

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

**Before
E.E. GEISER, E.C. PRICE, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**TIMOTHY J. HALL
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 200900119
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 27 August 2008.

Military Judge: LtCol Jeffrey Meeks, USMC.

Convening Authority: Commanding Officer, 9th Marine Corps
District, Kansas City, MO.

Staff Judge Advocate's Recommendation: LtCol S.C. Smith,
USMC.

For Appellant: CAPT A. Patricia Leonard, JAGC, USN.

For Appellee: LCDR Paul D. Bunge, JAGC, USN; Maj Elizabeth
Harvey, USMC.

15 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful general order and obstructing justice, in violation of Articles 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 934. The military judge also convicted the appellant contrary to his pleas of committing adultery in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for one year, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, pursuant to the terms of a pretrial agreement,

suspended all confinement in excess of four months for a period of one year from the date of trial.

The appellant initially raised three assignments of error; two alleging ineffective assistance of counsel and one alleging sentence inappropriateness. We specified two issues for briefing.¹ We have carefully considered the record of trial and the briefs submitted by counsel on the assigned errors and in response to the specified issues. We conclude that the appellant's conviction for Specification 1 of Charge II must be set aside. Following our corrective action we conclude that there are no remaining errors that are materially prejudicial to the appellant's substantial rights. Arts 59(a) and 66(c), UCMJ.

Background

The appellant, a staff noncommissioned officer assigned to recruiting duty, violated two lawful general orders by engaging in nonprofessional personal relationships with two separate women. The first was with JLC, a female prospective recruit applicant while she was a member of the delayed entry program. Record at 29-30. The second was with Private First Class CL, a female Marine recruited by the appellant who was home on leave. *Id.* at 32-33. Sometime later, the appellant became aware of a command investigation regarding the above conduct. *Id.* at 38. During the course of the investigation, the appellant had a telephone conversation with JLC about the investigation and tried to persuade her to lie about their past relationship. At the time, JLC was on active duty and held the rank of a lance corporal. *Id.* at 40.

During the contested portion of the trial JLC testified that in addition to kissing her, the appellant made a number of other sexual advances toward her ranging from hugs, to groping of her breasts, and ultimately to sexual intercourse in the recruiting office. *Id.* at 71-76. JLC testified that all of the appellant's advances were unwelcomed; that she tried to discourage him; and that she felt helpless to stop him due to his position of authority. *Id.*

Failure to State an Offense

At trial, the Government clearly intended to prosecute the appellant for adultery under Specification 1 of Charge II. *Id.*

¹ The issues specified were:

I. WHETHER CHARGE II, SPECIFICATION 1 (ADULTERY), STATES AN OFFENSE. See *United States v. King*, 34 M.J. 95 (C.M.A. 1992).

II. IF CHARGE II, SPECIFICATION 1, FAILS TO STATE AN OFFENSE, MAY THE COURT NONETHELESS FIND THE APPELLANT GUILTY OF A LESSER INCLUDED OFFENSE UNDER ARTICLE 134, UCMJ. See *United States v. McCracken*, 2009 CAAF LEXIS 743 (citing *United States v. Riley*, 50 M.J. 410, 415 (C.A.A.F. 1999)).

at 54, 90-91. However on appeal, both the Government and the defense concur that the specification fails to allege the intended offense because it lacks a factual allegation that either party named in the specification was married. Government Brief of 18 Aug 2009 at 1-2. For the reasons articulated by the Court of Military Appeals in *United States v. King*, 34 M.J. 95 (C.M.A. 1992), we agree.

Both parties also concur that the Court may not affirm a finding of guilty on the included offense of fornication because, that theory of criminal liability was not presented at trial. On this point we also agree. See *United States v. McCracken*, 67 M.J. 467 (C.A.A.F. 2009). Accordingly, the conviction for Specification 1 of Charge II is set aside, and the specification is dismissed.²

Sentence Reassessment

In his response to the specified issues, the appellant requested that his case be remanded for a rehearing on sentence. Defense Brief of 5 Aug 2009 at 4. Given the facts of this case, the court finds a remand for a rehearing on sentence unnecessary. As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006); *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

In view of the charges and specifications of which the appellant was properly convicted, we are satisfied beyond a reasonable doubt that the sentence adjudged would have been no less than a bad-conduct discharge, reduction to pay grade E-1, and confined for six months for the remaining charges. Art. 59(a), UCMJ. The appellant's prohibited conduct toward JLC "deteriorate[d] the integrity of the Marine Corps' image" and potentially impacted his ability to effectively recruit. Record at 28. His fraternization with PFC CL undermined his authority as a staff noncommissioned officer. *Id.* at 36. The appellant also admitted to obstructing justice, a very serious offense. *United States v. Villareal*, 47 M.J. 657, 665 (N.M.Ct.Crim.App. 1997), *aff'd*, 52 M.J. 27 (C.A.A.F. 1999). Furthermore, the appellant was a staff noncommissioned officer with over nine years of service at the time of trial. Record at 31. As such, the appellant was expected to maintain high personal standards of conduct. *United States v. Thompson*, 22 M.J. 40, 41 (C.M.A. 1986).

² As both parties noted in their response to the specified issues, dismissal of the specification moots the assigned errors related to effective assistance of counsel.

Conclusion

We affirm the guilty findings to Charge I and Specifications 2 and 3 thereunder, and Charge II and Specification 3 thereunder. We set aside the finding of guilty to Specification 1 of Charge II. We affirm a sentence of a bad-conduct discharge, six months confinement, and reduction to pay grade E-1.

For the Court

R.H. TROIDL
Clerk of Court