

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

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Andres LOPEZ
Lance Corporal (E-3), U. S. Marine Corps**

NMCCA 200600963

Decided 20 March 2007

Sentence adjudged 25 January 2006. Military Judge: M.B. Richardson. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Blue Diamond, Al Ramadi, Iraq.

Lt Col RICHARD R. POSEY, USMC, Appellate Defense Counsel
CDR TED YAMADA, JAGC, USN, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
Capt GEOFFREY SHOWS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of aggravated assault and loitering on post as a sentinel, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The appellant was sentenced to confinement for two years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 18 months pursuant to the terms of a pretrial agreement.

The appellant raises three assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). First, he asserts that his plea to aggravated assault was improvident because he did not share the shooter's intent and did not aid and abet the other Marine in the commission of the offense. Second, the appellant avers that his sentence was inappropriately severe considering all he did was videotape another Marine firing his weapon. Finally, the appellant argues that his pleas to both

charges were improvident because he felt he had no choice but to plead guilty when informed of the maximum punishment that could be imposed and because he merely acquiesced to the questions asked by the military judge.

We have examined the record of trial, the assignments of error, and 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 rifleman with Golf Company, 2d Battalion, 6th Marines, Regimental Combat Team-8, 2d Marine Division stationed at Camp Baharia, Iraq, between 23 November and 15 December 2005. As part of his duties, he would periodically stand watch as a sentinel on "post 1" overlooking the primary highway between Camp Fallujah and Baghdad. During all relevant times, the appellant stood watch with Lance Corporal (LCpl) Fausto Lockhart. While posted as a sentinel, the appellant's duties included vigilance and maintaining observation of those activities occurring near his post in order to prevent anti-coalition activities such as the emplacement of improvised explosive devices and/or hostile direct/indirect fire. Record at 23-24.

The appellant acknowledged during the providence inquiry that, on at least one occasion between 23 November and 15 December 2005, he and LCpl Lockhart would play music through speakers connected to an illicit CD player and dance around their post. He also acknowledged that on one occasion, LCpl Lockhart videotaped the appellant as the latter shot at a soft drink can set up nearby. *Id.* at 24-27.

At one point, LCpl Lockhart suggested that the appellant videotape him discharging his weapon at some Iraqi civilians visible from their post. According to the appellant, LCpl Lockhart wanted to send the videotape home for his friends or family to see. The appellant agreed and proceeded to videotape LCpl Lockhart discharging his weapon as they'd agreed. The M16A4 round impacted approximately 5-10 feet from the Iraqi civilians. The civilians scattered and departed in a car. The appellant agreed during the providence inquiry that his videotaping of the illegal weapon discharge aided and abetted LCpl Lockhart's plan to make the video to send home. He further opined that LCpl Lockhart would not have fired the round if the appellant had declined to videotape the event. *Id.* at 35-36.

Improvident Pleas

The appellant's first and third assignments of error assert that his pleas before the court were improvident. A military judge's decision to accept or reject an accused's guilty plea is

reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996); *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). An abuse of discretion is more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000). We will find a military judge abused his discretion in accepting a guilty plea only if the record shows a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). Rejecting a guilty plea must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

The appellant first asserts that he did not share LCpl Lockhart's intent to fire the weapon at the unarmed and non-threatening civilians nearby his post. We disagree. As reflected in Article 77, UCMJ, a person is deemed to share in a perpetrator's criminal design if he knows the perpetrator's intent and having a duty to interfere in the commission of the offense, fails to do so. As a duly posted sentinel, the appellant had a duty to ensure both he and the other sentinel maintained vigilance and observation of those activities occurring near his post. Further, the appellant's videotaping of the incident clearly aided and abetted the criminal action insofar as it served as an incentive and encouragement to LCpl Lockhart to commit the offense.

The appellant also argues that his pleas were improvident because he only pled guilty because he feared the imposition of the maximum punishment of ten-years confinement and because he merely acquiesced to the military judge's questions. These arguments are also without merit. The fact that the appellant faced the imposition of ten-years confinement was a function of his own misconduct and did not reflect an improper threat or inducement by the Government. The appellant correctly realized the gravity of his situation and chose a course of action which he hoped would minimize his punishment. Insofar as the appellant's plea agreement required the convening authority to suspend all confinement in excess of 18 months, it appears the appellant's choice to plead guilty was a wise one.

Further, having reviewed the entire record of trial, we do not find that the appellant merely acquiesced to the military judge's questions. The appellant filled in numerous details at various points during the providence inquiry such that we are satisfied that he articulated a factual basis for each element of each offense and that he truly believed he was guilty of the two charges. We find no substantial basis in law or fact to question the appellant's pleas of guilty. We find, therefore, that the military judge did not abuse his discretion.

Sentence Severity

The appellant argues that a dishonorable discharge, two years confinement, reduction to pay grade E-1, and forfeiture of all pay and allowances is inappropriately severe considering that he only videotaped another Marine firing his weapon. We have considered the appellant's record and the fact that he did not personally fire the weapon. We have also considered the seriousness of the offenses the appellant helped facilitate.

A Marine standing post as a sentinel in a combat zone has an awesome life or death responsibility both to his fellow Marines, who rely on his vigilance and focused attention to duty to keep them safe from terrorist attacks, and to the local citizens, who must rely for their very lives on the sentinel's solid judgment and cool-headed professionalism. Intentionally encouraging another Marine's childish and unbelievably dangerous scheme to shoot close enough to nearby unoffending local civilians to scare them for no purpose other than to videotape their terror and flight is a particularly reprehensible offense. It is an abdication of the basic core values of honor and integrity to which the American military generally and the United States Marine Corps specifically are trusted to adhere. Such conduct strikes directly at the trust and confidence needed to maintain unit cohesion, morale, and combat effectiveness.

The maximum punishment authorized for these offenses is confinement for ten years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *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).

Conclusion

The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court