

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

**Before
J.A. MAKSYM, B.L. PAYTON-O'BRIEN, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MARCHELLO K. HANCOCK
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201100466
GENERAL COURT-MARTIAL**

Sentence Adjudged: 4 May 2011.

Military Judge: LtCol David Jones, USMC.

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

Staff Judge Advocate's Recommendation: LtCol E.H. Robinson,
Jr., USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: LCDR Deborah S. Mayer JAGC, USN; LT Benjamin
J. Voce-Gardner, JAGC, USN.

29 March 2012

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.**

WARD, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of indecent acts, two specifications of burglary, and one specification of possession of child pornography, in violation of Articles 120, 129, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920, 929, and 934. The military

judge sentenced the appellant to 40 months confinement, forfeiture of all pay and allowances, and a dishonorable discharge. The pretrial agreement had no effect on the sentence and the convening authority (CA) approved the sentence as adjudged.

The appellant submits two assignments of errors: first that Article 120(k) of the UCMJ is unconstitutionally vague and overbroad; and second, that Specification 2 of Charge IV alleging the offense of unlawful entry under Article 134 fails to state an offense for want of the terminal element. As the Government points out, the appellant's second assignment of error is moot as the appellant pleaded not guilty to the unlawful entry offense which was later withdrawn by the Government pursuant to the pretrial agreement. After reviewing the record of trial and the parties' pleadings, we resolve the former assignment of error against the appellant. Although not raised as error, we find an inadequate factual predicate for Specification 2 of Charge I and set that finding of guilty aside, affirm a guilty finding to the lesser offense of housebreaking and reassess the sentence. We conclude that the findings as modified and the reassessed sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Constitutionality of Article 120(k)

The appellant avers that Article 120(k) is unconstitutionally vague and overbroad. Appellant's Brief of 8 Dec 2011. He acknowledges this Court's recent opinion in *United States v. Rheel*, No. 201100108, 2011 CCA LEXIS 370, unpublished op. (N.M.Ct. Crim. App. 20 Dec 2011), and raises this summary assignment of error in order to preserve the issue for appeal. For the same reasons we cited in *Rheel*, we reject the appellant's claims that Article 120(k) is unconstitutionally vague or overbroad.¹

The constitutionality of a statute is a matter we review *de novo*. *United States v. Disney*, 62 M.J. 46, 48 (C.A.A.F. 2005). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger

¹ In *Rheel*, we dealt with both a facial and an "as applied" vagueness and overbreadth challenge to Article 120(k). We note that the appellant does not distinguish whether he raises a "facial" or "as applied" challenge; therefore, we will treat his claim as a facial challenge only.

must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

As we said in *Rheel*, we are not persuaded that the Article 120(t)(12) statutory definition of indecent conduct is inadequate to place an ordinary person on notice as to what conduct is forbidden. Simply because it may be difficult to determine if an incriminating fact is proven - i.e., whether the appellant's conduct is indecent by that definition -- does not render the statute void for vagueness. Those potential challenges are resolved by the requisite standard of proof beyond a reasonable doubt. *United States v. Williams*, 553 U.S. 285, 306 (2008). Here, the statutory definition is sufficient to "provide a person of ordinary intelligence fair notice of what is prohibited" and is not "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* at 304 (citations omitted).

On the question of overbreadth, we do not find that the statute prohibits a substantial amount of speech protected under the First Amendment thereby making it overbroad. Indecent conduct, as defined by Article 120(t)(12), like obscenity, offends basic notions of decency and is not protected by the First Amendment. *Id.* at 288. We see no realistic threat that this statutory definition will have a chilling effect on protected speech and conduct.

Improvident Plea

Although not raised by the appellant, we find an inadequate factual predicate for his guilty plea to Specification 2 of Charge I. This specification alleges the crime of burglary with the intended underlying offense of indecent act. During the providence inquiry, the military judge explained the elements of this offense.² When the military judge asked the appellant why he believed he was guilty of this offense, the appellant initially stated that his intent when he entered Corporal (Cpl) V's barracks room was to videotape her sleeping without her permission. Record at 215-17. When asked by the military judge what was indecent about that conduct, the appellant explained that he would have achieved sexual gratification from the surreptitious nature of the act, but that unlike the other

² The military judge had previously explained the elements of indecent acts during the providence inquiry on Charge II and its two specifications. Record at 179-84.

occasions³ he did not know if it was his intent to masturbate when he entered the room. *Id.* at 218. When the military judge pressed him on this subject, the appellant conceded that it was more than likely his intention to masturbate based on his pattern of conduct from the other related offenses, but he had no independent recollection. *Id.* at 219-20, 224. After a prolonged discussion with the appellant, the military judge accepted the appellant's plea, noting:

I'm still satisfied with the accused's plea. He's not a lawyer. He's trying to plead guilty. I understand his plea. And I understand that there wasn't a masturbation on this occasion. But I also understand that it's his intent to plead guilty and that he admits, on more than one occasion, that he had intent to commit an indecent act, therein. So I'm satisfied with the plea.

