

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

**Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JAMES F. HICKS, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100423
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 6 May 2011.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding Officer, Combat Logistics
Regiment 37, 3d Marine Logistics Group, Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol J.J. Murphy,
USMC.

For Appellant: CAPT Stephen White, JAGC, USN.

For Appellee: Capt David N. Roberts, USMC.

28 December 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of three specifications of violating a lawful general order and one specification of violating a lawful order, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892. The appellant was sentenced to confinement for 180 days, reduction to the pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but,

in accordance with the pretrial agreement, suspended all confinement in excess of 45 days.

The appellant argues that the military judge committed plain error in accepting the appellant's pleas of guilty by exceptions and substitutions to two specifications. He asserts that when his trial defense counsel excepted dates other than those alleged in the specification, it created a fatal variance between the pleading and the proof. We disagree and find that no error materially prejudicial to substantial rights of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged with possession and distribution of spice between 1 February 2009 and 2 July 2010. This misconduct was charged under two different general orders, for two discrete time periods, for a total of four specifications. In Specifications 1 and 2 of the Charge, the appellant was charged with possession and distribution of spice between 1 February 2009 and 30 November 2009, in violation of a Marine Corps Bases Japan order. In Specifications 3 and 4 the appellant was charged with possession and distribution of spice between 1 December 2009 and 2 July 2 2010, in violation of a Marine Corps Forces Pacific order. (Charge Sheet).

At trial, the appellant pled guilty to all four specifications by exceptions and substitutions, pleading guilty to possession and distribution during a shorter three-month period of 1 April 2010 through 1 July 2010. In entering the pleas, however, the defense counsel misstated the dates alleged on the charge sheet for Specifications 3 and 4, entering pleas for both specifications as follows: "Guilty, except for the words '1 February 2009 through 30 November 2009,' substituting therefore the words '1 April 2010 through 1 July 2010.'" Record at 17. The dates alleged on the charge sheet for Specifications 3 and 4 were actually "1 December 2009 through 2 July 2010." No party to the trial corrected defense counsel's error.

During the subsequent providence inquiry, the military judge noted that the appellant was pleading to violating two different orders for the same conduct and questioned counsel; in response, trial counsel ultimately withdrew and dismissed Specifications 1 and 2. The military judge then conducted his providence inquiry into Specifications 3 and 4 based on the substituted dates provided by the appellant's counsel. The

appellant acknowledged possessing and distributing spice on several occasions between 1 April 2010 and 1 July 2010. Record at 43-45. The military judge then entered findings in accordance with the appellant's pleas to Specifications 3 and 4. When he entered those findings, the military judge adopted the defense counsel's earlier error, erroneously excepting the words "1 February 2009 through 30 November 2009," rather than the actual dates charged of "1 December 2009 through 2 July 2010." *Id.* at 85-86.

Contrary to the appellant's assertion on appeal, we find no variance between pleadings and proof. The appellant was inarguably on notice of the dates during which he was alleged to have possessed and distributed spice. Through his counsel, the appellant pled guilty to substituted dates of 1 April 2010 through 1 July 2010 that fell squarely within the dates alleged in the pleading of 1 December 2009 through 2 July 2010. The appellant provided the substituted language as to the shorter period, pled providently to possessing and distributing spice within that period, was found guilty in accordance with his pleas, and was sentenced based upon those provident pleas. The appellant was in no way prejudiced by the misstatement of the charged period by his counsel, or the repetition of that error by the military judge.

Although not raised by the appellant, we note that the court-martial promulgating order is in error regarding Specification 6 of the Charge, in that it reflects a plea and finding of guilty of violation of a lawful general order. In Specification 6, the appellant actually was charged with, pled guilty to, and was convicted of a violation of a lawful order. No prejudice has been alleged and we find none. Nevertheless, service members are entitled to records that correctly reflect the results of court-martial proceedings. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We shall order the necessary corrective action.

The findings and sentence are affirmed. The supplemental court-martial order will reflect that Specification 6 alleged a violation of a lawful order, rather than a lawful general order.

For the Court

R.H. TROIDL
Clerk of Court