the unit's stay, the appellant and Staff Sergeant (SSgt) Keys followed Corporal (Cpl) Hancock into his cabana. Soon after entering the room, the three men found Private First Class (PFC B), Cpl Hancock's girlfriend, lying naked in the bed. The appellant spoke to PFC B and began to touch her. He then turned to Cpl Hancock and told him to get "involved" in order that PFC B would be more willing and open to the situation. Cpl Hancock then began engage in sexual activity with PFC B while the appellant and SSgt Keys watched. After touching PFC B's breasts and vagina, the appellant attempted to have intercourse with PFC B, but was interrupted by a knock at the door. Immediately after the knock, the appellant left the room.

The appellant later learned that PFC B was at the hospital and, believing that an investigation into the incident would follow, called a meeting with SSgt Keys and Cpl Hancock in order to get their "stories straight." Record at 147. The three agreed that they would tell investigators that PFC B was never in the room.

Subsequently, the appellant was interviewed by Special Agent (SA) Garcia from the Naval Criminal Investigative Service (NCIS). During the interview, the appellant told the investigator that PFC B was not in the room and that he never met with SSgt Keys and Cpl Hancock to ensure that the three would tell investigators that PFC B was not in the room. SA Garcia confronted the appellant with evidence to the contrary; the appellant then admitted that he met with Cpl Hancock and SSgt Keys and agreed that they would all say the PFC B was not in the room.

At trial, the appellant pled guilty to attempted adultery, conspiracy to obstruct justice, and making a false official statement. The specifications at issue read as follows:

In that First Sergeant Benny Norwood Jr., U.S. Marine Corps, a married man, on active duty, did, at Okinawa, Japan, on or about 17 April 2009, attempted to commit adultery with [PFC B], U.S. Marine Corps, a woman not his wife, by trying to place his penis inside of her vagina and have sexual intercourse with her.

In that First Sergeant Benny Norwood Jr. . . . on active duty, did, at Okinawa, Japan, on or about 20 April 2009, conspire with [SSgt] Keys . . . and [Cpl] Hancock . . . to commit an offense under the [UCMJ], to wit: obstruction of justice in the investigation into the alleged sexual assault of [PFC B] and in order to effect the object of the conspiracy, First Sergeant Norwood did make false statements to Special Agent Joe Garcia . . . concerning his involvement and knowledge of the sexual assault of [PFC B].

#### **Failure to State an Offense**

Federal courts, to include the Court of Appeals for the Armed Forces, have long held that a defective specification challenged for the first time on appeal will be liberally construed in favor of its validity. See *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). In this instance, the appellant did not raise the issue at trial, pled guilty to the specifications as alleged, admitted that he committed the elements of the offense as explained to him by the military judge, satisfactorily completed the providence inquiry, and suffered no demonstrable prejudice. Under such circumstances, we are less inclined to find a specification defective.

We nevertheless address the appellant's contention that neither adultery nor obstruction of justice is an offense under the UCMJ and as such, the specifications fail to state an offense.

Whether a specification states an offense is a question of law which we review *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). A specification states an offense if (1) it alleges, either expressly or by implication, every element of the offense, (2) provides the accused notice of the charge, and (3) protects against double jeopardy. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994).

Articles 80 and 81, UCMJ, respectively, make it an offense to attempt or conspire to commit offenses "under this chapter". This court is firmly convinced that the offenses delineated under the General Article are, in fact, offenses under Chapter 47 of title 10, and are satisfied that the specification of Charge I

and Specification 1 of Charge II state offenses. See *United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010) (noting that paragraphs 61 through 113 of Part IV of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) are "various circumstances" under which the elements of Article 134 could be met). Further, we see no legal requirement to plead the elements of a "target" offense for either attempt or conspiracy and we are not persuaded by the appellant's argument that General Article "target" offenses should be treated differently, in pleadings under Article 80 or 81, from the enumerated offenses in Articles 83 through 132.

