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

Before
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANGELA K. RYAN
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200900007
GENERAL COURT-MARTIAL

Sentence Adjudged: 03 October 2008.
Military Judge: CAPT Moira Modzelewski, JAGC, USN.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: CAPT T.P. Tideswell, JAGC, USN.
For Appellant: LT Brian Korn, JAGC, USN.
For Appellee: Capt Mark Balfantz, USMC.

29 September 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A general court-martial, consisting of officer and enlisted members, convicted the appellant, contrary to her pleas, of attempting to wrongfully possess Vicodin, a controlled substance, and willful dereliction of duty in violation of Articles 80 and 92, Uniform Code of Military Justice, 10 U.S.C.

§§ 880 and 892.[1] The appellant was sentenced to 30 days confinement, reduction in rate to pay grade E-1, forfeiture of $673.50 pay per month for one month, and a bad-conduct discharge. The convening authority (CA) approved the confinement, reduction in rate, and discharge as adjudged and reduced the adjudged forfeiture to $673.00 pay per month for one month before approving it.

The appellant raises two assignments of error. First, she asserts the evidence is legally insufficient to sustain the willful dereliction of duty conviction. Second, she alleges ineffective assistance of counsel.

We have carefully examined the record of trial, the appellant's two assignments of error, the Government's answer, the appellant's reply brief, affidavits submitted by the appellant and trial defense counsel, the certificate of correction submitted by the military judge, and oral argument by the parties. We conclude the evidence is legally and factually insufficient to sustain a conviction of willful dereliction of duty (Charge I) and that the appellant's second assignment of error has no merit. We will take corrective action in our decretal paragraph and, following that action, conclude that the findings and the sentence, as reassessed, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

I. Legal and Factual Sufficiency

In her first assignment of error, the appellant asserts the evidence to prove Charge I is legally insufficient because the regulation she was found derelict for failing to follow did not apply to her and, even if it did, the Government failed to prove the appellant knew of or reasonably should have known of the regulation.

Background

The appellant was a Hospital Corpsman at the Naval Health Clinic (NHC) in Great Lakes, Illinois assigned to the Internal Medicine Department. On various occasions between June 2007 and February 2008, the appellant was alleged to have written multiple prescriptions for controlled substances for herself. Additionally, on one occasion, she wrongfully attempted to call in a prescription for controlled substances for herself to a

[1] The appellant was found not guilty of four specifications of wrongful possession of controlled substances and nine specifications of larceny.

local Walgreens Pharmacy while posing as a nurse from the Internal Medicine Department at NHC Great Lakes.

The Government charged the appellant with willful dereliction of duty in violation of Article 92(3), UCMJ, as follows:

> In that Hospital Corpsman Third Class Angela K. Ryan, U.S. Navy, Naval Health Clinic, Great Lakes, Illinois, on active duty, who knew of her duties at Naval Health Clinic, Great Lakes, Illinois, from on or about July 2007 to on or about February 2008, was derelict in the performance of those duties in that she willfully failed to follow the guidelines regarding the prescribing of medication set by the Naval Health Clinic, Great Lakes, Illinois, as it was her duty to do.

Prior to trial, the Government requested the military judge take judicial notice of the Manual of the Medical Department, NAVMED P-117, Section 21-22 (Ch. 21, 7 February 2005)(hereinafter NAVMED P-117), as a lawful general regulation.[2] Record at 213-14; Appellate Exhibit IX. Without objection from the appellant, the military judge took judicial notice that the regulation was a lawful general regulation, was punitive in nature, had been in effect since 7 February 2005 up to and including the date of trial, and all service members had the duty to obey it.[3] Record at 214.

At trial, the Government presented the testimony of Ms. Kathy Gluzinski and LT Laura Bradford, MC, USN, in support of the dereliction of duty charge. Ms. Gluzinski, a pharmacy supervisor at the NHC Great Lakes clinic, testified for the Government as an expert witness as to the electronic prescription system used at NHC Great Lakes. Record at 242-83. She testified NAVMED P-117 was the governing instruction for handling prescription medications at NHC Great Lakes and further

---

[2] Section 21-22 of NAVMED P-117 states that "[n]o person will prescribe or furnish a controlled substance for themselves or members of their immediate family."

[3] We conclude that the Government's request for judicial notice, the judicial notice granted by the military judge, and the instruction the military judge provided to the members regarding the judicial notice overstated the applicability of NAVMED P-117. Appellate Exhibit IX; Record at 213-14, 415. NAVMED P-117, as a regulation issued by the Chief, Bureau of Medicine and Surgery, is applicable only to Medical Department commands and personnel not all service members.

testified that this regulation "governs all Navy medicine." *Id.* at 262. She also testified physicians were allowed to write prescriptions for themselves in a limited capacity, but not for controlled substances. *Id.* She added no one else was allowed to write prescriptions for themselves. *Id.* LT Bradford, the Department Head of the Internal Medicine Department at NHC Great Lakes, testified she did not allow the corpsmen in her clinic to write themselves prescriptions and stated she believed the policy had been communicated to the corpsmen. *Id.* at 302-03.

