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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Matthew EDWARDS
Airman (E-3), U.S. Navy

NMCCA 200201826 Decided 19 January 2005

Sentence adjudged 12 December 2001. Military Judge: T.K. Leak. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Chief of Naval Education and Training, Pensacola, FL.

LT ROBERT E. SALYER, JAGC, USNR, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HEALEY, Judge:

A general court-martial composed of officer members, convicted the appellant, following the entry of mixed pleas, of one specification of attempt to commit a conspiracy, two specifications of conspiracy, distribution of ecstasy, use of ecstasy, and possession of ecstasy, in violation of Articles 80, 81, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, and 912a. The sentence consisted of confinement for 6 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved only so much of the sentence as provides for confinement for 6 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge.

We have carefully considered the record of trial, the five assignments of error,[1] and the Government's response. Following

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I. The military judge abused his discretion when he denied the appellant's motion to suppress his confession as the product of coercion in that the NCIS special agent in this case made unlawful promises to the appellant, inducing him to confess against his will.

our corrective action, we conclude that the findings and the 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.

Motion to Suppress

The appellant asserts that the military judge abused his discretion when he denied the appellant's motion to suppress his confession. The appellant avers that his confession was the product of coercion in that the Naval Criminal Investigative Service (NCIS) special agent in his case made unlawful promises, thereby inducing him to confess against his will. We disagree. Notably, the appellant does not attack the military judge's application of the law.

The military judge's ruling in denying the appellant's motion to suppress his confession at trial is reviewed by this court for abuse of discretion. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004)(citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000)). In conducting our review, the court reviews factfinding by the trial judge under a clearly erroneous standard. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). Additionally, when reviewing a military judge's ruling on a motion to suppress, we consider the evidence "in the light most favorable to" the prevailing party. *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)(citations omitted).

In this case, the appellant asserts the special agent conducting his interview told him if he did not cooperate he would go to a court-martial but that if he did cooperate the most he would get is a Captain's Mast. At trial, the court heard evidence on this motion from the special agent who took the appellant's statement, the appellant, and several other suspects who were interviewed by the same special agent. The special agent testified and denied he made any promises or that he had any authority to determine disposition. Several witnesses who were interviewed by the same agent believe that the agent inferred to them that he could have an impact on the ultimate disposition of their cases. The appellant asserts a reasonable

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II. The evidence is factually and legally insufficient to support a finding of guilt to the lesser included offense of attempted conspiracy to distribute ecstasy, Charge I, Specification 2.

III. The military judge abused his discretion when he denied the appellant's motion for a mistrial because the statement of Airman Recruit Madden should not have been admitted as evidence and its admission denied the appellant a fair trial.

IV. The staff judge advocate's recommendation fails to mention companion cases.

V. It was plain error for the trial counsel to argue that sending a message to the civilian public was a legitimate basis upon which to mete out punishment.

factfinder could only conclude that the special agent lied during his testimony, and as such, the military judge's ruling was clearly erroneous.

The appellant testified that he signed and acknowledged his Article 31(b), UCMJ, rights, and that he did not ask for an attorney. Although the appellant believes the special agent made assertions to him concerning disposition of charges, he also testified that he read, corrected, and understood his rights waiver and the statement that he signed. During the case-in-chief, at least one other suspect interviewed by the same agent, stated the agent made no promises. The military judge made findings of fact, to include: (1) that the special agent made general statements of potential consequences of cooperating or not cooperating in the investigation; and (2) that there was no unlawful inducement by the special agent in the defendant's confession. Record at 103. Thus, we find, the evidence, as a whole, establishes the appellant's statement was voluntary. The appellant has not shown the military judge's findings were clearly erroneous. Thus, we conclude that the military judge did not abuse his discretion in denying the appellant's motion to suppress his pretrial statement.

Sufficiency of the Evidence

In his second assignment of error the appellant avers that the evidence is factually and legally insufficient to support a finding of guilt to the lesser included offense of attempted conspiracy to distribute ecstasy, Charge I, Specification 2. We concur in part, and also address the sufficiency of the evidence supporting Charge II, Specification 3.

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (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 that all the essential elements were proven beyond a reasonable doubt. *United States. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary *de novo* power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

As to Specification 2 of Charge I, the only evidence that Private First Class (PFC) Vaughan participated in an attempted conspiracy comes from Lance Corporal (LCpl) Green, another of the alleged conspirators. We agree with the appellant's brief that LCpl Green's testimony on the exchange of phone numbers in the furtherance of the agreement is both, "confused and confusing." Appellant's Brief of 30 Apr 2004 at 7. We conclude that the evidence is factually and legally deficient as it pertains to the PFC Vaughan. We will take corrective action in our decretal paragraph.

As to Specification 3 of Charge I, the only evidence of Airman Recruit (AR) Jones' involvement in the conspiracy to purchase and use ecstasy is the indeterminate references in AR Madden's testimony. AR Madden was asked, "Okay, and was there anyone else that wanted pills at that time?" Record at 330. His response was, "Yes, Airman Smith -- Jack Smith, and I believe he was getting one for Casey Jones, but I wasn't clearly sure about that." *Id.* In a follow-up question, AR Madden was asked, "Was Jones involved in this at all--Airman Apprentice Casey Jones involved in this at all--in this transaction?" *Id.* at 332. To which he responded, "Maybe with Edwards not with me; he didn't give me any money." *Id.* We conclude that the evidence of AR Jones' participation in this conspiracy is factually and legally insufficient.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit.

In Specification 2 of Charge I, the words, "Lance Corporal Green gave Airman Matthew Edwards' telephone number to Private First Class Vaughan for the purpose of Airman Matthew Edwards discussing and purchasing for further distribution 3,4-methylenedioxymethamphetamine (ecstasy), a Schedule One controlled substance," are excepted and dismissed. In Specification 3 of Charge I, the words, "and Airman Recruit Casey A. Jones, U.S. Navy," and, "and Airman Recruit Casey A. Jones," are excepted and dismissed. With those modifications, the findings are affirmed.

Having set aside a portion of the language in two of the specifications under Charge I, we must reassess the sentence. Upon reassessment of the sentence, in light of dismissal of language concerning coconspirators, but affirming the specifications as excepted, we find that the sentence received by the appellant would not have been any lighter even if he had not been charged with the involvement of the additional conspirators. We further find that the sentence is appropriate for this offender and the remaining offenses. *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); *Unites States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). We, therefore, affirm the approved sentence.

We direct that the supplemental court-martial order indicate that the appellant was found not guilty of the excepted language in Specifications 2 and 3 of Charge I.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court