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

Before
C.L. REISMEIER, F.D. MITCHELL, R.E. BEAL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

WESLEY R. VANDERWYST
AVIATION MACHINISTS'S MATE AIRMAN (E-3), U.S. NAVY

NMCCA 201000452
SPECIAL COURT-MARTIAL

Sentence Adjudged: 6 April 2010.
Military Judge: CAPT David A. Berger, JAGC, USN.
Convening Authority: Commander, United States Naval Forces Marianas, Guam.
Staff Judge Advocate's Recommendation: CDR M.M. Bates, JAGC, USN.
For Appellant: Mr. Michael W. Macomber, Esq; Mr. Matthew B. Tully, Esq; LT Daniel Napier, JAGC, USN.
For Appellee: Capt Samuel C. Moore, USMC.

7 April 2011

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REISMEIER, Chief Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of one specification of aggravated sexual assault and one specification of adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to two years confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence, suspended all confinement in excess of 12 months for a period of confinement served plus 12 months, and except for the punitive discharge, ordered the sentence executed.

The appellant has submitted three assignments of error: (1) that the military judge erred by accepting appellant's guilty plea to aggravated sexual assault when neither assailant nor victim remembers the act in question; (2) that the military judge abused his discretion by accepting the appellant's guilty plea with an insufficient factual basis; and (3) that the military judge failed to explain certain defenses to the appellant, including that of mistake of fact as to consent. After considering the pleadings of the parties, oral argument, and the entire record of trial, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

On or about 25 July 2009, the victim, TG, invited the appellant and others to her new house on Guam. Record at 193; Prosecution Exhibit 1 at 1. TG had a fiancé at the time, who was deployed. Record at 189, 208; Prosecution 1 at 1. TG was also recovering from hip surgery. Record at 189-91. As the evening progressed, the appellant and TG found themselves alone consuming large amounts of alcohol. *Id*. at 148, 194; PE 1 at 1.

At some point during the evening, as TG sat upon the kitchen counter typing messages to her fiancé, the appellant began sucking on TG's toes. Record at 194-95, 208; PE 1 at 2. When TG attempted to remove herself from the counter, she struck the floor and lost consciousness due to some combination of alcohol, pain to her hip, or actually striking the floor. Record at 194; PE 1 at 2-3. The appellant claimed to also have blacked out at the same time. Record at 148, 155-56.

While neither the appellant nor TG remembers exactly what happened next, the appellant regained awareness sometime later when he woke with his penis inside of TG's vagina. Record at 145-47; PE 1 at 3. The appellant immediately terminated the sexual act. Record at 145. TG also regained consciousness while the appellant was withdrawing. *Id*. at 159. Further facts necessary to evaluate the providence of the appellant's plea are discussed below.

Discussion

The standard for determining whether to accept a guilty plea is prescribed in Article 45(a), Uniform Code of Military Justice, 10 U.S.C. § 845(a), which states the following:

> If an accused . . . sets up matter inconsistent with the [guilty] plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered in the record and the court shall proceed as though he had pleaded not guilty.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge abuses his discretion when he "fails to obtain from the accused an adequate factual basis to support the [guilty] plea." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We "afford significant deference" to the military judge in this area of inquiry, and ask whether the record as a whole demonstrates a "substantial basis" in law or fact for questioning the providence of the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). While the facts as revealed by the accused must objectively support the guilty plea, a guilty plea will only be considered improvident if testimony or other evidence of record reasonably raises the question of a defense, or includes something patently inconsistent with the plea in some respect. *See United States v. Roane*, 43 M.J. 93, 98-99 (C.A.A.F. 1995). The "mere possibility" that a defense exists is not enough of a basis for rejecting a guilty plea. *Id.* If an accused is unable to remember the facts surrounding the offense with which he is charged, a military judge may still accept his guilty plea as provident if the accused is convinced of his guilt based upon the evidence available to him. *See United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971).

We address the appellant's first two assignments of error as one and find that the military judge's questioning of the appellant established a sufficient basis in fact and law to accept the appellant's plea as provident.

