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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **J.D. HARTY**

UNITED STATES

v.

Jason S. BERTRAND
Corporal (E-4), U.S. Marine Corps

NMCCA 200100503 Decided 13 May 2004

Sentence adjudged 20 November 1998. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, U.S. Marine Corps Forces, Atlantic, MCAS, Cherry Point, NC.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel

HARTY, Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial before a military judge alone of conspiracy to obstruct justice, wrongful use of marijuana, and soliciting false testimony, in violation of Articles 81, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The adjudged sentence includes a bad-conduct discharge, 10 months confinement, reduction to pay grade E-1, and forfeiture of $600.00 pay per month for 10 months. The convening authority approved the sentence and, except for the bad-conduct discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's two assignments of error, and the Government's response. We find merit in the appellant’s second assignment of error and will take action later in our opinion. Otherwise, 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.

Unlawful Command Influence

The appellant's first assignment of error alleges that the military judge erred by finding the appellant failed to sustain his initial burden of raising unlawful command influence as an issue, and further by denying the appellant's motion to dismiss. We disagree.

The appellant filed a pretrial motion to dismiss for unlawful command influence, claiming actual and apparent command influence. Appellate Exhibit II. Specifically, the appellant alleged that the trial counsel (TC) engaged in the intentional harassment of potential defense witnesses, Mrs. H and Mrs. J, and had the commanding officer of Headquarters and Support Battalion write a letter to Mrs. H, a government-employee, implying employment retaliation if she testified for the appellant. Mrs. J was to be a defense witness on the merits and Mrs. H was to be a defense character witness. The motion to dismiss was fully litigated prior to trial, and the military judge issued narrative findings of fact and conclusions of law on the record. Record at 20-109.

In his findings of fact, the military judge found in part that:

1. Mrs. J provided a sworn statement for the appellant to use at nonjudicial punishment stating that she had served him spaghetti cooked with marijuana without his knowledge.
2. The TC contacted Mrs. J in response to the appellant's request for production of Mrs. J as a defense witness on the merits. Mrs. J retracted her earlier sworn statement after being interviewed by the TC.
3. Mrs. H[1] is a civilian employee who works at Morale, Welfare and Recreation (MWR), Parris Island, SC.
4. The TC questioned Mrs. H on several occasions. The TC accused Mrs. H of lying to him about the appellant's case.
5. The TC requested information from Mrs. T at MWR but she hesitated to provide information based on employee privacy concerns.
6. The Commanding Officer (CO), Headquarters and Service Battalion (H&S BN), Marine Corps Recruit Depot, Parris Island, SC, at TC's request, wrote a letter to Mrs. T and Mrs. H demanding complete cooperation with military authorities and informed them that failure to comply would be a failure to comply with their employment contracts.[2]

[1] Mrs. H is occasionally referred to as Mrs. S in the record – Mrs. S is her maiden name.

[2] This letter directed the witness' cooperation in a different court-martial that was being prosecuted by the same TC and that involved Mrs. T and Mrs. H. Appellate Exhibit II at 15.

7. Mrs. H was willing and remained willing to be a good character witness for the appellant.

Record at 106-07. The military judge concluded that:

> In this case, the court finds that the accused has not alleged sufficient facts which, if true, constitutes (sic) unlawful command influence nor has he shown that the proceedings are unfair. The defense, therefore, has not made a colorable showing of unlawful command influence. By the clear and convincing standard, the government has disproved the existence of unlawful command influence and has proved that the trial counsel's interviews with [the defense witnesses] did not affect the proceedings. Trial counsel's interviews with the witnesses did not interfere with [the appellant's] access to witnesses nor did it discourage the witnesses from testifying.
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> . . . .
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> . . . I also find beyond a reasonable doubt that unlawful command influence do (sic) not prejudice these proceedings.

Id. at 108. Mrs. J testified as a Government witness at trial on the merits, *Id*. at 176-213; Mrs. H did not testify at trial, except with respect to the motion to dismiss.