The elements of attempted adultery are: (1) the appellant did an overt act; (2) the act was done with the specific intent to commit an offense under the code; (3) the act was more than mere preparation; and (4) the act apparently tended to effect the commission of the intended offense. MCM, Part IV, ¶ 4b. The specification expressly alleges that the appellant, a married man, attempted to commit adultery by having intercourse with a private first class who was not his wife and he did so by trying to place his penis inside her. We are satisfied that the specification expressly alleges the elements of attempted adultery.

The elements of conspiracy to obstruct justice are: (1) the appellant entered into an agreement with another person to commit an offense under the code; and (2) while the agreement continued to exist, and while the appellant remained a party to the agreement, the appellant or another conspirator performed an overt act for the purpose of bringing about the object of the conspiracy. MCM, Part IV, ¶ 5b. Specification 1 under Charge II alleges that the appellant entered into an agreement with SSgt Keys and Cpl Hancock to commit an offense under the UCMJ, specifically, obstruction of justice, by lying to investigators as to the presence of PFC B and that in furtherance of that agreement, the appellant lied to SA Garcia. We are satisfied that the specification expressly alleges the elements of conspiracy to obstruct justice.

As to the remaining *Dear* factors, notice and double jeopardy, we find that for both specifications the appellant received adequate notice of the offenses alleged and is protected against further prosecutions for the conduct of which he was convicted. We are not persuaded by the appellant's argument that *United States v. Medina*;<sup>1</sup> *United States v. Miller*;<sup>2</sup> and, *United States v. Jones*<sup>3</sup> stand for the proposition that the "terminal elements" of the underlying Article 134 offenses, must be specifically alleged in order to provide adequate notice.

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<sup>1</sup> 66 M.J. 21 (C.A.A.F. 2008).

<sup>2</sup> 67 M.J. 385 (C.A.A.F. 2009).

<sup>3</sup> 68 M.J. 465 (C.A.A.F. 2010).

*Medina, Miller, and Jones* addressed the issue of whether the accused received adequate notice of an uncharged Article 134 offense as a lesser included offense of another offense.<sup>4</sup> That is not the case before us.

Accordingly, we conclude that the sole specification under Charge I and Specification 1 under Charge II properly state offenses.

### **Factual Basis to Support the Guilty Plea**

The appellant asserts that the military judge abused his discretion by failing to obtain an adequate factual basis into the terminal elements of: (1) the attempted adultery; and (2) the conspiracy to obstruct justice.

We review a military judge's decision to accept a guilty plea for abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). Once a military judge accepts an accused's plea as provident and enters findings based on the plea, we will not reject the plea unless there is a substantial basis in law or fact for questioning the guilty plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In this case, the factual circumstances as revealed by the appellant support his pleas.

#### **A. Attempted Adultery**

The record demonstrates that the military judge explained the elements of attempt and adultery to the appellant and that the appellant voiced his understanding of those elements. Specifically, the military judge went through a detailed description of what was meant by conduct prejudicial to good order and discipline and service discrediting conduct. Following the military judge's explanation, the appellant voiced his understanding of the terms. Record at 129-31. The military judge then explained a number of factors that could cause his attempted adultery to be prejudicial to good order and discipline. They included the fact that the appellant's wife was on active duty and PFC B was an active duty Marine "very subordinate" to the appellant. *Id.* at 130-31. When asked whether he intended all the elements that the military judge listed for adultery, the appellant stated that he did. *Id.* at 133. The appellant then went on to admit that he was a married man; that he removed his trousers and got onto his knees between PFC B's legs in order to have sex with her, but was interrupted by a knock on the door.

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<sup>4</sup> In *Medina*, while the other offense was an Article 134 offense, it was charged specifically as a violation of the Child Pornography Prevention Act, 18 U.S.C. §§ 2251(a), 2252(A)9a)(1), 2252A(a)(5)(A) (2000), as crimes and offenses not capital under clause 3 of Article 134. *Medina*, 66 M.J. at 22.

