IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Kenneth BUTLER, Jr.
Airman (E-3), U. S. Navy

NMCCA 200401515 Decided 23 May 2006

Sentence adjudged 13 May 2004. Military Judge: G.M. Felder. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS HARRY S. TRUMAN (CVN 75).

CAPT STEVEN COHN, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT D.S. MAYER, JAGC, USNR, Appellate Government Counsel
Maj K.C. HARRIS, USMC, Appellate Government Counsel

STONE, Judge:

A military judge sitting as a special court-marital convicted the appellant, following the entry of mixed pleas, of four specifications of unauthorized absence, one specification of missing movement through neglect, and one specification of breaking restriction in violation of Articles 86, 87, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 934. The appellant was sentenced to confinement for 45 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

After careful consideration of the record of trial, the appellant's sole assignment of error, and the Government's response, we 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 was committed. Arts. 59(a) and 66(c) UCMJ.

Background

The appellant was a Sailor stationed aboard the USS HARRY S. TRUMAN (CVN 75), berthed at Naval Station Norfolk, Virginia, when on 15 August 2003, he began an unauthorized absence that ended on 25 September 2003. On 20 August 2003, he began an unauthorized absence from the USS HARRY S. TRUMAN moved from Pier 14 at Naval Station Norfolk, Virginia, to Pier 5 at Naval Shipyard, Portsmouth, Virginia. The appellant missed this transit.[1] The transit covered 8.3 nautical miles in less than 3 1/2 hours. The transit occurred within the confines of Norfolk Harbor in Virginia. The purpose of this evolution was to accomplish scheduled maintenance. Prosecution Exhibit 3.

Legal and Factual Sufficiency

In his sole assignment of error, the appellant argues that the evidence is legally and factually insufficient to sustain his conviction of missing movement through neglect. Specifically, the appellant argues that his ship did not complete a "movement" as defined by MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 11c(1). We disagree.

By statute, we are charged with determining both the legal and factually sufficiency of the evidence presented at trial. Art. 66, UMCJ; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324. In contrast, the factual sufficiency test is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the reviewing court are themselves convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325. In making these determinations, we are mindful that 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 definition of "movement" as used in Article 87 "includes a move, transfer, or shift of a ship, aircraft, or unit involving a substantial distance and period of time. Whether a particular movement is substantial is a question to be determined by the court-martial considering all the circumstances." MCM, Part IV, ¶ 11c(1). The definition of movement also provides the example that "minor changes in location of ships . . . as when a ship is

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[1] The appellant initially pleaded guilty to this charge and specification. However, the appellant changed his guilty plea based on the advice of his counsel. His trial defense counsel argued at trial that the ship did not make a movement as defined by the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 11c.

shifted from one berth to another in the same shipyard or harbor" do not constitute a movement. *Id*.

The appellant argues that the USS HARRY S. TRUMAN transit from Naval Station, Norfolk, Virginia, to Norfolk Naval Shipyard, Portsmouth, Virginia was not substantial and was merely a shift from one berth to another in the same shipyard. In support of his argument, the appellant relies on the example given in the definition of movement which gives examples of minor changes in locations of ships as including "when a ship is shifted from one berth to another in the same shipyard or harbor" and also points to the decision of our superior court in *United States v. Quezada*, 40 M.J. 109 (C.M.A. 1994), where a missing movement conviction was upheld after a Sailor missed an eight-hour dependents cruise. In that case, the court indicated that the fact that the ship crossed the harbor's breakwater and headed to open sea was a consideration in their decision. Appellant's Brief of 22 Mar 2005 at 5.

Our reading of MCM, Part IV, ¶ 11c(1), is that the President intended to prevent "minor changes in location of ships" from forming the factual basis for charges of missing movement. To this end, the President provides an example of a minor change in location as being when "a ship is shifted from one berth to another in the same shipyard or harbor." In this case, however, the movement of the USS HARRY S. TRUMAN was not a minor change in location from a berth to another nearby berth. To the contrary, the facts reveal that the ship moved 8.3 nautical miles from one port facility to another. Because we find that the movement was not minor, we need not consider the fact that Naval Station, Norfolk, Virginia and Norfolk Naval Shipyard, Portsmouth, Virginia may be located in the same harbor. To hold otherwise would allow Sailors to miss major changes in the positions of their vessel simply because of the great size of a particular harbor. In other words, because we believe that the 8.3 nautical mile change in location is not minor, we view the fact that Naval Station, Norfolk, Virginia and Norfolk Naval Shipyard, Portsmouth, Virginia are located in the same harbor as coincidental.

The appellant reads the President's example as a logical syllogism, *to wit,* if the ship's movement occurs in the same harbor, then the ship's movement must be a minor change in location. The President's example, however, cannot serve as a legal syllogism because it can be proven false by example. This error is easily demonstrated by assuming that the harbor was, say, 1,000 miles across and that the USS HARRY S. TRUMAN traveled 1,000 miles during the movement from one naval base to another. Under these circumstances it is obvious that the 1,000 mile movement is substantial, and it cannot be therefore be concluded that a 1,000 mile change of location was a minor change in location.

We also reject the appellant's interpretation of *Quezada* to require a ship to cross the breakwater and reach the open sea before a Sailor may be convicted of missing movement. Appellant's Brief at 4. It is clear from our superior court's decision in that case that whether or not the ship crossed the breakwater was merely a factor for the court to consider in making a decision as to whether or not a movement was substantial for the purposes of Article 87.

Having considering the evidence in the light most favorable to the prosecution, we find that a reasonable factfinder could have found the essential elements of Charge II beyond a reasonable doubt. Additionally, after weighing the evidence in the record of trial and making the necessary allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. We therefore find the evidence legally and factually sufficient to support the appellant's conviction for this offense.

Conclusion

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

Senior Judge WAGNER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court