Unlawful command influence can take the form of statements or actions by a convening authority (CA) or senior authority in the chain of command that tend to have a chilling effect on potential defense witnesses, whether on the merits or for sentencing. *United States v. Gleason*, 43 M.J. 69, 73-75 (C.A.A.F. 1995); *United States v. Thomas*, 22 M.J. 388, 393, 396-97 (C.M.A. 1986). Generally, unlawful command influence takes place in one of two forms: actual or apparent. *United States v. Allen,* 31 M.J. 572, 589-90 (N.M.C.M.R. 1990); *United States v. Cruz,* 20 M.J. 873, 882-83 (A.C.M.R. 1985), *rev'd on other grounds,* 25 M.J. 326 (C.M.A. 1987); *cf*. *United States v. Johnson,* 34 C.M.R. 328, 331 (C.M.A. 1964). "The test for actual unlawful command influence is, figuratively speaking, 'whether the [CA] has been brought into the deliberation room.'" *Allen,* 31 M.J. at 589-90 (quoting *United States v. Grady,* 15 M.J. 275 (C.M.A. 1982)). The test for apparent unlawful command influence is "whether a reasonable member of the public, if aware of all of the facts, would have a loss of confidence in the military justice system and believe it to be unfair." *Id.* at 590.

Procedurally, the appellant bears the burden of raising the issue of unlawful command influence. *United States v. Stombaugh,* 40 M.J. 208, 213 (C.M.A. 1994). "To raise the issue, the defense must: (1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3)

show that unlawful command influence was the cause of the unfairness." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999)(citing *Stombaugh*, 40 M.J. at 213). The appellant's three-pronged burden is conjunctive, that is he must establish each prong. Once the issue of unlawful command influence is raised, the Government must prove beyond a reasonable doubt: (1) that the predicate facts do not exist; or (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence will not prejudice the proceedings or did not affect the findings and sentence. *Biagase*, 50 M.J. at 151. The Government's burden is disjunctive, that is it must only establish one of the three conditions beyond a reasonable doubt. *See United States v. Gore*, 58 M.J. 776, 786 (N.M.Ct.Crim.App. 2003), s*tay granted*, *United States v. Gore,* 59 M.J. 47 (C.A.A.F. 2003), *rev. granted*, *United States v. Gore*, 59 M.J. 205 (C.A.A.F. 2003).

We find that the military judge correctly concluded that the defense failed to present sufficient evidence to raise the issue of unlawful command influence. The heart of the appellant's motion was that Mrs. H had been deterred from testifying on his behalf as a result of TC harassment and a letter from the CO of H&S Battalion. Mrs. H testified that she was harassed and abused by the TC and interpreted the H&S BN letter as threatening her employment if she testified for the appellant. Mrs. H, however, stated that despite these deterrents she was still willing to testify truthfully on the appellant's behalf and would not avoid service of process. Record at 46-47. Although the appellant believed Mrs. J was going to testify on his behalf, she in fact testified against the appellant on the merits. Record at 176-213. The military judge told Mrs. H there would not be any employment retaliation for her testimony, *Id*. at 80-82, and the base commanding general's chief of staff sent her a letter stating the same. *Id*. at 41; Appellate Exhibit V. The military judge further ordered the Government to produce all witnesses requested by the defense and "strongly recommended" the chief of staff's letter be published base-wide to explain to all that if called as a defense witness it is their duty to testify. Record at 108. Even if the burden had shifted to the Government, we find beyond a reasonable doubt that the facts did not constitute actual or apparent unlawful command influence, and even if such unlawful command influence existed, that it would not and did not prejudice the proceedings.

