

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NATHAN M. WEEKLEY
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200700802
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 27 April 2007.

Military Judge: Maj Brian Kasprzyk, USMC.

Convening Authority: Commanding Officer, 1st Battalion, 1st Marines, 1st Marine Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col P.J. Uetz, Jr., USMC.

For Appellant: CDR Evelio Rubiella, JAGC, USN.

For Appellee: LCDR G.J. Rojas, JAGC, USN; LT J.E. Dunlap, JAGC, USN.

8 May 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, consistent with his pleas, of using ecstasy and of two violations of a federal immigration statute¹ which in pertinent parts criminalizes: (1) the knowing transportation of unauthorized aliens across the United States

¹ 8 U.S.C. § 1324(a)(2)(B)(iii), prohibits knowingly transporting unauthorized aliens across the United States border and 8 U.S.C. § 1324(a)(1)(A)(ii) prohibits knowingly transporting unauthorized aliens within the United States with the intent to facilitate the aliens' illegal presence in the United States. The two statutory provisions were charged under the Federal Assimilative Crimes Act (clause three of Article 134).

border and (2) the knowing transportation of unauthorized aliens within the United States, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 180 days, forfeiture of \$500.00 pay per month for a period of six months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

In the appellant's sole assignment of error, he asserts that his pleas to the specifications under Charge II (cross-border transport and domestic transport of illegal aliens) were improvident in that the appellant set up a matter inconsistent with guilt during the providence inquiry which the military judge failed to address. We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the appellant's assignment of error is partially meritorious. We will take appropriate action in our decretal paragraph. Following our action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Background²

On 31 January 2007, the appellant left his command on normal overnight liberty and drove himself and another Marine to the San Ysidro border crossing into Mexico. He parked on the American side and the two Marines walked through the border checkpoint and took a taxi into Tijuana, Mexico. After wandering through several clubs and having a couple beers, the appellant testified that his companion suggested that they make some extra money by transporting aliens from Mexico into the United States. The appellant agreed with the plan and his companion contacted an unnamed Mexican national.

The Mexican national loaded the two Marines into a car and drove them to another location. The Mexican national told the two Marines that they would be transporting several Mexicans in the trunk of a car across the border at Otay Mesa. The appellant and his friend were to be paid several hundred dollars and were given a cell phone through which they would be told which lane to get into at the border crossing. The two Marines got in the car provided by the Mexican national and drove to the Otay Mesa border crossing. The appellant was in the passenger seat and the other Marine was driving. They were instructed via cell phone which lane to enter.

An American border agent met the appellant's vehicle at a "pre-primary inspection area" located between the United States border and the primary inspection booth. Record at 78. At the agent's request, the two Marines displayed their military

² The background information was drawn from the appellant's testimony during his providence inquiry and from relevant testimony.

identification cards. At the agent's further direction, the driver popped the trunk revealing the hidden aliens. The agent closed the trunk and instructed the two Marines to turn off the vehicle and hand over the keys.

The appellant testified that he told the driver to follow the agent's directions and turn off the car's engine. Instead, the other Marine accelerated through and away from the checkpoint at a high rate of speed. Several miles inside the United States, the driver pulled off onto a dirt road and, losing control of the car, drove into a ditch. The driver popped the trunk and instructed the aliens and the appellant to run for it. Contrary to this suggestion, the appellant walked back down the dirt road. He didn't meet any law enforcement personnel nor did he indicate that he was seeking them. Ultimately, he ended up at a gas station where he called a taxi. The appellant had himself taken to his car on the American side of the San Ysidro border crossing. The appellant did not turn himself into law enforcement authorities but rather drove back to his command.

Improvident Pleas

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). 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).

If the appellant's statements or other evidence offered on his behalf appear inconsistent with his initial guilty plea, the military judge is obliged to conduct a thorough inquiry to determine the appellant's position regarding the apparent inconsistency. *United States v. Parker*, 10 M.J. 849, 851 (N.C.M.R. 1981). The military judge is not, however, required to "embark on a mindless fishing expedition to ferret out or negate all possible defenses or potential inconsistencies." *United States v. Jackson*, 23 M.J. 650, 652 (N.M.C.M.R. 1986). A "mere possibility" of a conflict is insufficient to render a providence inquiry inadequate. *United States v. Sanders*, 33 M.J. 1026, 1028 (N.M.C.M.R. 1991).

Specification 1 of Charge II (Transporting Aliens Into the United States)

The appellant acknowledges that, in return for a promise of several hundred dollars, he agreed to help transport aliens over the border to a location several miles inside the United States.

