

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARK J. KALLA, JR.
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000295
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 3 March 2010.

Military Judge: Maj Robert G. Palmer, USMC.

Convening Authority: Commanding Officer, 6th Marine Corps
District, Marine Corps Recruit District, Parris Island, SC.

Staff Judge Advocate's Recommendation: Col J.J. Lagasca,
USMC.

For Appellant: CAPT Salvador Dominguez, JAGC, USN.

For Appellee: Maj Elizabeth Harvey, USMC.

16 November 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two violations of a lawful general order, two false official statements, and adultery, in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The appellant was sentenced to confinement for seven months, forfeiture of \$964.00 pay per month for seven months, reduction to E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged but, pursuant to a

pretrial agreement, suspended all confinement in excess of four months for the period of confinement served, plus twelve months.

The appellant raises three errors. First, he challenges the evidentiary predicate of the adultery conviction. Second, he alleges judicial error in the military judge's admission and consideration of certain aggravation evidence. Third, he avers that a bad-conduct discharge is inappropriately severe.

We find the assigned errors to be without merit and 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 occurred. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was a Sergeant of Marines assigned to recruiting duty. He twice violated the general order pertaining to his duties as a recruiter by providing alcohol to members of the recruiting pool and by commencing a nonprofessional, adulterous relationship with a young woman who was a prospective recruit applicant. During two ensuing command investigations, he gave false official statements.

Improvident Plea

The appellant first alleges that his conviction for adultery cannot stand, focusing on the state of the providence inquiry on the terminal element.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008); *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)).

We find that the appellant's statements, the stipulation of fact, and the record as a whole support the providence of this plea and establish the terminal element for adultery under both clauses 1 and 2. The young woman in the adultery specification entered this scenario as a prospective recruit applicant, became the subject of a stay-away order to the appellant from his military superiors, then became the subject of two successive command inquiries into the relationship, and apparently became the appellant's second spouse.¹ The appellant's marital status at the time, his unique responsibilities as a recruiter, and the continuous nature of the relationship notwithstanding an order

¹ This case was tried on 3 March 2010. The appellant informs the court that he and the woman appearing in the charges were married on 12 February 2010. Appellant's Brief of 12 Jul 2010 at 6.

for it to cease, combined with its nexus to other violations of the UCMJ, were the subject of two command investigations.

Impacts on good order and discipline and conduct which stand to discredit the service are apparent. The appellant stipulated that he received the stay-away order, "to prevent the appearance or possible appearance of an inappropriate relationship." Prosecution Exhibit 1 at 2. During the providence inquiry the appellant twice gave largely conclusory remarks that his conduct was service discrediting. Pressed by the military judge to explain why, he stated that, in essence, not only was the conduct of a nature to discredit the Marine Corps, as an abstraction, but further submitted the perspective of his now former spouse as someone who would hold the Marine Corps in lesser esteem due to his infidelity, stating, ". . . now she is going to discredit the Marine Corps because they are not doing their job." Record at 59. We further find that the need for the command to conduct two successive investigations, specifically involving a party who, absent this misconduct, may have been recruited into the Marine Corps, was prejudicial to good order and discipline. Lastly, we find no persuasive value in the appellant's assertions that the adulterous relationship with a one-time prospective recruit applicant was discreet, and that family of the young woman somehow approved of the relationship. The fact remains that the relationship did become sufficiently exposed such that the command was compelled to expend efforts to twice investigate and punitively address it.

No substantial basis in fact exists to question this plea or otherwise conclude that the military judge abused his discretion in accepting this plea on these facts. This assignment of error is without merit.

Irrelevant Aggravation Evidence

The appellant next assigns as error the military judge's admission and consideration of certain evidence in aggravation. We begin our analysis by noting that the appellant's pretrial agreement with the CA, under "Specially Negotiated Provisions," paragraph 15e, begins with, "I agree not to object to telephonic testimony of Ms. [AK]" followed by other contemplated evidentiary agreements. The terms in 15e, comprise a single sentence which ends with, ". . . being offered into evidence in sentencing on the basis of hearsay, authenticity, Crawford, foundation, etc." The record informs us that Ms. [AK] was the appellant's spouse at the time the offenses were committed. While this court is not privy to any negotiations or considerations leading to this special provision, we need not be. The record before us provides an open-ended, pre-negotiated term, which clearly signals the Government's intent to offer telephonic testimony of Ms. [AK] in aggravation of the offenses, agreed to by the appellant and his trial defense counsel. Any fair reading of the term would indicate that Ms. [AK] would have her figurative "day in court" and, with the use of the word, "etc." following a listing of

possible objections, an extremely broad agreement by the appellant not to object.

The appellant's brief asserts there was a timely objection by trial defense counsel. Appellant's Brief at 19. Assuming *arguendo* such an objection was not knowingly waived in advance by the terms of the pretrial agreement, we find the objection timely only as to some limited testimony providing minor reinforcement to matters already fully developed prior to the objection being raised. We hold that the military judge, on the facts of this case and state of the record, when called upon to rule on the objection, did not abuse his discretion in considering, as part of sentencing, the financial impacts of the appellant's actions upon Ms. [AK] and the Kalla's two daughters. See generally, *United States V. Taylor*, 64 M.J. 416 (C.A.A.F. 2007). See also RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.).

We are similarly not persuaded by the aspect of the appellant's second assigned error which alleges an abuse of discretion by the military judge in allowing additional evidence regarding social media communications from Ms. [AK]. In three successive questions asked of Ms. [AK] on cross-examination, the trial defense counsel specifically "opened the door" on the content and meaning of those communications. Record at 102-03. We find no error or abuse of discretion in the ruling of the military judge in permitting subsequent questions by the Government on re-direct of Ms. [AK]. See *United States v. Banks*, 36 M.J. 150 (C.M.A. 1992).

Sentence Severity

The appellant's remaining assignment of error avers that his sentence to a bad-conduct discharge was inappropriately severe. We disagree and decline to grant relief.

"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 the 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)).

The appellant's misconduct, as described herein, demonstrates willful conduct to violate orders deemed essential for the conduct of the recruiting mission, then lying about it to investigators, all the while continuing the conduct and engaging in adultery. After reviewing the entire record and acknowledging the significance of the wartime service of the appellant, upon which he was selected for the trust and independence of action inherent in assignment to recruiting duty, we find that the sentence is appropriate for this offender and his offenses.

United States v. Baier, 60 M.J. 382, 384-85 (C.A.A.F. 2005);
Healy, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. Granting
additional sentence relief at this point would be to engage in
clemency, a prerogative reserved for the CA, and we decline to do
so. *Healy*, 26 M.J. at 395-96.

Conclusion

The findings of guilty and the sentence as approved by the
CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court