

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
D.E. O'TOOLE, J.A. MAKSYM, V.S. COUCH  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**REX S. SHELEY  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800396  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 21 February 2008.

**Military Judge:** LtCol David Oliver, USMC.

**Convening Authority:** Commanding Officer, Marine Air  
Control Squadron 4, Marine Air Control Group 18, 1st Marine  
Aircraft Wing, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol D.S. Jump,  
USMC.

**For Appellant:** Col Dwight Sullivan, USMCR; Maj C.  
Broadston, USMC.

**For Appellee:** Maj Elizabeth Harvey, USMC.

**30 October 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

MAKSYM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of failure to obey a lawful general order and of three specifications of aggravated sexual assault upon a child older than twelve, but younger than sixteen years of age, in violation of Articles 92 and 120 of the Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 920. The appellant was sentenced to a bad-conduct discharge, confinement for eight months, and reduction to pay grade E-1. The pretrial agreement had no effect

on the sentence. The convening authority approved the sentence as adjudged.

We have examined the record of trial, the appellant's two assignments of error, and the Government's response. While not brought to our attention by the parties, we find that specification one of Charge I does not constitute a lawful general order as authored, and cannot be affirmed as a lesser included offense of a violation of an other lawful order based upon the record before us. Accordingly, we will take corrective action in our decretal paragraph. We otherwise find the appellant's assigned errors without merit.<sup>1</sup> Following our corrective action, we find that the amended findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **Mistake of Fact**

In his initial assignment of error, the appellant asserts that the military judge should have inquired into the existence of a potential mistake of fact defense when conducting the providence inquiry associated with Specification two of Charge I. We disagree. A military judge need not inquire into the defense of mistake of fact when no issue of fact in dispute exists before him. *See generally United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995). In the case at bar, the appellant executed a stipulation of fact. Prosecution Exhibit 1. Paragraph 11 of this stipulation of fact concedes that "LCpl Sheley possessed alcoholic beverages in his barracks room on or about 26 October 2007 including, Corona, Budweiser, and Bartles and James strawberry daiquiri malt cooler." PE 1 at 2. The military judge had the stipulation of fact before him when he conducted his inquiry with appellant and could properly rely upon it in reaching his determination that the pleas were provident.<sup>2</sup>

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<sup>1</sup> The appellant advances two assignments of error for our review:

- I. DID THE MILITARY JUDGE ERR BY FAILING TO INQUIRE INTO A POTENTIAL MISTAKE OF FACT DEFENSE TO A PORTION OF THE SPECIFICATION ALLEGING VIOLATION OF A GENERAL ORDER BY POSSESSING ALCOHOLIC BEVERAGES IN A BARRACKS ROOM WHEN THE ACCUSED STATED THAT HE "THOUGHT" ONE OF THE TWO BOTTLES CONTAINING ALCOHOL IN HIS BARRACKS ROOM CONTAINED "A NONALCOHOLIC BEVERAGE?"
- II. IS A SENTENCE THAT INCLUDES AN UNSUSPENDED BAD-CONDUCT DISCHARGE INAPPROPRIATELY SEVERE FOR A 19-YEAR-OLD ACCUSED WHO ENGAGES IN CONSENSUAL NON-INTERCOURSE SEXUAL ACTS WITH A 14-YEAR-OLD AND WHO VIOLATES TWO GENERAL ORDERS BY POSSESSING ALCOHOL WHILE UNDERAGE AND HAVING A FEMALE NONMILITARY GUEST IN THE BARRACKS?

<sup>2</sup> *See United States v. Sawinski*, 16 M.J. 808, 811 (N.M.C.M.R. 1983)(upholding the legitimate use of a stipulation of fact as part of the providence colloquy); *see United States v. Sweet*, 38 M.J. 583, 590 (N.M.C.M.R. 1993)(en banc)(holding that essential facts may be established virtually exclusively

## Lawful General Order

Specification one of Charge I alleges a violation of a lawful general order, to wit: Marine Corps Bases Japan Order P11000.2B (Bachelor Housing Management), Appendix B, dated 13 October 1999. This order is executed by the deputy chief of staff for Marine Corps Bases Japan. It is not signed by direction and does not purport to place the signatory in an "acting" capacity for his principal. Article 92, UCMJ, outlines those officials who are capable of issuing lawful general orders. They include the President, the Secretary of Defense, the Secretary of the Navy, an officer having general court-martial jurisdiction, a general or flag officer in command, a commander superior to either an officer having general court martial jurisdiction or a flag officer in command. The deputy chief of staff to Commander Marine Corps Bases Japan is not a general officer, nor does he exercise general court martial jurisdiction, and thus does not fit into any of the categories listed under Article 92. Based on this fact, the elements of Article 92 are not met, and the appellant's conviction for this offense must be set aside.

## Sentence Appropriateness

In his second assignment of error, the appellant asserts that his sentence is inappropriately severe. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

Interestingly, the appellant refers to his myriad convictions of aggravated sexual assault upon a minor as "consensual non-intercourse sexual acts." This court need not remind the parties of the legal axiom that sexual assault upon a child can never be consensual. Notwithstanding our action in setting aside one of the appellant's convictions for violation of a lawful general order, we conclude the adjudged sentence was appropriate for this offender and his offenses.

Having determined that appellant's sentence was appropriate, we nonetheless conduct a sentence reassessment in view of our action on findings. We reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 42

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from the stipulation without questioning the accused about its specific contents); see also *United States v. Wimberly*, 42 C.M.R. 242 (C.M.A. 1970); *United States v. Davis*, 48 C.M.R. 892 (N.C.M.R. 1974); *United States v. Sweisford*, 49 C.M.R. 796 (A.C.M.R. 1975)

(C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *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); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We are satisfied beyond a reasonable doubt that, in the absence of the additional conviction for violation of a lawful general order, which we have set aside, the military judge would have adjudged a sentence no less than that approved by the convening authority in this case. Therefore, we decline to grant relief on this issue.

### **Conclusion**

Accordingly, we set aside the appellant's conviction under specification one of Charge I. The findings, as amended, and the approved sentence are affirmed.

Chief Judge O'TOOLE and Senior Judge COUCH concur.

For the Court

R.H. TROIDL  
Clerk of Court