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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Harvie L. SMITH
Chief Warrant Officer 2 (W-2), U.S. Marine Corps

NMCCA 200201307 Decided 29 September 2005

Sentence adjudged 15 November 2001. Military Judge: C.H. Wesely. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

JOSEPH W. KASTL, Civilian Appellate Defense Counsel
LT COLIN A. KISOR, JAGC, USNR, Appellate Defense Counsel
Capt PETER GRIESCH, USMC, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

WAGNER, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of failure to obey a lawful order, false official statement, assault consummated by battery, adultery, and two specifications of obstruction of justice, in violation of Articles 90, 107, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 907, 928, and 934. Officer members sentenced the appellant to a dismissal. The convening authority approved the sentence as adjudged. The pretrial agreement had no effect on the sentence.

The appellant submitted four assignments of error[1]. After considering the record of trial, the assignments of error, and

[1] I. THE SENTENCE OF DISMISSAL FOR THIS RETIREMENT-ELIGIBLE WARRANT OFFICER IS TOO HARSH.

II. THE ARTICLE 107 VIOLATION MUST BE REVERSED -- APPELLANT'S CONDUCT WAS NOT "OFFICIAL."
III. PRIOR ARGUMENTS BETWEEN APPELLANT AND HIS SPOUSE SHOULD NOT HAVE COME

the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicing the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant, a warrant officer, was married to another Marine warrant officer. He admitted during the providence inquiry into his pleas of guilty that he had carried on an extramarital sexual affair with an enlisted Marine in her barracks room and in the Bachelor Enlisted Quarters. When the affair came to the attention of his wife, the appellant assaulted her during the ensuing argument, violently pushing her to the floor and holding her down. The appellant's son called 911, reported that his father was hitting his mother, and hung up the telephone. When the 911 operator called back to the appellant's residence, the appellant told her that the call was made in reference to some children throwing rocks at his house. His intent was to mislead the operator and prevent authorities from being dispatched to his residence.

In spite of his attempt, law enforcement was dispatched and the appellant was removed from the home and given a Military Protective Order (MPO) to remain away from his residence and his wife. That order was later revoked. The appellant then drafted letters to the authorities for his wife's signature essentially retracting her complaints against the appellant. The appellant also communicated with his paramour asking that she lie to investigators regarding the adultery investigation. When the appellant's attempts to obstruct justice were discovered, a second MPO was issued. The appellant immediately violated that MPO by going to his residence and spending the night there with his wife.

Providence of Guilty Plea

The appellant claims that the military judge erred in accepting his plea of guilty to the sole specification under Charge III, false official statement. Post-trial speculation as to whether the appellant's statement was official is barred by his plea of guilty, where he admitted that the operator was acting in the course of her official duties in calling back to the residence and that he had a duty to respond truthfully to her questions. *See United States v. Knight,* 52 M.J. 47, 49 (C.A.A.F. 1999)(citing *United States v. Harrison*, 26 M.J. 474, 476 (C.M.A. 1988)). We, like our superior court, do not countenance post-trial speculation about factual issues after the Government, in

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INTO EVIDENCE; THIS WAS FATAL ERROR.

IV. THE ORDER TO "STAY AWAY FROM YOUR WIFE" WAS NOT A LEGITIMATE AND LAWFUL ORDER.

good faith, has forgone its opportunity to present evidence to the trier of fact in favor of a guilty plea voluntarily offered by the appellant. *United States v. Grimm*, 51 M.J. 254, 257 (C.A.A.F. 1999).

Prior Bad Acts

The appellant claims that the military judge erred by allowing the trial counsel to cross-examine the appellant's wife as to a prior assault she suffered at the hands of the appellant. We review the military judge's decision for an abuse of discretion. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

Testifying as a defense witness, the appellant's wife stated that she and the appellant had "never faced this kind of a problem before" and that they were "on good terms" when "we came here," presumably meaning their present duty station. Record at 343. The clear implication of her testimony was to suggest to the members that there was no prior history of marital issues similar to those giving rise to the charged offenses. The trial counsel, over objection, questioned the appellant's wife about a previous assault she suffered at the appellant's hands.

Ordinarily, evidence of prior bad acts is not admissible to prove the character of a person and that he or she acted in conformity with that character in committing the charged offenses. MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Such evidence may be admissible, however, to rebut a statement of fact to the contrary. *See generally*, *United States v. Hallum,* 31 M.J. 254 (C.M.A. 1990). The military judge, after performing the requisite balancing test from Uni*ted States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), properly allowed the testimony regarding the prior assault.

Even assuming the evidence was improperly admitted, which we do not, there is no prejudice evident in the record of these proceedings from such an erroneous admission. *See United States v. Saferit*e, 59 M.J. 270 (C.A.A.F. 2004).

Sentence Appropriateness

The appellant claims that a sentence to a dismissal from the service is disproportionate to the offenses in light of his years of service and evidence of good military character. We disagree.

The appellant pled guilty to assaulting his wife, also a Marine officer, violating a lawful order to remain away from his wife and to have no contact with her, a false official statement to an emergency operator in an effort to hide his assault from those outside his household, adultery with an enlisted Marine, and two specifications of obstruction of justice where he attempted to have his wife and paramour lie on his behalf. Given

the seriousness and extent of the offenses described by the evidence, including the appellant's own statements to investigators and during providence inquiry, the charges of which the appellant was convicted accurately and fairly reflect his criminal conduct. After reviewing the entire record, we find that the sentence is appropriate for this offender and his offenses. *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).

Lawfulness of the "No Contact" Order

The appellant and his wife, the two subjects of the order in question, were both Marine officers. The order barring contact between them is clearly within the authority of their superiors under the circumstances of this case, involving assault consummated by a battery, adultery with an enlisted Marine, and obstructing justice. This allegation of error is without merit.

Conclusion

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

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court