

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ALEXANDER M. WATSON
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201000263
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 January 2010.

Military Judge: LtCol Peter J. Rubin, USMC.

Convening Authority: Commanding General, Training and Education Command, Quantico, VA.

Staff Judge Advocate's Recommendation: LtCol C.M. Greer, USMC.

For Appellant: Maj Jeffrey Liebenguth, USMC.

For Appellee: Maj Elizabeth Harvey, USMC.

29 March 2011

OPINION OF THE COURT

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

BOOKER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of fraudulent enlistment, unauthorized absence, communicating a threat, communicating indecent language to a minor, service-discrediting actions, and possession of child pornography, respectively violations of Articles 83, 86, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 883, 886, and 934. The convening authority (CA) approved the adjudged sentence of confinement for 42 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge from the U.S. Marine Corps.

The appellant now alleges 8 errors. Briefly stated, they are that the military judge erred in releasing a detailed defense counsel; that the appellant's pleas to communicating a threat, fraudulent enlistment, and communicating indecent language to a person under 16 are improvident; that a California statute is unconstitutional; that a prosecution for service discrediting conduct similar to that proscribed in a California statute is preempted by Article 80; that the specifications of certain Article 134 offenses fail to state an offense; and that counsel were ineffective in failing to explore conditional pleas.

We have carefully reviewed the record of trial and the parties' pleadings¹ and we conclude that no error materially prejudicial to the substantial rights of the appellant occurred. We therefore affirm the findings and the approved sentence. Arts. 59(a) and 66(c), UCMJ.

A brief overview of the facts is useful to place the assignments of error and their resolution in context. Except for the fraudulent enlistment and the indecent communications, the appellant's criminal activity occurred, or was discovered, during a two-day period in March 2009. He absented himself from his unit without authorization, purchased a 12-gauge pump-action shotgun and buckshot, drove several hours to Temecula, California, and was apprehended by civilian law enforcement at the home of one of the intended victims of his written threats. A search of his room at his parents' home revealed the threats that he had made against several women. A search of his barracks room at the Defense Language Institute produced a hard drive containing images of child pornography. The facts necessary to resolve individual assignments of error will be included in discrete discussions.

Severance of Attorney-Client Relationship

After the appellant was apprehended by California authorities, he was transferred to Marine Corps control. He was provided with a uniformed counsel, Captain (Capt) M, and about a month later the senior defense counsel in the area, Capt S, detailed himself onto the case as assistant defense counsel.

Capt M and Capt S represented the appellant during the pretrial investigation stage, and they additionally counseled him during his pretrial confinement period (which began in March 2009 and lasted until sentence was imposed). As trial preparations continued, it became apparent that Capt M would require an extension of his expiration of active service (EAS) date if he were to see this case to its conclusion. Record at 8-9. Accordingly, he set in motion the appropriate administrative steps to extend his EAS beyond 01 October 2009. Capt M received an extension until 01 December 2009. *Id.* at 9.

¹ Including the appellant's request for en banc consideration and for oral argument, both of which are denied.

When it became evident that a trial could not be completed by his release date, Capt M requested another extension which, although it received favorable endorsement through the local chain of command and through judge advocate channels, was ultimately denied by the manpower division at Headquarters, U.S. Marine Corps. *Id.* Before his release, Capt M prepared and presented a motion to suppress child pornography found on the appellant's computer, a motion which the military judge denied. In a final court appearance on 1 December 2009, Capt M was relieved by the military judge from further participation in the case. *Id.* at 138-42. During the colloquy with the military judge over counsel rights and the events that had transpired, the appellant reiterated his desire to be represented by Capt M, but he also understood that Capt M was to be released from active duty and could not be extended. The appellant also informed the military judge of a request for individual military counsel which was being prepared. *Id.* Competent authority shortly thereafter named Capt E as the appellant's individual military counsel.

Approximately two weeks after Capt M's release, the appellant entered into a pretrial agreement with the CA (the document, Appellate Exhibit XV, indicates an 11 December 2009 tender by the appellant and a 16 December 2009 acceptance); he entered guilty pleas pursuant to the agreement at the end of January 2010. He was represented during the negotiations and at trial by the individual military counsel, Capt E, and by his long-standing assistant defense counsel, Capt S. Before the appellant entered pleas, the military judge advised him one last time of his counsel rights, and on the record the appellant voiced his desire to be represented by Capt E and Capt S. Record at 143.

In the absence of definitive guidance, we will review the judge's determination that the relation was severed for an abuse of discretion. *Cf. United States v. Hutchins*, 69 M.J. 282, 290 (C.A.A.F. 2011) (while separation from active duty normally constitutes good cause, highly contextual circumstances may warrant an exception, and the trial judge must ensure that competent authority has good cause and that the record demonstrates good cause). We hold that the military judge did not abuse his discretion, as the evidence before him, in particular AE VII, clearly established that Capt M's departure was a routine personnel action not designed to hinder the appellant's defense. *See United States v. Eason*, 45 C.M.R. 109, 113-14 (C.M.A. 1972).

