

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

**Before  
E.E. GEISER, R.G. KELLY, P.D. KOVAC  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**MARCUS W. ZAPP  
AVIATION ORDNANCEMAN AIRMAN (E-3), U.S. NAVY**

**NMCCA 200700844  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 2 July 2007.

**Military Judge:** CAPT Tammy Tideswell, JAGC, USN.

**Convening Authority:** Commanding Officer, USS ABRAHAM LINCOLN (CVN 72).

**Staff Judge Advocate's Recommendation:** LCDR D.D. Flatt, JAGC, USN (19 Feb 2008); LCDR D.C. Peck, JAGC, USN (12 Sep 2007).

**For Appellant:** LT Dillon Ambrose, JAGC, USN.

**For Appellee:** LCDR F.L. Gatto, JAGC, USN; Capt G.S. Shows, 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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

KOVAC, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of unauthorized absence, disrespect toward a superior petty officer, violation of a lawful regulation, false official statement, drunk on duty, distribution of ecstasy, use of marijuana, use of cocaine, provoking words, breaking restriction, and drunk and disorderly conduct, in violation of Articles 86, 91, 92, 107, 112, 112a, 117 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 891, 892, 907, 912, 912a, 917, and 934. The convening authority (CA)

approved the adjudged sentence of a bad-conduct discharge, confinement for nine months, and reduction to pay grade E-1.

The CA initially acted in this case on 29 September 2007. On 16 January 2008, this court set aside the CA's action and remanded the case for new post-trial processing. The CA took his new action on 25 March 2008.

Prior to our remand, the appellant raised three assignments of error. The appellant's first assignment of error, alleging problems with the staff judge advocate's recommendation, was resolved by our remand and new post-trial processing. In his second assignment of error, the appellant asserted that the military judge erred when she found certain specifications unreasonably multiplicitious for sentencing instead of dismissing the specifications outright. Finally, the appellant avers that his plea to Additional Charge V (provoking words) was improvident. When the case was returned to the court following remand, the appellant was provided an opportunity to submit additional assignments of error, but he declined to do so.

We have carefully considered the record of trial, the appellant's two remaining assignments of error, and the briefs submitted by the parties. We agree with the appellant that his plea to Charge V was improvident. 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.<sup>1</sup> Arts. 59(a) and 66(c), UCMJ.

#### **Unreasonable Multiplication of Charges**

In his second assignment of error, the appellant claims that the military judge erred by failing to *dismiss* the charges that she determined were unreasonably multiplicitious for sentencing purposes. We disagree.

The unreasonable multiplication of charges (UMC) issue was initially raised by the appellant during trial in the form of a motion for appropriate relief.<sup>2</sup> Appellate Exhibit VII. As relief, the defense requested dismissal of the unreasonably multiplied charges or, in the alternative, that the charges be

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<sup>1</sup> The appellant's motion for oral argument is denied.

<sup>2</sup> The appellant asserted that the specification and charge alleging unauthorized absence and the charge and specification alleging the breaking of restriction were an unreasonable multiplication of charges. The appellant further asserted that the three specifications alleging disrespectful language under Article 91, UCMJ, and the single specification of provoking words under Article 117 were also an unreasonable multiplication of charges. Finally, the appellant averred that the specification and charge alleging violation of a lawful general order by, *inter alia*, introducing alcohol onto a military ship was unreasonably multiplicitious with the charge and specification alleging drunk and disorderly conduct.

held as multiplicitious for sentencing. AE. VII at 7. Prior to litigating the matter, however, the trial defense counsel (TDC) withdrew this motion; stating on the record that he did not intend to go forward with it. Record at 142. The appellant subsequently pled guilty, *inter alia*, to unauthorized absence and breaking restriction, to one specification of disrespect and provoking words, and to violating a lawful order and drunk and disorderly conduct. He pled and was found not guilty, *inter alia*, of the two additional disrespect charges at issue in the withdrawn motion.

By withdrawing the motion and pleading guilty, the appellant affirmatively waived the UMC issue with respect to findings absent plain error. We find no plain error. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998).

During presentencing, the appellant asserted a slightly different version of the UMC issue in an oral motion. He requested that the relevant charges and specifications be found multiplicitious for sentencing.<sup>3</sup> The military judge granted the motion and consolidated the contested specifications for sentencing purposes.

UMC is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Our superior court has stated that a military judge may abuse his or her discretion if their "decision is influenced by an erroneous view of the law." *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995).

When a military judge *at sentencing* makes a UMC determination, it is acceptable to consolidate the disputed charges, as was done here, and determine a sentence on those charges as consolidated. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006)(citing *United States v. Quiroz*, 55 M.J. 334, 339 (C.A.A.F. 2001)). Dismissal of charges is certainly a "remedy available to the trial court," but not one that was either requested or required in this case. Accordingly, we find that the military judge's determination was clearly within her discretion and within the range of appropriate remedies. This assignment of error is without merit.