Standard of Review

Article 66, UCMJ, requires the courts of criminal appeal to conduct a *de novo* review of the legal and factual sufficiency of each case. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, a reasonable fact-finder could have found the essential elements beyond a reasonable doubt.[4] The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the court is convinced of the accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). The term reasonable doubt does not mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

Elements and Definitions

The elements of dereliction of duty are (1) that the accused had certain duties; (2) that the accused knew or reasonably should have known of the duties; and (3) that the accused was willfully or through negligent or culpable inefficiency derelict in the performance of those duties. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 16b(3). A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. MCM, Part IV, ¶ 16c(3)(c). "Willfully" means intentionally. *Id.* "Negligently" means an act or omission of a

[4] Although the appellant has not raised factual sufficiency as an error, pursuant to our Article 66, UCMJ, mandate, we are also required to evaluate the factual sufficiency of the evidence.

person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. *Id.*

Analysis

Our initial inquiry focuses on whether the Government satisfied the first element of the offense by establishing that the appellant had a duty or duties.

A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service. MCM, Part IV, ¶ 16c(3)(a). The theory advanced by the Government at trial was that NAVMED P-117, Section 21-22 imposed a duty on the appellant.[5] NAVMED-P-117 states "Designated articles of MANMED establish regulations that must be adhered to by all Medical Department commands and personnel. Violations of such articles are punishable per the Uniform Code of Military Justice. These mandatory regulations are marked "Regulatory"." Section 21-22 of NAVMED P-117 is marked "Regulatory" and states that "[n]o person will prescribe or furnish a controlled substance for themselves or members of their immediate family."

Although the appellant argues that NAVMED P-117 did not apply to her, we disagree. As a hospital corpsman, the appellant was a member of the Medical Department and, therefore, had a duty to obey NAVMED P-117, Section 22-21. However, dereliction of duty does not encompass a failure to obey. Rather, both willful and negligent dereliction of duty focus on the concept of a failure to perform, which indicates inaction or non-performance of specified duties. *United States v. Sojfer*, 44 M.J. 603, 609-10 (N.M.Ct.Crim.App. 1996). Article 92(1) and (2), UCMJ, on the other hand, are meant to address failures to obey orders and regulations.

Prescribing medication was not one of the appellant's regular assigned duties. Therefore, she was not charged at trial with failing to perform an assigned duty or performing an assigned duty in an inadequate manner. Instead, she was charged with dereliction of duty by failing to obey a regulation prohibiting her from engaging in specific conduct that fell outside the scope of her prescribed duties. A more appropriate

[5] We note the Government charged the appellant with failing to follow guidelines for prescribing medication as set by the NHC Great Lakes, but relied instead upon NAVMED P-117, a lawful general regulation, to prove the charge at trial.

charge in this case, and in fact the offense that the Government proved, but did not charge, was a violation of a lawful general regulation.[6] As a result, although NAVMED P-117 applied to the appellant and she had a duty to obey it, we find that failing to obey the regulation was not a duty that could be punished as charged under Article 92(3), UCMJ.

a. Actual Knowledge

Even if we were to decide the appellant had a duty contemplated by Article 92(3), UCMJ, we conclude that the Government failed to prove the appellant had the requisite knowledge of the duty. Actual knowledge is required to prove the dereliction was willful. *United States v. Ferguson*, 40 M.J. 823, 834 (N.M.C.M.R. 1994). The only evidence introduced at trial in an attempt to show actual knowledge was the testimony of LT Bradford. LT Bradford testified she did not allow corpsmen in the Internal Medicine Department to write prescriptions for themselves. Record at 302. When asked if that policy had been communicated to the corpsmen, she testified that she believed the policy had been communicated to them. *Id*. at 303. There was no evidence proving that LT Bradford, or any other person, directly informed the appellant that she was not allowed to write herself medical prescriptions. Additionally, there was no evidence introduced to show that the appellant was specifically told of NAVMED P-117, Chapter 21, Section 22-21 or provided a copy of it. Finally, the Government did not present any evidence that the appellant was present at any command function, including any training session, where NAVMED P-117, Chapter 21, Section 21-22 and/or prescription procedures were discussed.

Accordingly, we find the Government failed to show the appellant had actual knowledge of any regulation or policy prohibiting corpsmen from writing prescriptions for themselves.

b. Constructive knowledge

We next consider whether the knowledge requirement for the lesser included offense of negligent dereliction of duty, that the appellant reasonably should have known of the regulation,

---

[6] Violation of a lawful general regulation is a greater offense than dereliction of duty. *See United States v. Bivins*, 49 M.J. 328, 332 (C.A.A.F. 1998). Therefore, although the Government proved violation of a lawful general regulation in this case, we are unable to affirm the charge on that basis.

was met by the Government. To establish an individual should have known of a duty or duties, regulations, training or operating manuals, customs of the service, academic literature, testimony of persons who have held similar or superior positions, or similar evidence can be used. MCM, Part IV, ¶ 16c(3)(b).

