

**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.

**Norman G. ETTER
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600422

Decided 21 March 2007

Sentence adjudged 22 September 2005. Military Judge: D.P. Fry. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, 2d Force Service Support Group, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

CAPT STEPHEN WHITE, JAGC, USN, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
Capt BRIAN KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of missing movement by design, in violation of Article 87, Uniform Code of Military Justice, 10 U.S.C. § 887. The appellant was sentenced to a bad-conduct discharge and confinement for ten months. The convening authority approved the sentence as adjudged.

The appellant raises five assignments of error, the last three of which are addressed below.¹ We have examined the record

¹ I - military judge erred by refusing to allow the appellant to call witnesses to rebut the testimony of Staff Sergeant (SSgt) Betts; II - military judge erred in not granting the appellant's motion for mistrial based on trial counsel's references to the appellant's exercise of his rights; III - legally and factually insufficient evidence to support a conviction for missing movement by design; IV - ineffective assistance of counsel when counsel (1) failed to disclose the names of crucial defense witnesses resulting in their exclusion and (2) failed to present any witnesses or evidence in the appellant's case in chief; V - sentence severity.

of trial, the assignments of error, and the Government's response. We conclude that 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. Arts. 59(a) and 66(c), UCMJ.

Background

On 1 March 2005, the appellant was assigned to a Provisional Rifle Company (PRC) attached to the 2d Maintenance Battalion, 2d Force Service Support Group, Camp Lejeune, North Carolina. The unit formed up on 28 January 2005 and conducted a series of training exercises. Record at 29. On approximately 26 February, the PRC platoon sergeant held a mass formation and informed the company, including the appellant, that they would be departing for Iraq beginning on 1 March 2005. *Id.* at 31. The sergeant broke the unit into two "sticks" each of which would be traveling separately. The appellant's stick was told they would deploy on 1 March 2005.

The night before the appellant's stick was scheduled to move, the appellant, along with all the other members of his stick, were told by their platoon sergeant that they had 8 hours to hygiene, clean their gear, repack everything and get ready to depart the following morning at 0800. The stick was dismissed at approximately 2030. *Id.* at 32. The following morning, the appellant was not present at formation. The appellant's platoon sergeant sent out available NCOs to search, but they were unable to locate the appellant in his barracks or work center. Searchers noted that the appellant's gear was in his room in the same state (dirty and muddy) as the night previously. The gear had not been cleaned, sorted, or otherwise prepared for the appellant's departure that morning. *Id.* at 33. The remaining Marines boarded buses and departed at approximately 0930 for the 45 minute to 1 hour ride to Cherry Point, North Carolina, where they boarded a plane and departed for Iraq.

Following the departure of the buses, the platoon sergeant went to the exchange area on personal business when he encountered the appellant at approximately 1030 "coming from the Subway." *Id.* at 36. The platoon sergeant confronted the appellant who appeared shocked that he'd been caught. The sergeant ultimately transported him to his company gunnery sergeant. *Id.* The aircraft transporting the Marines from Cherry Point left sometime after the appellant and his platoon sergeant met at the exchange. The platoon sergeant acknowledged that he did not attempt to get the appellant to Cherry Point in time to make the flight.

Legal and Factual Sufficiency

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the

offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd.* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

There are four elements to the offense of missing movement by design: (1) that the appellant was required in the course of duty to move with a ship, aircraft or unit; (2) that the appellant knew of the prospective movement of the ship, aircraft or unit; (3) that the appellant missed the movement of the ship, aircraft or unit; and (4) that the appellant missed the movement through design. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2002 ed.), Part IV, ¶ 11b.

The appellant argues that he did not miss movement because missing the 45 minute to 1 hour bus ride from Camp Lejeune to Cherry Point was not a sufficiently substantial distance or period of time to constitute the offense. Appellant's Brief and Assignment of Errors of 15 May 2006 at 10. We disagree and decline to divide the stick's transportation to Iraq into discreet segments. The appellant was ordered to form up with his stick at 0800 for transportation to Iraq. That transportation included the bus ride to Cherry Point, the subsequent flight to Iraq, and any ground transportation necessary to get to their specific duty location within Iraq. There is no meaningful distinction to be made between the various modes of transportation necessary to get the unit to their new location. It is the missed "move," not the mode of moving, that is significant. *See United States v. Graham*, 16 M.J. 460, 461 (C.M.A. 1983). Thus, when the appellant failed to muster and depart with his stick on the buses to Cherry Point, he was guilty of missing movement.²

Taken together with the rest of the record, the testimony of the appellant's platoon sergeant provides sufficient proof of the appellant's guilt of the charge of missing movement by design. This court is convinced that a rational fact finder could have found the appellant guilty of this offense. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to the charge and specification.

² The appellant also argues that there was no evidence that he missed the movement by design. We disagree. The disheveled and unorganized state of the appellant's gear found in his barracks room strongly suggests he had no intention of departing for Iraq with his unit. Record at 34.

Ineffective Assistance of Counsel

The appellant asserts that his trial defense counsel was ineffective when she failed to provide the names of crucial defense witnesses to the prosecution in a timely manner resulting in their exclusion by the military judge, and when she failed to present any witnesses or evidence in the appellant's case in chief. In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

We conclude that the appellant has not demonstrated deficient performance by his trial defense counsel. The trial defense counsel's affidavit³ states that the defense strategy was to argue that the command could have gotten the appellant to the aircraft in time to depart for Iraq had they desired to do so and that therefore, the appellant was not responsible for missing the movement of his stick. The essence of the defense was that the appellant's command had, in effect, lost confidence in him and made a conscious decision not to send him on to Iraq.

The trial defense counsel attempted to call the two rebuttal witnesses at issue only after she mistakenly perceived that the appellant's platoon sergeant had testified to the timeline for departure differently than he had during her prior interviews with him. Affidavit at 1; Record at 46-53. Following reference to her personal notes, however, she determined such was not the case. The military judge went to great lengths to ensure the defense had not been surprised by the platoon sergeant's testimony. Thus, we find that the two witnesses at issue, far from being "critical" to the defense case, were apparently not even relevant to the proceedings. With respect to the fact that the defense rested without providing any evidence, the trial defense counsel's affidavit sets out a reasonable explanation for her actions. We find, therefore, that the appellant's trial defense counsel did not err and acted within the wide range of reasonably competent professional assistance required under *Strickland*.

³ Affidavit of Captain Danielle N. Fitz, USMCR of 14 Feb 2007.

Sentence Severity

The appellant argues that a bad-conduct discharge and ten months of confinement is inappropriately severe for missing movement by design. We have considered the appellant's record in the context of the entire record of trial. We have also considered the seriousness of his offense. Intentionally missing movement is a serious offense in the abstract. Taken in the context of a unit moving to participate in an armed conflict, it is particularly reprehensible. It strikes directly at the trust and confidence needed to maintain unit cohesion, morale, and combat effectiveness. The maximum punishment authorized for this offense is a dishonorable discharge, confinement for two years and forfeiture of all pay and allowances. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The appellant's remaining assignments of error are without merit. The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court