Id. at 226.

Prior to accepting a guilty plea, a military judge must make an inquiry of an accused to ensure a factual basis exists for the plea. RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); see also Art. 45(a), UCMJ. This inquiry must elicit sufficient facts to satisfy every element of the offense in question. R.C.M. 910(e). We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

The providence inquiry reveals that, despite the military judge's best efforts to obtain the requisite factual support, the appellant never provided more than the suggested affirmative replies to the military judge's leading and conclusory questions. The appellant's repeated statement that his intent to masturbate when he entered Cpl V's room was "more than likely" is an assumption on his part, as he had no independent recollection, and was based solely on his similar conduct on

³ The "other occasions" was a reference to the providence inquiry for Specification 1 of Charge I and the two specifications under Charge II to which the appellant also pleaded guilty. The gravamen of these offenses is that the appellant would video record himself masturbating while a female Marine lay asleep nearby.

other occasions. We find that the military judge's reliance on the appellant's affirmative responses to his conclusory questions was inadequate to establish a factual basis for this element, and there is no evidence in the remainder of the record to establish this element. See *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002) (reviewing court may consider the entire record of trial in determining whether a providence inquiry is legally sufficient). The stipulation of fact merely reiterates the same allegation on the charge sheet by stating that the "breaking and entering were done with the intent to commit therein the offense of indecent act." Prosecution Exhibit 1 at 2.⁴ Cpl V did not testify.⁵ There is no other evidence in the record on this element save for the providence inquiry.

In sum, the providence inquiry never adequately established that, at the time of his entry into Cpl V's barracks room, the appellant specifically intended to commit the offense of indecent acts. At best, the inquiry established the specific intent to commit the lesser included offense of housebreaking.⁶ Consequently, we set aside the guilty finding to Specification 2 of Charge I and affirm a guilty finding to the lesser included offense of housebreaking, a violation of Article 130, UCMJ.

Sentence Reassessment

Because of our above action on findings, we must now consider whether we can reassess the sentence. A "'dramatic change in the penalty landscape' gravitates away from the ability to reassess" a sentence. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (quoting *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003)). We conclude that we can. While our

⁴ Of note, the stipulation specifically states that the appellant "intended to masturbate inside of the room and commit an indecent act" in regard to the burglary offense in Specification 1 of Charge I. PE 1 at 2. However, it contains no such language with respect to Specification 2 of Charge I.

⁵ PE 6 is a copy of Cpl V's testimony at the Article 32 hearing. However, she testified that she remained asleep throughout the time that the appellant was in her room.

⁶ The providence inquiry is more than sufficient to establish that at the time of the entry, the appellant intended to videotape Cpl V asleep without her permission, a simple disorder under Article 134. See *United States v. Webb*, 38 M.J. 62, 69 (C.M.A. 1993) (evidence legally sufficient to prove offense of housebreaking with intent to peep); *United States v. Foster*, 13 M.J. 789 (A.C.M.R. 1982) (window peeping as a violation of Article 134); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978) (voyeurism as a violation of Article 134).

action on findings ostensibly changes the sentencing landscape, the change is in no way so dramatic as to gravitate away from our ability to reassess. *Id.* The same corpus of evidence was before the military judge and the maximum sentence was only reduced from forty to thirty-five years. Furthermore, the military judge was far more influenced by the nature of the child pornography the appellant possessed than by his actions in Cpl V's room.⁷ We are confident that the sentencing authority would impose, and the CA would approve, a sentence of at least 40 months confinement, forfeiture of all pay and allowances and a dishonorable discharge.

Conclusion

We affirm the findings, as modified, and the sentence approved by the convening authority and reassessed by this court.

Senior Judge MAKSYM and Judge PAYTON O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court

⁷ After announcing sentence, the military judge commented "I must say, for the record, that the content of the child pornography was some of the worst that I have seen." Record at 371.