As aforementioned, Ms. Gluzinski testified at trial that no one other than a physician could prescribe medications for themselves.[7] However, her testimony did not establish whether it was a policy widely known or considered common knowledge among those at NHC Great Lakes, or if the corpsmen at NHC Great Lakes were provided any training on prescription procedures. Additionally, there was no evidence presented to prove that it was a Navy-wide custom, practice, or understanding that corpsmen were prohibited from writing prescriptions for themselves. Therefore, we find the Government also failed to prove that the appellant should have known that she was prohibited from prescribing medication for herself.

Considering the evidence in the light most favorable to the Government, we find a reasonable fact-finder could not have found the essential elements beyond a reasonable doubt. Similarly, after reviewing the evidence and making allowance for not having personally observed the witnesses, we are not convinced of the accused's guilt beyond a reasonable doubt. Therefore, we set aside the appellant's conviction of Charge I.

II. Ineffective Assistance of Counsel

In her second assignment of error, the appellant alleges that Lieutenant [S], formerly LT [C], her trial defense counsel, was ineffective when she recommended to the members during her sentencing argument that the appellant's record of military service indicated that she should receive a bad-conduct discharge. During LT [S]'s sentencing argument, the original authenticated record of trial transcript states that she said, "We'll talk a little bit later about HM3 Ryan's stellar record in the Navy which indicated she should get a bad conduct discharge." Record at 492. Appellant's Brief of 6 Mar 2009 at 9-14.

Background

[7] Ms. Gluzinski testified that physicians could not write prescription for controlled substances for themselves. Record at 262.

After receiving the appellant's initial pleading, we issued an order permitting the appellant to submit a personal affidavit or declaration in support of her ineffective assistance of counsel claim. Navy-Marine Corps Court of Criminal Appeals Order (NMCCA) of 9 Apr 2009. The appellant filed a declaration indicating (1) trial defense counsel never discussed an intention to ask the members to sentence her to a bad-conduct discharge; (2) that she did not want to receive a bad-conduct discharge; and (3) that if she had been asked she would have told counsel she did not want a discharge. Appellant's Declaration of 7 Apr 2009.

In response to the appellant's declaration, we ordered the Government to contact LT [S] and obtain an affidavit responding to the appellant's claims. NMCCA Order of 15 Apr 2009. On 4 May 2009, the Government filed an affidavit from LT [S], who indicated that she actually argued that the appellant "should not" get a bad-conduct discharge and that the authenticated record of trial transcript was inaccurately transcribed. Affidavit of LT [S] of 1 May 2009. In response to LT [S]'s assertions, we ordered the military judge review the audio tapes. NMCCA Order of 11 May 2009. On 11 June 2009, the Government submitted a certificate of correction from the military judge that acknowledged there was an error in the authenticated record of trial and corrected the record by substituting the following sentence: "We'll talk a little bit later about HM3 Ryan's stellar record in the Navy which indicates that she shouldn't even get a bad conduct discharge." Certificate of Correction of CAPT Moira Modzelewski, JAGC, USN, of 11 Jun 2009.

Analysis

Based upon the military judge's certificate of correction,[8] we find that LT [S] did not ask the members to award the

[8] Two military judges presided over the proceedings in this case. The first judge conducted the arraignment and the second judge presided over the remainder of the proceedings. The military judge who presided over the arraignment did not authenticate that portion of the record of trial. The portion of the transcript pertaining to the arraignment is 13 pages out of the 521 page record.

Failure of the military judge to authenticate the record of proceedings constitutes error under RULE FOR COURTS-MARTIAL 1104(a)(2)(A), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Nonetheless, the appellant does not claim that the record is either incomplete or inaccurate. Absent an objection and a specific showing of prejudice to the appellant, such an error is harmless, does not require us to return the record of trial to the judge for authentication, and does not preclude the court from conducting meaningful

appellant a bad-conduct discharge and, as a result, was not deficient in her performance. Therefore, we need not evaluate whether the appellant suffered any prejudice and we decline to grant any relief.

III. Sentence Reassessment

As a result of our action on the findings with regard to Charge I, we must reassess the appellant's sentence. *See United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006). We are satisfied that the sentencing landscape in this case has not changed dramatically as a result of our decision to set aside the finding of guilty to willful dereliction of duty. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). After reviewing the evidence presented on the merits and on sentencing, we conclude that the adjudged sentence for the remaining offense would have been at least the same as that adjudged by the members and approved by the convening authority. *Id*. at 478.

IV. Conclusion

We affirm the findings as to Charge IV and its specification, and the sentence. We set aside the finding as to Charge I and dismiss that charge.

Judge MAKSYM and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court

---

review of the appellant's case. Art. 59(a), UCMJ; *United States v. Hasting*, 461 U.S. 499 (1983).