

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

**Before
L.T. BOOKER, J.K. CARBERRY, M.A. FLYNN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**PATRICK S. KIMBELL
AVIATION ELECTRICIAN'S MATE SECOND CLASS (E-5), U.S. NAVY**

**NMCCA 201000348
GENERAL COURT-MARTIAL**

Sentence Adjudged: 8 February 2010.

Military Judge: CDR Tierney Carlos, JAGC, USN.

Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

Staff Judge Advocate's Recommendation: Capt B. Howell, JAGC, USN; **Addendum:** CDR F.D. Hutchison, JAGC, USN.

For Appellant: Charles D. Swift, Esq; Capt Peter Griesch, USMCR.

For Appellee: Maj William Kirby, USMC; Capt Mark Balfantz, USMC.

22 February 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RUE 18.2, NMCCA RULES OF PRACTICES AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

FLYNN, Judge:

On 8 February 2010, a military judge sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempted indecent language to a child under the age of 16 years, of violating 18 U.S.C. § 2422(b) by attempting to induce a person he believed to be under the age of 18 years to engage in sexual acts, and of violating 18 U.S.C. § 1470 by attempting to transfer obscene matter over the internet to a child under the age of 16, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. The military judge sentenced

the appellant to confinement for 10 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. The pretrial agreement in this case had no effect on the sentence adjudged.

The appellant raises one assignment of error: that the military judge erred by accepting the appellant's plea to Charge II, Specification 1, because he voluntarily abandoned his plan to have intercourse with "Sarah." After carefully considering the record of trial and the parties' pleadings, we conclude that the findings and the sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

The record reflects that the appellant engaged in sexually explicit conversations over the internet in a Yahoo! Messenger chat room with an individual he believed was a 13-year-old girl named Sarah. In reality, "Sarah" was a Naval Criminal Investigative Service Special Agent. The on-line conversations took place over the course of two days and comprise approximately fourteen pages of typed messages between the appellant, using the screen name "virtigoguy," and "Sarah," using the screen name "naveebrat13." The appellant asked "naveebrat13" about sex and whether she had been with an older man sexually. He asked for a photo of "naveebrat13" and sent her a picture of himself exposing his penis and masturbating and also sent her a link to a website with adult pornographic videos to assist her in learning how to masturbate. He also asked repeatedly whether she was willing to meet with him, asked if she wanted him inside of her, and assured her that he would be gentle with her to ease her concerns. At various points, the appellant expressed concern that it was dangerous for him to be talking with her online because he couldn't be sure she was who she said she was and that he didn't want to get caught in a "sting operation." Still, they continued to exchange messages and discussed possible meeting places. On 3 November 2008, they agreed to meet the next day at 1100 at the appellant's barracks room on board Dam Neck Annex. The appellant provided the barracks building number and room number. At the end of this "chat," the appellant stated to "naveebrat13": "look im scared to do this i caould get in so much trouble i mean yea it would be nice but i dunno if I can do this im sorry i have too much at steak i could looses everything i ahve worked for [sic]." Prosecution Exhibit 1 at 18. Continuing, he stated, "I might show up at the alley but right now i cnat do anything sexually I jsut cant oyur way to oyung and its wrong . . . I cant let myself down or God down or the anvy and my country . . . you caught me in a real moment of weakness and im sorry for that and this is jsut worgn in so many ways [sic]." *Id.*

As part of the appellant's providence inquiry, the military judge explained the elements of the various offenses and defined

relevant terms. Record at 36-39, 49-53. In the context of discussing the attempted indecent language charge, the military judge correctly stated that the appellant's acts must have "amounted to more than mere preparation, that is, they were a substantial step and direct movement towards the commission of the intended offense," and likewise, correctly defined the terms "preparation" and "substantial step." Record at 36-37.