### **Provoking Words - Improvident Guilty Plea**

The appellant pled guilty to the specification alleging that he used provoking speech towards security personnel. This specification asserts that the appellant stated: "Bring it on, F\*\*\* all you all bitches . . . I'm from the hood and I'm white.

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<sup>3</sup> The TDC again requested that the military judge find the unauthorized absence and breaking restriction specifications multiplicitious for sentencing. The TDC also asked that the military judge find the specifications alleging disrespectful language, provoking words, and drunk and disorderly as multiplicitious for sentencing. The TDC did not reference the previously cited specification alleging violation of a lawful order. Record at 169.

I will knock that mother f\*\*\*\*\* out." The appellant claims on appeal that his plea was improvident because the military judge failed to ask sufficient questions to establish a factual basis that the words were either "provoking or reproachful." Given the circumstances surrounding their utterance, we agree.

In *United States v. Inabinette*, 66 M.J. 320, 321-22 (C.A.A.F. 2008), the court held that the appellant's responses during a guilty plea inquiry must be sufficient for the military judge to determine whether there is an adequate basis in law and fact to support the plea. We review the military judge's decision under an abuse of discretion standard. *Id.* at 322. "A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea - an area in which we afford significant deference." *Id.* We will only overturn a military judge's determination if we find a substantial basis in law and fact for questioning the guilty plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

"Provoking" words or gestures are those which "a reasonable person would expect to induce a breach of the peace under the circumstances."<sup>4</sup> The cases analyzing provoking speech under Article 117, UCMJ, have produced mixed results depending upon the unique factual circumstances presented in each case. Some of the cases have analyzed the words uttered to a military policeman or security personnel and have considered their specialized training in determining whether such language was actually provoking. See *United States v. Adams*, 49 M.J. 182, 184 (C.A.A.F. 1998); *United States v. Davis*, 37 M.J. 152, 153 (C.M.A. 1993). Courts have also highlighted the following additional factors as being potentially relevant in a provoking speech inquiry: whether the accused was physically confined or otherwise restrained when the language was uttered; whether the language was uttered within the hearing of other people besides the intended recipient(s); whether the accused was involved in any physical altercations prior to uttering the language; and whether the language contained any racial overtones. See *Adams*, 49 M.J. at 182; *Davis*, 37 M.J. at 152; *United States v. Thompson*, 46 C.M.R. 88 (C.M.A. 1972); *United States v. Ybarra*, 57 M.J. 807 (N.M.Ct.Crim.App. 2002); *United States v. Shropshire*, 34 M.J. 757, 758 (A.F.C.M.R. 1992). Provoking speech inquiries are fact intensive, with no one factor being necessarily dispositive. *Adams*, 49 M.J. at 185.

With this background, we now turn to the specific facts of the appellant's case. The appellant asserted on the record that he had no memory of the specific exchange of words. However, he stated that his lawyer had spoken to two of the master-at-arms (MA) personnel against whom the words were directed and that the appellant was satisfied that he said the words and that the words were provoking. Record at 94. When pressed by the military judge to articulate why the words were provoking, the appellant

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<sup>4</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 42c(1)(2005).

responded that "it is perhaps challenging to the person or might make them react, like you said, violently or whatnot, ma'am." *Id.* There is no other discussion of the provoking nature of the words in the record.

There is also no discussion of what specific training the MA victims might or might not have received or who else was in a position to hear the words. We further find no discussion of whether the appellant was physically restrained when the language was uttered or any of the other factors that the courts have deemed significant in a provoking speech inquiry. The focus in this case was simply on whether the words were, in fact, uttered.

In addition to the appellant's blanket and non-specific admission, the record also contains a stipulation of fact. Prosecution Exhibit 2. However, this stipulation did no more than rearticulate the words used by the appellant and otherwise reflect, without supporting facts, the legal conclusions that the words were "provoking and reproachful... [and] wrongful" and were intended to "provoke and/or reproach a breach of peace between himself and security personnel." PE 2 at 5. Accordingly, we agree with the appellant that the record, to include the stipulation of fact, fails to establish a sufficient factual basis to support a plea of guilty to this specification. We find, therefore, a substantial basis in fact to question the plea. We will take appropriate action in our decretal paragraph.

### **Conclusion**

The findings of guilty to Additional Charge V and its specification are set aside. Charge V and its specification are dismissed. The remaining findings of guilty are affirmed. The affirmed charges and specifications reflect distribution of 31 Ecstasy tablets, use of marijuana, use of cocaine, disrespect, unauthorized absence, making a false official statement, breaking restriction, violation of a lawful order, and drunk and disorderly conduct. 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 States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

In view of the remaining charges and specifications and considering evidence properly admitted during the presentencing hearing, we are confident that the minimum sentence for the remaining offenses would have included at least the approved sentence of confinement for nine months, reduction to pay grade E-1 and a bad-conduct discharge. See *United States v. Buber*, 62 M.J. 476, 478-79 (C.A.A.F. 2006); *United States v. Doss*, 57 M.J.

182, 185 (C.A.A.F. 2002). We therefore affirm the approved sentence.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court