

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

**Before  
M.D. MODZELEWSKI, C.K. JOYCE, T.R. ZIMMERMANN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JACK A. MEINERO  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201200112  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 9 September 2011.

**Military Judge:** Maj Clay Plummer, USMC.

**Convening Authority:** Commanding Officer, 6th Marine  
Regiment 2d Marine Division, Camp Lejeune, NC.

**Staff Judge Advocate's Recommendation:** Maj J.T. Leggett,  
USMC.

**For Appellant:** LT Daniel C. LaPenta, JAGC, USN; LT Jared  
Hernandez, JAGC, USN.

**For Appellee:** LT Joseph Moyer, JAGC, USN; LT Ann E. Dingle,  
JAGC, USN.

**27 December 2012**

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**OPINION OF THE COURT**  
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**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 panel of officer members, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one specification of violating a lawful general order, two specifications of making a false official statement, and one specification of obstructing justice, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§

892, 907, and 934. The members sentenced the appellant to reduction to pay grade E-1, confinement for 4 months, forfeiture of \$600.00 pay per month for 4 months, a reprimand, and a bad-conduct discharge. The convening authority approved the sentence as adjudged except for the reprimand.

The appellant challenges the legal and factual sufficiency of each of his convictions. We agree that his convictions were factually insufficient and therefore do not reach the final assignment of error concerning the effectiveness of his counsel.

### **Background**

A Marine sergeant standing duty noticed a strange smell outside of a barracks room: inside were the appellant and three other Marines. The sergeant alerted the officer of the day, who eventually questioned the appellant about whether he had used spice in the room. The appellant denied using spice, and later again denied using spice when asked by a command investigator.

At his trial, the appellant was convicted of the following offenses arising from these events: violating a lawful general order by using spice; making two false official statements when he denied use of spice to the duty officer and command investigator; and obstructing justice for asking one of the other Marines to lie in the course of the investigation. We conclude that the Government's proof is insufficient on each of these specifications.

### **Discussion**

We review the factual sufficiency of convictions *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Evidence is factually sufficient if, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The conviction for using spice cannot stand for two reasons. No witness testified that the appellant smoked spice in the barracks room. Lance Corporal (LCpl) H and LCpl P were called to the stand, admitted to using spice in the barracks room, and admitted that the appellant was present: each testified, however, that they did not see the appellant use spice. Record at 95, 105-06, 126-28. Both Marines acknowledged making earlier statements implying that everyone present in the room, including the appellant, had smoked spice, but at trial

they both insisted they were mistaken. The Government offered no other evidence that the appellant used spice.

Moreover, there is a failure of proof on the Secretary of the Navy Instruction (SECNAVINST) that the appellant was charged with violating. While the military judge took judicial notice of the existence and lawfulness of SECNAVINST 5300.28D, which presumably forbids the use of spice, the military judge did not take notice or instruct the members of any substantive portion of the instruction. In his instructions on findings, the military judge listed one of the elements of the Article 92 violation as "wrongfully using a controlled substance analogue with the intent to induce intoxication, excitement, or stupefaction of the central nervous system," simply quoting from the specification. Record at 163. Other than that language from the specification, we have no evidence or notice of what the SECNAVINST prohibits, what a "controlled substance analogue" is, what spice is, whether spice is such an analogue, or how the instruction applies to the appellant's conduct. After weighing the evidence in the record and making allowances for not having personally observed the witnesses, we are not convinced that the appellant wrongfully used a controlled substance analogue in violation of a lawful general order.

Having determined that we are not convinced beyond a reasonable doubt that the appellant used spice, we are likewise not convinced that he made false official statements when he denied using spice to the duty officer and the command investigator.

The appellant's final conviction was for obstructing justice by telling LCpl H to lie about the involvement of a Private (Pvt) C. The Government introduced a partial voice recording from LCpl H's cell phone in which the appellant told LCpl H to tell investigators that Pvt C had not brought spice to the room. At trial, LCpl H testified that he had initially told authorities that Pvt C brought spice to the room on the day in issue, but that he really did not know who brought the contraband, and that the appellant's statement to him on the recording was encouragement to tell the truth, not to lie. Record at 109, 114, 151-54. LCpl H testified, "I was talking with [the appellant] to see if I should change my story or if I would get in trouble for changing my story." *Id.* at 151. Beyond this testimony, the Government offered no other evidence that Pvt C ever brought spice to the room or that the appellant encouraged LCpl H to lie. With no other evidence, we are not

convinced beyond a reasonable doubt that the appellant told LCpl H to lie.<sup>1</sup>

### **Conclusion**

The findings and sentence are set aside, and the charges and specifications are dismissed with prejudice. A rehearing is not authorized. All rights, privileges, and property of which the appellant has been deprived by virtue of the findings of guilty and the sentence will be restored.

For the Court

R.H. TROIDL  
Clerk of Court

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<sup>1</sup> This charge and specification were hotly contested at trial, and defense counsel moved for a finding of not guilty under R.C.M. 917 on three separate occasions. The military judge ultimately deferred his final ruling until after completion of trial to have the opportunity to review the record of trial. In a post-trial hearing on the motion, the military judge opined that there was no evidence of the falsity of the statement, but declined to "overturn" the members' verdict, noting that it will "get another look on appeal." Record at 244.