In the context of the attempted inducement offense, the military judge explained that:

under this Section 2422 of Title 18, you're charged with an attempt. For that reason, it's not necessary for the government to prove, if this were a contested case, that you actually completed a sexual act, but only that you used the mail or other means of interstate commerce, in this case the internet and instant messaging, in order to attempt to persuade or induce the person you knew as "naveebrat13" to engage in sexual activity, and that that sexual activity that you were intending to engage - - entice her to commit was sexual activity, was in violation of Article 120 of the UCMG-J, that is, you could be charged with a criminal offense for that activity, were it undertaken. It is not necessary the government prove that this person actually existed or that the person was, in fact, under the age of 16.

Record at 52-53.¹

In response to questions from the military judge during the plea inquiry, the appellant explained that he had attempted to persuade "naveebrat13" to engage in sexual activity with him and that his use of sexually explicit language was in furtherance of that goal. *Id.* at 54. In the stipulation of fact, PE 1, the appellant admitted to engaging in multiple online conversations over the course of two days, during which he attempted to persuade "naveebrat13" to meet him and engage in sexual intercourse. He engaged in sexually explicit communications, asked if she had ever been with an older man sexually, if she was looking for sex, and expressed clear interest in meeting "naveebrat13" and engaging in sexual activities with her. He described specific sexual acts, transmitted a webcam video of himself masturbating, and sent her a website with adult pornographic videos. He offered to meet to answer any questions she might have about sex and make sure she was on the "right track." In the stipulation he stated, "At one point, I asked

¹ At an earlier point on the record, the military judge summarized a conference at which he had discussed applicable case law with counsel for the Government and for the appellant. The parties agreed that an offense under section 2422 of Title 18 was completed when the coercion or enticement was attempted, not when sexual activity was attempted, and thus voluntary abandonment was not a viable defense once the communication was made. Record at 23-25.

'naveebrat13' if she wanted me inside of her pussy, and I indicated that I would be gentle to appease her of any concerns. At the time I was chatting with her on this date, I wanted to meet with 'naveebrat13' and to engage in sexual acts with her." PE 1 at 3. Towards the end of the second day of "chats," the appellant succeeded in getting "naveebrat13" to agree to meet him the next day in his barracks room. He stated, "When I agreed upon the meeting with 'naveebrat13,' I fully intended to engage in sexual acts with her. Furthermore, during this chat, I intended my request to meet with and engage in sexual acts to be a serious request and I did not represent it in any other manner." *Id.*

During the providence inquiry, the military judge stated:

However, I've gone over and I've done some research and, in my opinion, based upon the specific intent of this attempted coercion or enticement, the - - the intent to entice somebody under the age of - - or in this case, "naveebrat13" to commit a sexual act, and there's no intent that you actually engaged in a sexual conduct, so that under the facts of this case, I believe that your - - the crime was committed at the exact moment while you were communicating this indecent language and attempting to entice this 13 year old to engage in the sex - - sexual act and, therefore, it's not a defense, but I just wanted to go over that with you, make sure you've had an opportunity to talk about that with Mr. [M] and Lieutenant Commander [M], and whether or not you have any questions about that or whether or not—or whether or not you agree with that. So, take a couple of minutes and just talk with—take as much time as you need and talk to Mr. [M].

[The appellant and defense counsel did as directed.]:

ACC: I understand, sir.

MJ: Okay. Mr. [M], do you agree that the defense of voluntary abandonment is not applicable here?

CDC: Yes, sir, I do.

MJ: Okay. Petty Officer Kimbell, do you have any questions regarding that?

ACC: No, sir.

Record at 59-60.

Sufficiency of the Appellant's Plea

Before this court, the appellant asserts that his plea to attempting to induce a minor to commit sexual acts in violation of Article 134, Charge II, Specification 1, was improvident because he voluntarily abandoned his plan to engage in sexual

intercourse with "Sarah", and that the military judge erred by accepting his guilty plea to the specification. We disagree.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). An abuse of discretion occurs 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). In order to find the plea improvident, this court must conclude that there has been an error prejudicial to the substantial rights of the appellant. Art. 59(a), UCMJ. Such a conclusion "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App.1999); see also RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Voluntary abandonment is a viable defense to attempt offenses if the accused voluntarily and completely abandons the crime solely because of the individual's sense that it was wrong, prior to completion of the crime. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 4c(4). The voluntary abandonment defense is not viable if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. *Id.*; see also *United States v. Rios*, 33 M.J. 436 (C.M.A. 1991); *United States v. Haney*, 39 M.J. 917 (N.M.C.M.R. 1994).