Sufficiency of Evidence

For his second assignment of error, the appellant alleges the military judge erred by finding the appellant guilty of conspiracy to obstruct justice. Specifically, the appellant alleges the evidence shows there was no meeting of the minds between the appellant and Mrs. J as to her providing untruthful testimony at his court-martial, and, therefore, under a bilateral theory of conspiracy, the military judge should have excepted

that portion of the Additional Charge, sole specification, language. We agree.

The Specification under Additional Charge I, alleges the appellant conspired with Mrs. J to obstruct justice by having Mrs. J provide a false statement to the appellant for his use at nonjudicial punishment (NJP) in order to avoid a wrongful use of marijuana charge. The same specification alleges the appellant conspired with Mrs. J to obstruct justice by planning to have her testify falsely at the appellant's court-martial for the same offense. Charge Sheet. The military judge found the appellant guilty of the Additional Charge and sole supporting specification without excepting the language concerning false court-martial testimony. Record at 340.

The test for legal sufficiency 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 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. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

Before we may affirm the appellant's conviction of Additional Charge I we must be convinced beyond a reasonable doubt of each of the elements involved in that offense. One of these elements is that "the accused entered into **an agreement with one or more persons** to commit an offense under the code." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 5b (emphasis added).

Mrs. J testified that in June 1998, she agreed to assist the appellant by signing a statement claiming she served him food laced with marijuana without telling him about the controlled substance. That statement was for use at the appellant's NJP, and Mrs. J believed that her role would not be required beyond that point. She further testified that in August 1998, the appellant asked her to testify at his court-martial consistent with the earlier written statement. Mrs. J told the appellant she would stick to the story, but never intended to go along with the appellant's request. She never told the appellant of her true intent.[3] Record at 205-06, 211-13. It is clear that the

[3] The appellant submitted a Request for Production of Defense Witness on 3 August 1998 requesting the Government to produce Mrs. J who would testify that

appellant believed there was a meeting of the minds with respect to Mrs. J providing false testimony at his court-martial. The appellant, however, is the only person who believed that, because Mrs. J had no intention of testifying falsely. Stated another way, there was no meeting of the minds, and therefore, no agreement.

Our superior court has rejected the unilateral theory of conspiracy that would allow a conspiracy conviction if an accused believed there was an agreement with another to commit an offense when there was no such agreement. *See United States v. Valigura*, 54 M.J. 187, 189-90 (C.A.A.F. 2000). Under the bilateral theory of conspiracy, there must be an actual meeting of the minds between two or more people. *United States v. Jiles*, 51 M.J. 583, 586 (N.M.Ct.Crim.App. 1999). We have applied the standards of review set out above to this issue and are convinced beyond a reasonable doubt that the evidence is legally and factually insufficient to prove the appellant conspired with Mrs. J to obstruct justice by providing false testimony at his court-martial.

We approve the finding of guilty to Additional Charge I and the sole specification thereunder as follows:

> Guilty, excepting the words "divers occasions"; excepting the word and numbers "3 August 1998" and substituting the word and numbers "30 June 1998"; and excepting the words and symbols "; and in that Corporal Jason S. Bertrand did conspire with Mrs. [J] to have her falsely testify at a court-martial in the case of United States v. Corporal Jason S. Bertrand, that, 'she fed him marijuana without his knowledge', or words to that effect" and "; and that the accused requested and informed Mrs. [J] that she appear as a defense witness to testify under oath, falsely and contrary to the truth, at the said court-martial". Of the excepted words and symbols Not Guilty, of the specification as excepted and substituted, Guilty, and of Additional Charge I, Guilty.

Conclusion

We conclude that the findings, as modified by this decision, are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ. Accordingly, the findings, as modified, are affirmed.

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, 438 (C.A.A.F. 1998), *United*

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in May 1998 she cooked spaghetti seasoned with marijuana and served it to the appellant without telling him about the marijuana.

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). Based on the nature and circumstances of the appellant's remaining offenses and his character, we affirm the sentence approved by the convening authority. We direct that the supplemental court-martial order reflect the findings as modified above.

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court