The military judge spent a considerable amount of time trying to ensure that the appellant, despite absence of recall, was able to admit to every element of the offense before accepting the plea. The appellant stated that while he had no memory "of the actual intercourse itself," he believed that his act was wrongful because TG "was, as far as [he could] remember, incapable of saying yes or no," and because the two of them were "both too intoxicated to properly discuss previously what [they] were going to be doing." Record at 147. The military judge went on to ask the appellant whether TG was "capable of appraising the nature of the sexual conduct at issue," and again, the appellant seemed to equivocate, stating, "Not that I can ever recall." *Id.*

The military judges then properly asked for clarification as to what "not that you can recall" meant. The appellant explained that he "came out of a stupor" and remembered himself "penetrating her, being inside of her, of [his] penis being inside of her vagina, and only having no memory of anything to--beforehand to state that she would not want to." *Id.*

At that point, the military judged noted that he was not convinced that the plea was provident and recessed the court. *Id.* at 149. When the court-martial reconvened, the military

judge asked the appellant whether TG was ever capable of appraising the nature of the sexual conduct at issue, to which the appellant responded, "Never in anything I can ever remember." *Id*. at 150.

The military judge then conducted an inquiry for an accused who wishes to plead guilty, but who cannot recall the events. He inquired whether the appellant reviewed reports or investigations about the incident; whether TG testified at the Article 32, UCMJ, hearing; whether the appellant was present during the hearing; whether he was satisfied that the statements he reviewed were true and correct; and whether the appellant was given access to all relevant discovery. *Id*. at 150-54. The appellant was then asked what he personally believed happened, replying:

> I think that, because of my foot fetish, that I have, whenever I was sucking on her toes, I got aroused, she probably freaked out, jumped off the counter and, because of her recent hip surgery, it caused a lot of pain. And so being the amount of alcohol and the automatic shot—shooting of the pain up her leg, she probably passed out on the floor, and I think I might have taken advantage of the fact that she was passed out on the floor.

Id. at 154. After further equivocation, the military judge asked again what the appellant recalled, to which he responded:

> I did not recall her jumping off the counter, I'm just remembering from what she—from her statements, and recalling between my statements and her—and her statements of what possibly happened between from where I sucked on her toes and to where I found myself inside of—of penetrating with my penis her vagina.

Id. at 156. To ensure he understood what the appellant was admitting, the military judge asked him, "[D]o you doubt that that's what happened?" *Id.* The appellant responded, "No, sir." *Id.* Again, the military judge asked "Are you convinced that's what happened?" *Id.* The appellant responded with "Yes, sir." *Id.* The military judge then asked "Are you willing to plead guilty and face the consequences that that's what happened?" and again, the appellant replied "Yes, sir." *Id.* Continuing, the military judge asked "And do you personally believe that that's what occurred on the 25th of July 2009?" Once again, the appellant replied affirmatively. *Id*. at 156-57.

The military judge conducted further specific inquiry of this appellant who pleaded guilty without an independent recall of events, and again, the appellant replied that he was convinced that TG did not consent to the sexual intercourse. *Id*. at 157.

Whatever confusion existed prior to the military judge's earlier inquiries was dispelled by the complete discussion with the appellant.

The appellant was able to plead guilty to aggravated sexual assault, despite his lack of memory of the incident, because based upon the evidence presented to him, he was convinced that he engaged in a sexual act with TG without her consent. A military judge may accept a guilty plea as provident when the accused does not remember the incident, so long as the accused is convinced he committed the charged offense. *See Moglia*, *Luebs*, and *Butler, supra*. The appellant admitted that, "after considering all of the evidence and discussing the case with . . . defense counsel," he believed he committed the offense of aggravated sexual assault as it was previously defined and described. Record at 154. The military judge was able to accept the appellant's plea as provident based upon this record.

Contrary to the appellant's assertions, the military judge did more than simply elicit yes or no answers and legal conclusions. While doing so may have constituted error, *see United States v. Dunning*, 40 M.J. 641 (N.M.C.M.R. 1994), *United States v. Vinson*, 33 M.J. 1073 (A.C.M.R. 1991), that is not what occurred. Rather, the military judge asked the appellant repeatedly about matters such as his memory of events, what the appellant believed happened, and whether TG consented. He did so in an open-ended manner that did not lead the appellant into giving binary answers to leading questions that stated legal conclusions.

