

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

**Before
J.A. MAKSYM, E.E. GEISER, J.R. PERLAK
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JOHN J. KIM
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000007
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 September 2009.

Military Judge: LtCol Peter S. Rubin, USMC.

Convening Authority: Commanding Officer, 3d Battalion, 5th
Marines, 1st Marine Division, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col B.D. Landrum,
USMC.

For Appellant: LT Ryan Santicola, JAGC, USN.

For Appellee: Capt Robert E. Eckert, Jr., USMC.

30 April 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 specifications of violating a lawful general order, one specification of wrongful distribution of marijuana, one specification of wrongful possession of marijuana, and one specification of larceny of military property, in violation of Articles 92, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, and 921. The approved sentence was

confinement for 10 months, forfeitures of \$933.00 pay per month for 10 months, reduction to E-1, and a bad-conduct discharge.¹

The appellant raises the following error: whether his plea to the offense of violating a lawful general order (Charge I, Specification 1) is improvident because of a lack of proof that Camp Pendleton Base Order P5000.2J was enforceable under Article 92(1), UCMJ.

After considering the record of trial and the submissions by the parties, we find the military judge did not abuse his discretion in accepting any of the appellant's pleas. The findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Abuse of Discretion

We review a military judge's decision to accept a guilty plea for an abuse of discretion. A military judge abuses that discretion when there is a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Background

The facts are not in dispute. The appellant was stopped at an entry control point on board Camp Pendleton and his vehicle was randomly selected for a search. Record at 26. During the search, military police officers discovered, *inter alia*, two feet of detonation cord, which the appellant stole while performing duties as an ammunition technician. *Id.* at 20, 26. The appellant was charged, *inter alia*, with violating Camp Pendleton Base Order P5000.2J which states that, except for official duties, "no person . . . may . . . possess any explosive materials," and further defines the term explosives to include detonating cord. Appellate Exhibit V. The appellant avers that the order is not enforceable under Article 92(1), UCMJ.

Punitive Order

While "[n]o single characteristic of a general order determines whether it applies punitively to members of a command . . . [t]he order in its entirety must demonstrate that . . . it is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident." *United States v. Nardell*, 45 C.M.R. 101, 103 (C.M.A. 1972); *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), App. 23, ¶ 16, at A25-5.

¹ In accordance with the pretrial agreement, the convening authority suspended all confinement in excess of 180 days for a period of 12 months.

In reviewing the record in its entirety and the portions of Camp Pendleton Base Order P5000.2J contained therein, we find that the order is enforceable under Article 92(1), UCMJ. While the appellant asserts that the order does not specifically state that it is punitive in nature, standing alone, that is not dispositive. We note that the order is intended to establish "responsibilities and procedures which govern the conduct of all persons and activities at . . . Camp Pendleton. . . ." AE V at 1. As such, it specifically regulates individual conduct and does not purport to articulate generalized policy. In addition, this regulation's prohibition against possession of various dangerous or contraband items on the base does not require further action or implementation by subordinate commands. *Id.* Finally, we note the directive nature of the language in the regulation, specifically styled as "Prohibited Weapons" which further explains that "[n]o person . . . may . . . possess any explosive materials," the definition of which includes "detonating cord." *Id.* at 3. Taken as a whole, there is no ambiguity as to whom this regulation applies and what it proscribes.

Our decision in *United States v. Fahim*, No. 200600479, 2006 CCA LEXIS 284, unpublished op. (N.M.Ct.Crim.App. 30 Oct 2006), is distinguishable from the current case. In *Fahim*, this court dealt with matters involving a suspended drivers license and lack of proof of insurance, for which administrative sanctions and loss of privileges were prescribed. *Id.* The instant case involves inherently dangerous instrumentalities, specifically explosives, which, per the order in question, individuals are specifically prohibited from possessing aboard the base.

While the inquiry here could have been more complete in discussing the punitive nature of the order, the order on its face is clear in regulating individual conduct on board Camp Pendleton and is self-evidently punitive in nature. Accordingly, we find that the military judge did not abuse his discretion in accepting the appellant's guilty plea and we find no substantial basis in law or fact for questioning the appellant's guilty plea. *Inabinette*, 66 M.J. at 322.

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court