

**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.

**RYAN J. WILLIAMS
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100431
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 June 2011.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding Officer, 6th Marine Corps District, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

Staff Judge Advocate's Recommendation: LtCol E.R. Kleis, USMC.

For Appellant: LCDR Shannon Llenza, JAGC, USN.

For Appellee: Capt David Roberts, USMC.

27 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 two specifications of violating a lawful general order, in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. §892. The appellant was sentenced to confinement for five months, reduction to pay grade E-1, forfeiture of \$978.00 pay per month for five months, and a bad-conduct discharge. The convening

authority (CA) approved the sentence but, pursuant to a pretrial agreement, suspended the adjudged forfeitures and confinement in excess of three months, and deferred and waived automatic forfeitures in the amount of \$300.00 per month in favor of the appellant's dependent.¹ On appeal, the appellant challenges Specification 2 under the Charge on the basis that his plea was improvident and that the specification fails to state an offense.

After careful consideration of the record of trial and the pleadings submitted by the parties, we resolve these assignments adversely to the appellant. We conclude that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Background

In July 2009, the appellant made telephonic contact with KP during the normal course of his recruiting duties while KP was still a high school student. After the initial telephone call, KP went to the recruiting office where she met with the appellant to discuss joining the Marine Corps. Thereafter, KP attended a number of physical training exercise sessions, but then decided not to join the Marine Corps.

During their encounters at the recruiting office, the appellant began flirting with KP. The appellant and KP then engaged in text-messaging with each other, and the appellant took KP to the movies, lunch and dinner. Eventually, in September 2009, the appellant and KP had sexual intercourse, which resulted in KP getting pregnant with the appellant's baby. The appellant learned about KP's pregnancy in December 2009, and at first they tried to hide the pregnancy from KP's parents. Ultimately, however, the appellant confessed to KP's parents. During the pregnancy, the appellant used his government recruiting vehicle on five occasions to pick up KP from her home and take her to prenatal doctor appointments at a civilian medical center.

The offenses to which the appellant pleaded guilty at court-martial included a violation of a recruiting order for his

¹ To the extent that the CA's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009). To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it was a legal nullity. *United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

unlawful romantic relationship with KP, a "prospective recruit applicant," and a violation of the joint ethics regulation for wrongfully using the government vehicle to take KP to her prenatal doctor's appointments. The appellant now challenges the specification that charged the ethics violation on the basis that it does not specify the particular section of the Joint Ethics Regulation (JER) he violated. Further, he challenges the providency of his plea on the basis that he acted in his official capacity as a recruiter in taking KP, a prospective recruit, to a doctor for medical care. We disagree with both assertions.

Failure to State an Offense

The question of whether a specification states an offense is a question of law, which this Court reviews *de novo*. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). The standard for determining whether a specification states an offense is "whether the specification alleges 'every element' of [the offense] 'either expressly or by necessary implication, so as to give the accused notice and protect him against double jeopardy.'" *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (quoting RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1984). Failure to object does not waive the issue of a specification's legal sufficiency. R.C.M. 905(e). If, however, a specification has not been challenged prior to findings and sentence, the sufficiency of the specification may be sustained on appeal "'if the necessary facts appear in any form or by fair construction can be found within the terms of the specification.'" *Crafter*, 64 M.J. at 211 (quoting *United States v. Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)).

The elements of Specification 2 of the Charge under Article 92, are:

- (1) That there was in existence a certain lawful general order or regulation;
- (2) That the accused had a duty to obey it; and
- (3) That the accused violated or failed to obey the order or regulation.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2008 ed.), Part IV, ¶ 16b(1).

Here, the Government charged the appellant with a general orders violation in that he "did, at or near Baton Rouge, Louisiana, between on or about 1 September 2009 to

on or about 31 October 2010, violate a lawful general order, to wit: paragraph 2-301, Joint Ethics Regulation 5500.7-R, dated 29 November 2007, by wrongfully using a government vehicle for unauthorized purposes.² Based upon the facts of this case, we find that the specification is legally sufficient to allege conduct in violation of Article 92, UCMJ.

First, the specification contains each required element. It identifies the general regulation violated, states that the appellant violated his duty under that general regulation, and identifies the particular misconduct he committed.

Second, the specification provides the appellant with notice of the offense charged through: (1) the Article of the Code violated; (2) the time frame of the offense; (3) the location of the offense; and, (4) the conduct alleged to have been committed by the appellant.

