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

BEFORE

CHARLES Wm. DORMAN **W.L. RITTER** **M.J. SUSZAN**

UNITED STATES

v.

Mario A. MARTINEZGARCIA
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200101589 Decided 11 January 2005

Sentence adjudged 27 July 2000. Military Judge: S.A. Folsum. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

LCDR R.D. EVANS, JR., JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried before a general court-martial composed of officer members. Contrary to his pleas, the members convicted the appellant of conspiracy to import marijuana, making a false official statement, wrongfully possessing 99 pounds of marijuana with the intent to distribute it, and wrongfully importing 99 pounds of marijuana into the customs territory of the United States. These offenses violated Articles 81, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to pay grade E-1. As a matter of clemency, the convening authority suspended confinement in excess of 3 years.

This case is before the court upon automatic review under Article 66(b), UCMJ. The appellant has assigned eight errors for

our consideration, and the Government has responded. We will only address Assignments of Error IV and V. Our resolution of Assignment of Error IV, concerning legal and factual sufficiency of the evidence, either moots the remaining assigned errors, or we find no merit in them. Following our review and corrective action, we find that there are no remaining errors that are materially prejudicial to substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

This is a companion case with Lance Corporal Barraza-Martinez, hereinafter LCpl B, the appellant's alleged co-conspirator. The Government's case against the appellant was built primarily upon the testimony of three witnesses, Special Agents (SA) Gossett and Rozman from the Naval Criminal Investigative Service (NCIS), and SA Meadows of the U.S. Customs Service. LCpl B was also called as a witness by the prosecution.

In early February 2000, LCpl B met with a friend of his cousin's in Los Angeles, CA. The friend, who went by the nickname of "Beto," asked LCpl B if he would be willing to drive a vehicle containing drugs across the US-Mexican border for $1500.00. LCpl B agreed. On 11 February 2000, Beto contacted LCpl B to have him drive the vehicle that night. As LCpl B and Beto were driving towards Tijuana, Mexico, Beto told LCpl B that it would be better if he had someone to ride along with him as he was coming back into the United States. Using a cell phone, LCpl B called the appellant and asked if he would ride along with him to Tijuana. The appellant agreed and LCpl B and Beto picked him up at his barracks at Marine Corps Air Station (MCAS), Miramar, CA. The three proceeded to drive down to Tijuana, but they did not discuss the drug transaction along the way. Once they arrived in Tijuana, the appellant and LCpl B were let out in a market area, where they got something to eat, and where they bought a bottle of tequila. After they ate, Beto was waiting for them with a Volkswagen pickup truck. Beto told LCpl B that the keys were in the truck. He also told LCpl B to drive the truck to a Wendy's restaurant near MCAS, Miramar, where Beto would meet him.

LCpl B and the appellant got into the truck and started towards the border. As they neared the border LCpl B became nervous, and when they were within a few car lengths of the customs inspectors, he told the appellant that if the inspectors asked, the appellant should say they had visited LCpl B's grandmother at his aunt's house in Tijuana. LCpl B also told the appellant that he was going to pay him $250.00 when they got back. When the customs inspector approached the vehicle, he asked LCpl B what he was bringing back from Tijuana. He asked this question several times. When he did not receive a convincing response, the customs inspector directed the vehicle to a secondary inspection lot. At that lot a drug detection dog alerted on the vehicle, and a more detailed inspection was

conducted. Subsequently, inspectors found 99 pounds of marijuana hidden in the side panels of the bed of the pickup truck. The side panels were removed to reveal the drugs. The marijuana was wrapped in an attempt to throw off drug detection dogs. No marijuana was found in the passenger compartment of the pickup truck.

LCpl B testified under a grant of immunity as a Government witness. He testified that when initially interviewed by the three special agents he denied knowledge of the marijuana. He eventually provided information consistent with the facts set out in the two paragraphs above. He testified that the appellant had no knowledge of his plans to smuggle marijuana and that when interviewed on 12 February 2000 he told the investigators that the appellant had no knowledge. That testimony is consistent with the recollection of two of the three interrogators who questioned him during the early morning hours of 12 February 2000. LCpl B also testified that as he approached the border he told the appellant that he was going to pay him $250.00. He testified that this money was in payment of money he owed the appellant.

