

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

**Before
J.A. MAKSYM, L.T. BOOKER, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JEROME FLEMING
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201000439
GENERAL COURT-MARTIAL**

Sentence Adjudged: 11 May 2010.

Military Judge: Maj Robert Palmer, USMC.

Convening Authority: Commanding General, Marine Corps
Recruit Depot/Eastern Recruiting Region, Parris Island, SC.

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

For Appellant: LCDR Matthew Schelp, JAGC, USN.

For Appellee: Maj William Kirby, USMC.

14 July 2011

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 general court-martial convicted the appellant, pursuant to his pleas, of failure to obey a lawful general order, committing indecent acts, and obstruction of justice, in violation of Articles 92, 120, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 920, and 934. The military judge sentenced the appellant to confinement for 36 months, reduction in pay grade to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority approved the adjudged sentence, but suspended confinement in excess of 18 months.

In his sole assignment of error, the appellant asserts that his plea to Charge IV, obstruction of justice, was improvident. Having carefully reviewed the record of trial and the pleadings of the parties, we find the assigned error 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, then serving as a drill instructor at Parris Island, South Carolina, supervised recruits through basic training. One night, after lights out, he informed a recruit that the urine specimen he had submitted for urinalysis testing was inconclusive and that the recruit needed to provide another sample and, in addition, a semen sample. The appellant told the recruit that his provision of both samples must be observed and that observation could be accomplished by the appellant personally, or that the recruit could videotape himself providing the samples. The recruit digitally recorded himself providing the samples using the appellant's cell phone and returned the cell phone to the appellant. The appellant viewed and then deleted the videos from his cell phone shortly thereafter.

Obstruction of Justice

The appellant was charged with obstructing justice by destroying the video recording of the recruit urinating stored on his cell phone. The appellant asserts that his plea to Charge IV was improvident because he was merely concealing his misconduct without the requisite intent to obstruct justice. He argues that deletion of the videos shortly after receiving them and prior to any report of his misconduct to the authorities, and his "mere realization" that the misconduct, if reported, might result in investigation and potential prosecution was insufficient to satisfy the elements of the offense. Appellant's Brief of 4 Oct 2010 at 7-9. We disagree.

The military judge is charged with determining whether there is an adequate basis in law and fact to support a plea of guilty. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo*. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The determination whether the destruction of evidence is obstruction of justice, requires "'case-by-case [consideration of] the facts and circumstances surrounding the alleged obstruction and the time of its occurrence with respect to the administration of justice.'" *United States v. Lennette*, 41 M.J.

488, 490 (C.A.A.F. 1995) (quoting *United States v Finsel*, 36 M.J. 441, 443 (C.M.A. 1993)).

The two elements of obstructing justice in issue are (1) "That the [appellant destroyed evidence of his misconduct] . . . [with] *reason to believe there were or would be criminal proceedings pending*;" and (2) "That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice" *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶ 96b (emphasis added).

During the plea inquiry the appellant acknowledged that if "the the information on the cell phone had got out, I knew it could potentially spark a criminal investigation[]," and that based upon his experience with recruits "they are more than likely going to tell someone." Record at 56-57. In response to the military judge's question "Did you think [that someone was going to find out] was a strong possibility or were you just trying to cover up your criminal misconduct?" the appellant responded "A little bit of both[.]" *Id.* at 56. The appellant made several additional admissions that he believed that his misconduct would be reported and that a criminal investigation would ensue. *Id.* at 57, 61, 62. Moreover, a stipulation of fact, signed by the appellant, also reflected he deleted the videos with the intent of avoiding criminal accountability for his actions and that the appellant knew he was likely to become the subject of a criminal investigation. Prosecution Exhibit 1 at 3.

We find the appellant's plea of guilty to obstructing justice voluntary and knowing and after review of the entire record, including the pleadings of the parties, conclude that there is no substantial basis in law or fact to question that plea. *Inabinette*, 66 M.J. at 322.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court