In this case, whether the appellant abandoned his efforts because he had a change of heart or due to fear of detection or apprehension is of no moment because the abandonment goes to the offense of attempted sexual conduct, an offense that was not charged. As to the charged offense of attempted enticement or persuasion of a minor, we find that the defense of voluntary abandonment was not applicable under the facts of this case and that the military judge did not abuse his discretion in accepting the appellant's guilty plea. See *United States v. Brooks*, 60 M.J. 495, 498 (C.A.A.F. 2005) (holding that the offense in section 2422 is to persuade or to attempt to persuade, not to engage in sexual acts).

In *United States v. Garner*, 67 M.J. 734, 736 (N.M.Ct.Crim.App. 2009), we considered what actions, short of arranging a specific meeting with a purported minor or making travel preparations, constitute a "substantial step" to attempting to entice a minor to engage in illegal sexual activity under 18 U.S.C. § 2422(b). Taking guidance from the Ninth Circuit in *United States v. Goetzke*, 494 F.3d 1231 (9th Cir. 2007) (per curiam), we looked at several facets of the appellant's conduct, such as verbal advances of a sexual nature, his suggestions of an exchange of pictures, flattery, attempts to

impress, and advice to the minor about how to sexually stimulate herself, and determined that the appellant's "grooming behavior" was sufficient to constitute a substantial step. *Garner*, 67 M.J. at 738-39. On review, the Court of Appeals for the Armed Forces held that it did not need to rely on such factors, nor address our court's interpretation of the various cases, because the case involved "a guilty plea with a detailed plea inquiry in which Appellant admitted that he intended to persuade, entice, or induce 'Molly' into sexual activity." *United States v. Garner*, 69 M.J. 31, 33 (C.A.A.F. 2010).

In the case before us, we are satisfied that the appellant's plea to Specification 1 of Charge II was knowing and voluntary. First, the appellant voluntarily entered into a stipulation of fact in which he admitted that he was attempting to entice or persuade "naveebrat13," a person he believed to be a 13-year-old girl, to engage in sexual activities with him. Second, in discussing the elements of the offense and the appellant's conduct, the military judge sufficiently covered the requisite elements and definitions. The appellant's responses, taken together with the stipulation of fact, which included a transcript of the "chats," support his admission that he was attempting to persuade "naveebrat13" to engage in sexual activities with him. The appellant's conduct closely mirrors the conduct described in *Garner* with the key addition that he also successfully established a time and place to meet "naveebrat13," thus clearly satisfying the substantial step requirement. Third, the military judge thoroughly explained the possible affirmative defense of voluntary abandonment and the appellant and his defense counsel specifically agreed that it was not applicable to the appellant's situation.

Notably, on two separate occasions, during an R.C.M. 802 conference and during the providence inquiry itself, the military judge discussed the defense of voluntary abandonment. Record at 23-25, 59-60. After considering the pertinent law and facts, all parties agreed that the defense was not applicable because the intent at issue related to the appellant's intent to entice or persuade "naveebrat13" to engage in sexual conduct, not his intent to actually engage in the sexual conduct. *Id.* at 23-25, 59-60. Additionally, the appellant's efforts to persuade "naveebrat13" to engage in sexual conduct achieved an agreement from her to meet him the next day in his barracks room. Only then did he state that he could not go through with the meeting. Hence, we agree with the military judge's determination that the defense of voluntary abandonment was not raised. We find that the military judge did not abuse his discretion in accepting the appellant's guilty plea to Specification 1 of Charge II; we see no substantial basis to question that plea.

Conclusion

Accordingly, the findings and the approved sentence are affirmed.

Senior Judge BOOKER and Senior Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court