Upon finding the marijuana in the Volkswagen, SA Meadows became the lead agent. Since the suspects were active duty Marines, he contacted the NCIS and, prior to any interviews being conducted, SA Gossett and SA Rozman met him at the San Ysidro Border Station. Collectively, the three agents decided to interview the appellant first to see if he could provide information about LCpl B. During that interview the appellant told them the "story" that LCpl B had told him to relate if he was asked -- telling them that they had gone to see LCpl B's grandmother at LCpl B's aunt's house. Since the story was false, the appellant could not provide specific details of where they had gone. The agents then questioned LCpl B, who also began the interview with the story he had told the appellant to tell. Upon further questioning, he admitted his involvement in smuggling the marijuana across the border. He denied that the appellant knew about the marijuana, but he did tell the agents that he had told the appellant to lie about what they had been doing in Tijuana, and that he had told the appellant that he was going to pay him $250.00 when they got back. After this interview was completed, SA Meadows ceased participation in the investigation.

SA Gossett and SA Rozman then reinterrogated the appellant. During this second interview, the appellant admitted that he had not been truthful during the first interview, concerning where he and LCpl B had gone in Tijuana. He admitted that he had lied by telling the story that LCpl B had suggested to him. He then told them essentially the same story that LCpl B had told them about why he had gone down to Tijuana and allowed the agents to listen to the voice mail message LCpl B had left for him as LCpl B and Beto were driving towards Tijuana. The appellant denied any knowledge of the marijuana or of the plan to smuggle marijuana.

The testimonies of LCpl B and the three Special Agents are generally consistent, except for one portion of Special Agent Meadows' testimony. According to him, near the end of LCpl B's interrogation, LCpl B admitted that the appellant knew about the marijuana. Both SA Gossett and SA Rozman were present during the entire interview, and they did not hear this admission. LCpl B testified he did not state that during the interview. Although SA Meadows prepared case notes concerning the interview, nowhere in SA Meadow's case notes is there any indication that LCpl B made such an admission. Following the interview, SA Meadows conferred with SA Gossett, but Gossett did not recall Meadows mentioning this admission -- an admission that Meadows acknowledged was the "crux of the case." Record at 366. No written statements were taken from either the appellant or LCpl B, nor were they given the opportunity to review the agents' notes of the interviews.

In the defense case-in-chief, the appellant presented a good military character defense. The appellant called three witnesses, a warrant officer, a gunnery sergeant, and a staff sergeant in support of his good character defense. The warrant officer testified that the appellant was very responsible in comparison to other Marines of his rank, and that his military character was excellent to outstanding. She also testified that the appellant was somewhat naïve, and would be willing to help a friend simply because he was asked to help.

Sufficiency of Evidence

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from 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); *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we.

The appellant has challenged the legal and factual sufficiency of the evidence against him with respect to the offenses of conspiracy to import marijuana, possession of

marijuana with the intent to distribute it, and the importation of marijuana. Appellant's Brief of 12 Sep 2003 at 14-17. In applying the above standards, we find that while the evidence concerning these three charges is legally sufficient, it is factually insufficient.

While not required to do so, we will briefly state some of the reasons why the Government failed to meet its burden of proof in this case. In order to convict the appellant of the offense of conspiracy, the Government was required to prove that, on 11 February 2000, the appellant entered into an agreement with LCpl B to commit the offense of the wrongful importation of marijuana and that while the agreement continued they imported marijuana. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed), Part IV, ¶ 5b. In order to convict the appellant of the offense of wrongful importation or wrongful possession with the intent to distribute marijuana, the Government was required to prove that, on 11 February 2000, the appellant imported the marijuana or possessed it with the intent to distribute it, and that the importation or possession was wrongful. MCM, Part IV, ¶ 37b. Further, one cannot be guilty of these offenses absent knowledge of the presence of a controlled substance. *Id*., Part IV, ¶ 5c(5).

