

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

**Before
J.K. CARBERRY, L.T. BOOKER, G.G. GERDING
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL D. FRANSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100256
GENERAL COURT-MARTIAL**

Sentence Adjudged: 8 February 2011.

Military Judge: LtCol David M. Jones, USMC.

Convening Authority: Commanding General, 3d Marine
Logistics Group, Okinawa, Japan.

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

For Appellant: Capt Michael Berry, USMC.

For Appellee: Maj Paul M. Ervasti, USMC.

16 August 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 general court-martial convicted the appellant, pursuant to his pleas, of attempted conspiracy to commit assault and of wrongfully possessing child pornography, respectively violations of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The convening authority approved the adjudged sentence of confinement for 18 months, reduction to pay grade E-1, and a bad-conduct discharge from the United States Marine Corps.

The appellant now asserts that his plea to the attempted conspiracy was improvident because his putative conspirator was a

cooperating witness with a law enforcement agency. Finding no error, we affirm the findings and the adjudged sentence. Arts. 59(a) and 66(c), UCMJ.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. We will reject an accepted guilty plea if there is a substantial basis in law or in fact for doing so. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The appellant argues that he cannot be guilty of a conspiracy to assault because his conspirator was a cooperating witness with a state law enforcement agency concerned with narcotics trafficking. We need not, and do not, decide whether it is impossible for an informant (as opposed to a sworn officer) assisting a law enforcement agency with an investigation into a particular kind of misconduct to share the requisite intent to commit other, unrelated, misconduct, as arguably is the case here. We note particularly that the "Sears Rule," cited frequently by United States Courts of Appeals, involved persons engaged in illegal distillery operations cooperating with the Internal Revenue Service to ferret out other persons engaged in illegal distillery operations, and the cases applying the "Sears Rule" are usually, if not exclusively, considering conspiracy cases where the informant's "warrant" matches the target offense. *See Sears v. United States*, 343 F.2d 139, 142 (5th Cir. 1965) (requiring that juries be instructed that informants do not share the criminal intent to commit offenses); *see also United States v. Escobar de Bright*, 742 F.2d 1196, 1200 (9th Cir. 1984) (drug smuggling); *United States v. Chase*, 372 F.2d 453 (4th Cir. 1967) (illegal gambling). *Accord United States v. Valigura*, 54 M.J. 187, 189 n.2 (C.A.A.F. 2000) (citing Court of Appeals decisions). *Cf. United States v. Tombrello*, 666 F.2d 485, 490 n.3 (11th Cir. 1982) (conspiracy will not exist between defendant and undercover FBI agent). Those cases stand in distinction to the one before us, as there is no clear linkage between the narcotics trafficking studied by the cooperating witness and "assault for hire."

As we say, however, we need not decide that particular issue because here the appellant pleaded guilty to an attempt to conspire. Military jurisprudence recognizes attempted conspiracy as an offense under the UCMJ. *See United States v. Riddle*, 44 M.J. 282, 285 (C.A.A.F. 1996). *See also United States v. Lawrence*, 47 M.J. 75 (C.A.A.F. 1997) (summary disposition where putative conspirator was law enforcement agent). The appellant therefore cannot point to a substantial basis in law for us to set aside his guilty plea. The record amply demonstrates the appellant's criminal design to hire another person to harm his wife's ex-husband; therefore there is no substantial basis in fact for us to set aside the guilty plea.

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court