We likewise find no prejudice to the appellant from the severance of counsel. We note, first, that the appellant pleaded guilty to the offenses of which he was convicted. An unconditional guilty plea generally waives all pretrial and trial defects that are not jurisdictional or a deprivation of due process of law. *See United States v. Rehorn*, 26 C.M.R. 267, 268-69 (C.M.A. 1958). The appellant was not deprived of due process of law, as he was represented by competent counsel throughout.

Second, and related to the first point, the appellant was represented at all critical stages of the proceedings by Capt S, who had been detailed before the Article 32 investigation as assistant defense counsel and who continued to serve in that role under both Capt M, the originally detailed defense counsel, and Capt E, the individual military counsel.²

Providence of the Appellant's Pleas

The appellant attacks aspects of three of the guilty pleas that he entered and the military judge accepted. We will discuss each briefly, noting at the outset that we review, using the "substantial basis" test, the military judge's decision to accept the guilty plea for an abuse of discretion and any questions of law relating to the plea *de novo*. See *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The appellant claims that his guilty plea to a fraudulent enlistment, alleged in the specification to Charge II, is improvident because the inquiry did not establish whether the concealed information actually, as opposed to might have, precluded his enlistment. Appellant's Brief of 28 Jun 2010 at 33. The appellant misreads the applicable law, however; see *United States v. Holbrook*, 66 M.J. 31, 33 (C.A.A.F. 2008). We are satisfied that his deliberately concealing his in-patient treatment, several years earlier, at a mental health facility, followed by his enlistment and receipt of pay and allowances, gave the military judge a sufficient factual and legal basis to accept the guilty plea.

The appellant next claims that his guilty plea to communicating a threat was improvident because he did not intend to carry out the threatened harms (rape and murder of named persons and witnesses to his acts) and because he did not make known his intentions to another. Again, however, the guilty plea inquiry demonstrates amply the correctness of the findings.

The military judge had before him the appellant's log book full of detailed plans to kidnap, rape, and murder four women in southern California. The appellant told the military judge that when he left his parents' home in an unauthorized absence status, he fully expected that his command would call looking for him. The appellant also told the military judge that he left the log book in a location where it was sure to be found by his parents when they would certainly try to determine his whereabouts, and he wrote explicit instructions on what part of the log book they

² Often, assignment of an individual military counsel constitutes good cause to sever the relationship with a detailed counsel. See RULE FOR COURTS-MARTIAL 505(d)(2)(B)(i), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Because the oral request and the written request both came after the military judge severed the relationship, Record at 141 and AE VIII, that Rule does not provide a basis for upholding the military judge's ruling.

should view to see his plans. Record at 179-84; 265-66; Prosecution Exhibit 7. As further evidence of his present intent to carry out the threat, we note that the appellant also pleaded guilty to wrongful possession of a loaded shotgun in the vicinity of one of the "targets" of the threat. See, e.g., Record at 193.

The appellant claims finally that his plea to communicating indecent language to a child under 16 is improvident because the communications must be viewed in light of a long-standing relation he had with the girl. We find this claim to be without merit.

The test that we employ is "whether the particular language is calculated to corrupt morals or excite libidinous thoughts." *United States v. French*, 31 M.J. 57, 60 (C.M.A. 1990) (citations omitted). The appellant admitted during the providence inquiry that his language was "sexually charged and of a vulgar or filthy nature," Record at 199, and he responded that the average member of the military community would find it grossly offensive "[b]ecause it incites sexual thoughts clearly and specifically and considering the fact that Ms. [S] was under the age of 16, it had even more of an inappropriate look to it" *Id.* at 199-200. His admission that the language was grossly offensive at any rate, and all the more so because of the age of the person to whom he communicated it, places the appellant's offense well within the *French* boundaries, and the military judge did not abuse his discretion in accepting that guilty plea.

General Neglects and Disorders Offenses

As an initial matter, we reject the appellant's claims that Specifications 1 and 6 of Charge IV³ fail to state an offense because the specifications omit the allegation that the acts were either prejudicial to good order and discipline or were of a nature to bring discredit upon the armed forces. These two particular offenses fall into the category of "that which is or generally has been recognized as illegal under the common law or under most statutory codes" *United States v. Davis*, 26 M.J. 445, 448 (C.M.A. 1988). See, e.g., 18 U.S.C. § 876(d) (mailing threatening communications); 18 U.S.C. § 1461 (mailing obscene matter); 18 U.S.C. § 1470 (mailing obscene matter to a child); *Miller v. California*, 413 U.S. 15, 36-37 (1973) (states may regulate, including criminally, obscene material). We reach that determination in part because each is a specifically delineated offense within Article 134. See *United States v. Jones*, 68 M.J. 465, 471-72 (C.A.A.F. 2010) (noting that paragraphs 61 through 113 of Part IV of the Manual are "various circumstances" under which the elements of Article 134 can be met). We note also that both affected specifications are replete

³ Specification 1 alleges communication of a threat in violation of Article 134, UCMJ. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 110. Specification 2 alleges communication of indecent language to a child under 16. *Id.* at ¶ 89.

with language suggesting criminality - "wrongfully communicated a threat" with regard to Specification 1, "indecent language . . . to a child under 16" for Specification 6 - language which could be considered "surplusage" in the case of conduct which by its very unlawful nature is prejudicial or discrediting. *Davis*, 26 M.J. at 448. We find that Specifications 1 and 6 under Charge IV sufficiently apprised the appellant of what he must be prepared to meet and erected an appropriate bar to subsequent prosecution; those specifications therefore stated offenses. See also *United States v. Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953); see generally *United States v. Fosler*, 69 M.J. 669 (N.M.Ct.Crim.App. 2010), rev. granted, ___ M.J. ___, 2011 CAAF LEXIS 131 (C.A.A.F. Feb. 9, 2011).