In this case the only real issue is whether the Government met its burden to prove that the appellant had knowledge of the presence of the marijuana that was secreted in the side panels of the Volkswagen pickup truck. In attempting to prove this element the Government relied on the testimony of Special Agent Meadows, as well as a theory of deliberate avoidance of the fact that there was marijuana in the truck. We are not convinced of this element. First, there is no direct evidence that the appellant was aware that marijuana was contained in the Volkswagen pickup truck. Second, we find the testimony of LCpl B concerning whether the appellant had knowledge of the marijuana to be credible, particularly because he testified under a grant of immunity and understood that were he to lie at the appellant's trial he risked losing the benefit of his favorable pretrial agreement. Third, the similarities between what the appellant and LCpl B told the agents they did while they were in Tijuana, after they both admitted they had not visited LCpl B's grandmother, lends credence to the appellant's contention that he did not know about the marijuana. Fourth, we do not find the testimony of SA Meadows concerning LCpl B's admission that the appellant knew about the marijuana to be credible. Fifth, the failure of the three Special Agents to either take statements from the appellant and LCpl B, or to record their interviews, resulted in differences in their testimonies concerning critical evidentiary issues, and those differences significantly weaken the weight given to their testimonies. Sixth, we are not convinced that the evidence sufficiently raised the inference that the appellant was "'subjectively aware of the high probability of the existence of the illegal conduct.'" *United States v. Brown*, 50 M.J. 262, 266 (C.A.A.F. 1999)(quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990)).

Finally, the quality of the appellant's evidence of good military character was significant given his rank and relatively brief length of service.

Accordingly, we are left with a reasonable doubt of the appellant's guilt to the charged offenses of conspiracy, importation of marijuana, and possession of marijuana with the intent to distribute. We will take corrective action in our decretal paragraph.

False Official Statement

The appellant asserts that he should not have been convicted of making a false official statement because of an error in the language contained in the Specification under the Additional Charge. Appellant's Brief at 17. Although the appellant is correct in asserting that there is no evidence that the U.S. Customs Service employed Special Agent Gossett, he is mistaken in his belief that that error somehow was prejudicial. Under MCM, Part IV, ¶ 31b, the name of the individual to whom a false official statement is given is not an element of the charged offense of making a false official statement. The evidence is both legally and factually sufficient to support the appellant's conviction of having made a false official statement. However, to ensure the pleadings match the proof, we will do that which the members should have done when announcing their findings by taking corrective action in our decretal paragraph.

Conclusion

Findings.

The findings of guilty to Charges I and II and all specifications thereunder are set aside and ordered dismissed. The findings of guilty to the Additional Charge and its Specification are affirmed, excepting the language, "United States Customs Service." The excepted language is ordered dismissed.

Sentence.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (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).

Upon reassessment of the sentence, we have taken into consideration that but for the original charges, the additional charge which we have affirmed would not likely have been referred to trial before a general court-martial, and it is highly unlikely that it would have been referred to a special court-martial. We have also weighed heavily the fact that the

appellant has now served the entire 3-year sentence to confinement as approved by the convening authority.

We are particularly troubled by the length of time it took for this case to be presented to us for decision. This is one of those rare cases where the appellant requested expedited review by the convening authority. This was a contested case at trial, a case in which the Government's evidence was woefully inadequate, and one in which the Government administered a polygraph to the appellant post-trial. The Government also attempted to obtain the appellant's testimony against LCpl B by offering to reduce the appellant's sentence by one year if he would testify at a vacation hearing, that LCpl B had committed perjury during the appellant's court-martial. Not only did appellant refuse the deal, but he also passed the NCIS-administered polygraph exam concerning the issue of whether he had knowledge of the marijuana. *See* Request for Clemency, letter of Detailed Defense Counsel of 7 Nov 2000. Since the convening authority considered these unrebutted matters at the time he took action in this case, it is also appropriate that we consider them with respect to the question of "What sentence should be approved?" For all of these reasons we approve a sentence of **NO PUNISHMENT**. His general court-martial conviction is punishment enough. A supplemental court-martial order shall be issued consistent with this decision.

Senior Judge RITTER and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court