Third, the specification alleges sufficient facts, and the record as a whole provides a sufficient factual basis, for the appellant to use in a claim of double jeopardy if he is later prosecuted for the same offense. Charge Sheet; see *Dear*, 40 M.J. at 197 (holding "the defendant may turn to the entire record of trial in raising double-jeopardy protection") (citing *United States v. Williams*, 21 M.J. 330, 332 (C.M.A. 1986)).

The appellant argues, however, that the particular section under paragraph 2-301 of the JER is not identified in the specification, and, therefore, without further amplification, it fails to state an offense. Appellant's Brief of 13 Oct 2011 at 5. Additionally, the appellant argues that the military judge's listing of elements of the offense and the definitions during the providence inquiry failed to cure the defect in the specification. *Id.* at 5-6.

We note that when listing the elements of the offenses to the appellant, the military judge initially read from Paragraph 2-301(a), which addresses the proper use of government communications systems. Record at 24. However, the military judge then referred the appellant to paragraph 2-301(b), when he stated, "Federal government resources, including personnel, equipment, and property, shall be used by DoD employees for official uses only." *Id.* at 25; Appellate Exhibit VI at 7. In fact, the appellant admitted to the military judge that he had

² Charge Sheet.

seen the regulation at issue, Appellate Exhibit VI, and in particular, page 28, subparagraph (b) of Section 2-301. Record at 25. The record of trial reveals that the appellant demonstrated no confusion to the military judge as to which section was applicable to his misconduct.³ Not only did the appellant display his understanding to the military judge as to which section of paragraph 2-301 was applicable to him, we note that the specification at issue clearly and precisely informs the appellant that his alleged misconduct was "wrongfully using a government vehicle for unauthorized purposes." The charged misconduct clearly falls within the scope of 2-301 of the JER. In reviewing this phrase, set forth within the terms of the specification, we find that the specification as alleged to be sufficient. *Crafter*, 64 M.J. at 211.

Having satisfied all three prongs of the test enunciated in *Dear*, we conclude that Specification 2 under the Charge states an offense under Article 92, UCMJ. Accordingly, we decline to grant relief.

Providence of the Appellant's Plea

The appellant next avers that the military judge erred in accepting his plea of guilty to violating the recruiting order. He alleges that there was an insufficient factual basis for his plea since KP was a prospective recruit and he was acting in his official capacity when he drove her to prenatal medical appointments, and he alleges that the paragraph 2-301 of the JER does not address the use of government vehicles. Appellant's Brief at 8.

A military judge's decision to accept or reject a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). Once a military judge has accepted a guilty plea and entered findings of guilty, we will not set them aside unless we find a substantial basis in law or fact for questioning the plea. *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009) (citing *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)); see Art. 45(a), UCMJ. If, at any time during the plea, an accused sets up a matter that is inconsistent with his pleas, the military judge must resolve the alleged inconsistency. *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006).

³ Of further importance to us is the stipulation of fact, which states, in relevant part, "The accused believes and admits that he had a duty to obey this regulation, specifically section 2-301, *paragraph (b)*. Prosecution Exhibit 1 at 3. *Emphasis added*.

To rise to the level of inconsistency contemplated by Article 45(a), matters raised at trial must have been patently inconsistent with the plea in some respect. *United States v. Roane*, 43 M.J. 93, 98 (C.A.A.F. 1995). In determining on appeal whether there is a substantial inconsistency, we consider the "full context" of the appellant's plea inquiry, the stipulation of fact, as well as the inferences drawn from them. *United States v. Craig*, 67 M.J. 742, 744 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010).

We find no substantial basis in either law or fact to question the appellant's guilty plea in this case. *Schweitzer*, 68 M.J. at 137. The record sufficiently shows that the appellant utilized the recruiting office's government vehicle in an unauthorized manner by driving KP, a prospective recruit whom he had gotten pregnant, from her home to her doctor's appointments on numerous occasions. The appellant admitted under oath that these appointments were regularly scheduled situations related to KP's pregnancy, and not emergent or life-threatening situations. He acknowledged during the providence inquiry as well as in the stipulation of fact that he was not authorized to use the government vehicle for this unofficial purpose. Nothing in the record indicates the appellant was acting in his official recruiting capacity when he took KP to these appointments. Further, in reviewing Paragraph 2-301 of the JER, we do not agree with the appellant's narrow reading that it "does not address the violation of wrongfully using a government vehicle. Paragraph 2-301(b) titled, "Other Federal Government Resources" states, "Federal Government resources, including personnel, equipment and property, shall be used by DoD employees for official purposes" Certainly, government vehicles are included within the definition of government resources.

Conclusion

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

For the Court

R.H. TROIDL
Clerk of Court