After reviewing the inquiry between the military judge and the appellant, we find no basis for questioning the appellant's plea.

### **B. Conspiracy to Obstruct Justice**

The appellant similarly avers that the military judge failed to conduct an adequate providence inquiry because he failed to elicit from the appellant his specific intent to commit an offense that was prejudicial to good order and discipline or service discrediting.

In order to prove the crime of conspiracy it must be established that: (1) there was an agreement to commit an offense; and (2) an overt act in furtherance of the conspiracy was committed. MCM, Part IV, ¶ 5b. The military judge informed the appellant that he did not have to establish that the underlying offense had been committed in order to adequately plead guilty, but rather that the agreement intended each of the elements of the underlying offense. Record at 140. The military judge informed the appellant of the elements of obstruction of justice and asked whether he needed the military judge to again define conduct prejudicial to good order and discipline or service discrediting. The appellant answered in the negative and, in response to the military judge's question as to whether he intended to violate all the elements listed, the appellant twice responded in the affirmative. *Id.* at 140-45.

The inquiry clearly established that the appellant met with SSgt Keys and Cpl Hancock in order get on the "same sheet of music" as to the account they would provide to investigators. *Id.* at 148 The appellant explained that the three Marines agreed that they would lie to the investigators by telling them that they had no involvement in the incident and that PFC B was not in the room. In furtherance of the conspiracy, the appellant and SSgt Keys lied to SA Garcia during the investigation into the incident. In light of the facts and admissions elicited from the appellant, we find no basis in law or fact to question the plea. Accordingly, we find this assignment of error is without merit.

### **Ambiguity of Military Judge's Findings**

The appellant claims that this court is unable to conduct its Article 66, UCMJ review relative to the attempted adultery and conspiracy to obstruct justice specifications because it is impossible to determine whether the military judge convicted the appellant of conduct that was prejudicial to good order and discipline or to conduct that was service discrediting.

The appellant again loses sight of the distinction between substantive and target offenses in his argument that we cannot perform an adequate Article 66 review. After examining the record, we are convinced that the appellant provided sufficient information to review his convictions for attempted adultery and

conspiracy to obstruct justice, to allow us to perform an Article 66 review for the attempted adultery and conspiracy to obstruct justice, i.e., that the appellant was a married man, first sergeant, tried to have sexual intercourse with a PFC in the unit who was not his wife and that the appellant entered into an agreement with two junior Marines to lie to investigators about the crime.

### Conclusion

The findings and the sentence as approved by the convening authority are affirmed.

Judge LUTZ concurs.

BOOKER, Senior Judge (concurring in the result):

I join in affirming the findings and the approved sentence. The appellant did not plead guilty to, nor was he convicted of, adultery or obstruction of justice. He instead pleaded guilty to, and was convicted of, attempted adultery and conspiracy to obstruct justice. It was therefore unnecessary for the military judge to determine whether his actions were prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Those factors are not elements of an attempt or of a conspiracy, as the lead opinion ably discusses. There is thus no impediment to our conducting an Article 66 review of this case.

The appellant does have a colorable argument regarding the providence inquiry into the attempt and the conspiracy, but only so far as the potential, not actual, effect of adultery or obstruction is concerned. While I do not agree with the appellant that the inquiry must reveal that he *intended* a prejudicial or service-discrediting effect, I do believe that in any such inquiry into a *target*, as opposed to *substantive*, offense under the General Article, the military judge should at least obtain the accused's acknowledgment that his actions *could* have such an effect and why. The military judge did not pose such direct questions to the appellant here, but when I consider the entire inquiry I cannot say that I harbor a substantial basis in law or fact to question the providence. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

For these reasons, I concur in the result.

For the Court

R.H. TROIDL  
Clerk of Court