The appellant assigns two errors with respect to Specification 4 of Charge IV: that California Penal Code section 12024 is unconstitutionally overbroad, and that an offense under Article 134 is preempted by Article 80. For reasons discussed below, we need not address the constitutionality of the California statute, although we are persuaded by the analysis of *United States v. Gamache*, 156 F.3d 1 (1st Cir. 1998), that a constitutional challenge would fail, as the appellant engaged, just like Gamache, in a series of acts long past the "mere thinking stage". See *id.* at 8. We further find that this prosecution is not preempted by Article 80.

The parties both overlook the fact that the appellant was not prosecuted for violation of the substantive California law. His offense did not occur in an area that would give rise to court-martial jurisdiction under Clause 3 of the General Article. See 18 U.S.C. §§ 7 and 13. The fine but important distinction here is that the appellant was charged with, and pleaded guilty to, conduct of a nature to bring discredit upon the armed forces by possessing a dangerous weapon while intending to harm a named person. "Accordingly, the specific elements of the crime . . . as a matter of civilian or military law are not particularly relevant." *United States v. Choate*, 32 M.J. 423, 425 (C.M.A. 1991). The question, rather, is the gravamen of the conduct in light of its military context. *Id.* at 426.

Turning to the record, the appellant admitted that he possessed the dangerous weapon as he drove to an intended victim's dormitory room, and that he intended to assault her once he arrived, although he also stated that he decided while driving not to go through with the assault. He had not only the shotgun but also rounds for the shotgun that would cause death or serious bodily injury. Record at 195. The appellant also told the military judge that his actions would "give the impression that my conduct was definitely unsafe and unsatisfactory as a Marine and as a person." *Id.* at 196. We note, as did the Government in its response, Government's Brief of 15 Sep 2010 at 34, that the appellant was not simply sitting in a room in his parents' house with a shotgun; rather, he harbored murderous thoughts and in fact embarked on a three-hour journey that could have resulted in

substantial injury or loss of life. We are satisfied that the appellant's actions constituted a serious discredit to the armed forces.

As far as the appellant's position on preemption is concerned, we apply the test quoted in *United States v. McGuinness*, 35 M.J. 149, 151-52 (C.M.A. 1992), and find no support for his argument that Congress intended to occupy the field by creating either assault and all its variants, see Article 128, or attempt, see Article 80. Certainly an aggravated assault would be prosecuted under Article 128, but that is not what is alleged in the specification. There is furthermore no provision in the punitive articles that outlaws mere possession of a dangerous weapon, although authority exists in some circumstances to punish possession as an orders violation; compare Article 92, UCMJ, with U.S. Navy Regulations, Art. 1159 (1990). Likewise, this offense is not an instance where certain elements from enumerated offenses are lacking and the general article is providing "spackling" to fill the gaps within the remaining elements; see generally *United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953).

Ineffective Assistance of Counsel

The appellant claims that his defense counsel were ineffective in failing to negotiate for a conditional plea of guilty to the child pornography offense because he specifically wanted to preserve his ability to challenge the correctness of the military judge's ruling on the suppression motion. In support of his claim, the appellant submits an affidavit to the effect that his team never discussed the possibility with him. The lead defense counsel, in response, submitted an affidavit claiming that he did discuss the matter with the appellant and advised him that a conditional plea was not viable. Additionally, the defense counsel had concluded that the trial counsel would not endorse nor would the CA approve a conditional plea. Declaration of Capt S of 8 Sep 2010 at ¶¶ 3, 6.

We realize that in many cases involving ineffective assistance claims, the assignment cannot be resolved simply on the basis of "competing affidavits". See *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997). Where, however, the "facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* at 248.

Having reviewed the record of the proceedings on the suppression motion, Record at 14-137, and the military judge's findings and conclusions, AE XII, we are satisfied that the military judge's findings of fact were not clearly erroneous and that he applied the proper legal standard in determining that both searches, executed pursuant to authorization by a competent commander, were lawful. Cf. *United States v. Loving*, 41 M.J. 213, 244 (C.A.A.F. 1994) (not ineffective for defense counsel to

fail to move for suppression of otherwise admissible evidence). Because the appellant's motion to suppress the child pornography was properly denied at trial, and because we would not have reversed the trial judge's decision, the appellant would have gained nothing by entering a conditional plea. We therefore find that this assignment is without merit.

Conclusion

The findings of guilty and the approved sentence are affirmed.

Senior Judge CARBERRY and Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court