On appeal, however, the appellant points to his conduct at the border crossing. Specifically, the appellant testified during his providence inquiry that, in response to the border agent's order to turn off the car, he told the driver to comply with the agent's order. This, the appellant argues, potentially constituted his abandonment of the plan to help transport aliens. The appellant states that his testimony was a matter clearly inconsistent with his plea of guilty which the military judge was obliged to resolve.

The first specification under Charge II has five elements. Specifically, the specification requires:

(1) that the appellant brought a person or persons who was or were aliens into the United States and upon arrival, did not immediately bring or present the alien or aliens to an appropriate immigration official at the port of entry;

(2) that the appellant knew or was in reckless disregard of the fact that the person or persons was or were an alien or aliens who had not received prior official authorization to come to, enter, or reside in the United States;

(3) that the appellant acted with the intent to violate the U.S. immigration laws;

(4) that the appellant knew his acts were wrongful; and,

(5) that 8 U.S.C. § 1324(a)(2)(B)(iii) was in existence at the time of his conduct.³

We also note that the appellant was pleading guilty to both specifications under Charge II under an aiding and abetting⁴ theory. Record at 35-36.

Assuming, *arguendo*, that the appellant's admonition to his companion to comply with the border agent's order constituted an effective abandonment⁵ of their joint "criminal purpose" to smuggle illegal aliens into the United States, the appellant

³ 8 U.S.C. § 1324(a)(2)(B)(iii); Record at 31.

⁴ "If one is not a perpetrator, to be guilty of an offense...the person must (i)...assist, encourage, advise, counsel, or command another in the commission of the offense; and (ii) share in the criminal purpose or design." Article 77(b), UCMJ.

⁵ The appellant's subsequent failure to report the incident or to turn himself into law enforcement authorities potentially undercuts the appellant's contention that he had abandoned his plan to smuggle aliens into the United States, but clearly the testimony raised more than a "mere possibility" that such was the case. See *Sanders*, 33 M.J. at 1028.

would, from that point forward, arguably no longer be responsible for his companion's subsequent decision to evade authorities by speeding away from the border checkpoint. His admonition would not, however, impact the appellant's legal responsibility for any offenses committed by either of the men in furtherance of the plan up to that point.

As reflected in the elements above, Specification 1 of Charge II alleged that the appellant "brought a person or persons who was or were aliens into the United States and upon arrival, did not immediately bring or present the alien or aliens to an appropriate immigration official at the port of entry."⁶ Insofar as the appellant and his companion had already crossed the border into the United States when they encountered the border agent and their plan was discovered, the offense charged under Specification 1 was already complete. There is no indication that the border agent's discovery of the aliens in the trunk somehow preempted an intention by the appellant to "present" the aliens to the border authorities. Thus, the appellant's change of heart at the point of discovery in no way limits his legal accountability for unlawful acts committed up to that point. We find, therefore, that the appellant's testimony during his providence inquiry was in no way inconsistent with his plea of guilty to this specification.

**Specification 2 of Charge II
(Transporting Aliens Within the United States)**

The second specification under Charge II has four elements. Specifically, the charged offense requires:

- (1) that some unnamed person was an alien;
- (2) that this unnamed person was not lawfully in the United States;
- (3) that the appellant either knew or was in reckless disregard of the fact that this unnamed alien was not lawfully in the United States; and
- (4) that the appellant knowingly transported or moved, or attempted to transport or move this unnamed alien in order to help him or her remain in the United States illegally.⁷

The appellant does not contest that the aliens concealed in the trunk of his car were not lawfully in the United States and that the appellant was aware of that fact. What he contests is the intent requirement embedded in the fourth element which requires that any movement of the aliens within the United States

⁶ 8 U.S.C. § 1324(a)(2)(B)(iii).

⁷ 8 U.S.C. § 1324(a)(1)(A)(ii)

be done "in order to help [the aliens] remain in the United States illegally."

Taken at face value, the appellant's testimony that he admonished his companion to comply with the border agent's orders suggests that the appellant no longer had any interest in helping the aliens remain in the United States. Whether this was in fact the case is not at issue. It is clear that the appellant's statement during the providence inquiry raised a matter inconsistent with his guilty plea to Specification 2 of Charge II which the military judge was obliged to explore. The military judge's failure to do so rendered the appellant's plea to Specification 2 of Charge II improvident. We will take appropriate action in our decretal paragraph.

Conclusion

The finding of guilty to Specification 2 of Charge II is set aside and Specification 2 is dismissed. The remaining findings of guilty are affirmed. We note that the military judge found Specifications 1 and 2 of Charge II to be multiplicitious for sentencing purposes. Record at 74. In view of this, our modification of the findings does not require us to reassess the sentence adjudged or approved. The approved sentence is affirmed.

Judge KELLY and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court