For his third assignment of error, the appellant argues that the military judge should not be entitled to the presumption of regularity normally attendant to his decisions because he demonstrated a misunderstanding of the law. Appellant's Brief of 22 Oct 2010 at 15. First, as proof of the judge's misunderstanding of the law, the appellant cites the judge's recitation of five (5) elements of sexual assault in the charged offense under Article 120(c), UCMJ, when only two needed to be established to meet the elements of an Article 120(c) offense. Appellant's Brief at 7; Record at 138-39. Second, the appellant argues that the military judge should not have accepted his plea when it was established on the record that neither party involved remembered exactly how the appellant's penis came to be inside of TG, suggesting that there may have been an affirmative defense available of mistake of fact as to consent or lack of mental responsibility.

First, we find that the military judge's questioning of the appellant about alternate theories under Article 120(c) does not constitute reversible legal error, even if portions of the military judge's inquiry were superfluous. Although the military judge may have asked more questions than were required, whatever misunderstanding he might have had was different from a misunderstanding of the law that leads to a failure to inquire

into all of the elements of the charged offense. *See United States v. Bullman*, 56 M.J. 377 (C.A.A.F. 2002); *United States v. Nystrom*, 39 M.J. 698 (N.M.C.M.R. 1993). Even in such cases where the inquiry is deficient, that error does not necessarily constitute reversible error. *See United States v. Kilgore*, 44 C.M.R. 89 (C.M.A. 1971); *United States v. Williams*, 6 M.J. 884, 886 (A.C.M.R. 1979). In this case, the charge sheet listed all possible theories of culpability under Article 120(c). While it may have been preferable for the military judge to establish at the outset which theory of liability the parties thought would apply, it was not legal error for the military judge to inquire as to all theories on the record.

Second, we conclude that the military judge did adequately address the issue of mistake of fact as to consent and lack of mental responsibility. He explained to the appellant how a mistake of fact as to consent could constitute a defense. Record at 141-42. He later questioned the appellant about whether TG ever consented to sexual intercourse, and what the appellant personally believed happened. *Id*. at 156, 157, 159. The appellant explained that he was convinced that TG did not consent, why he believed she did not consent, that he took advantage of TG while she was passed out and that the Government would be able to prove beyond a reasonable doubt at trial that she did not consent. *Id*. at 156-59, 162. Finally, when the military judge asked, based on everything the appellant had seen, whether he, at the time of the offense, or then and there in court, had a mistaken belief that TG consented, the appellant replied "No, sir." *Id*. at 162. At no point during the inquiry did the appellant indicate that he was confused about whether TG consented.[1] Further inquiry was not required.[2] These admissions, (particularly when combined with those indicating that nothing forced him to have sex with TG, he could have avoided it, and it was a freely made decision on his part to have intercourse with TG)[3] fail to raise any concerns as to the appellant's mental responsibility, drunk though he may have been at the time. The mere fact that the appellant stated that he "woke up" or came out of a "stupor" to find his penis inside TG does not, based on this record, insert into the record an unresolved matter inconsistent

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[1] Mistake of fact as to consent due to intoxication is not a defense under Article 120. *See* Art 120(t)(15), UCMJ.

[2] The appellant rightly notes that the military judge asked whether there was a defense available to the appellant based upon his voluntary intoxication. The judge was concerned that the appellant's level of intoxication could have negated the requisite intent necessary to satisfy one of the "sexual act" definitions contained in Article 120. Record at 160. To the extent that the military judge was initially confused as to intent as it related to this offense, counsel for both sides agreed that the "sexual act" in this case would be defined as contact between the penis and the vulva, obviating the need to inquire into the appellant's intent at the time of insertion. *Id.* at 160-61. Apparently in agreement, the military judge inquired no further.

[3] These admissions as to the conduct being volitional were made twice, once with regard to this offense, and again with regard to the related adultery.

with the plea. Whatever his intoxication might mean on the evening in question, in the face of the totality of his admissions, the record fails to suggest a basis to question the plea.

Conclusion

The findings and sentence are affirmed.

Senior Judge MITCHELL and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court