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

Before
J.R. PERLAK, M.D. MODZELEWSKI, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JONATHAN W. JOHNSON
ENGINEMAN FIREMAN (E-3), U.S. NAVY

NMCCA 201200049
GENERAL COURT-MARTIAL

Sentence Adjudged: 14 October 2011.
Military Judge: CDR Douglas P Barber, Jr., JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.D. Hutchison, JAGC, USN.
For Appellant: LT Ryan C. Mattina, JAGC, USN.
For Appellee: Maj William Kirby, USMC.

24 October 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.

PER CURIAM:

This was a mixed-pleas case at a general court-martial. First, a military judge convicted the appellant, pursuant to his pleas, of one specification of unauthorized absence in excess of 30 days, terminated by apprehension, in violation of Article 86, Uniform Code of Military Justice, 10 U.S.C. § 886. The appellant contested the remaining charges before a panel of members with enlisted representation, and they acquitted him of all remaining charges. The members then sentenced the appellant

to confinement for seven months, reduction to pay grade E-1, and a bad-conduct discharge for the unauthorized absence offense. On 27 January 2012, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant assigns one error: that the record does not establish the duration of his unauthorized absence because the military judge did not ascertain with specificity when civilian authorities arrested the appellant and informed the military that he was available. He asserts that these dates conceivably made the duration of his absence less than 30 days, making his plea improvident and requiring us to reassess his sentence.[1]

After carefully considering the record of trial and the pleadings of the parties, we conclude that the military judge did not abuse his discretion in accepting the appellant's guilty pleas. The findings and the sentence are correct in law and fact and there was no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

On 7 March 2011, the appellant failed to muster at the USS MCFAUL (DDG 74). He initially remained at home in Norfolk, Virginia, having decided he did not want to be in the Navy anymore. Later that morning, he drove to his home of record in Mississippi, fully aware that he was beginning a period of unauthorized absence. During the first week of April, he was arrested and taken into custody by civilian authorities in Mississippi for matters unrelated to his military absentee status. At some point during his civilian incarceration, the appellant told the civilians that he was in the military, not for purposes of terminating his unauthorized absence, but rather in hopes that his military status would be viewed favorably by the civilian authorities. He had no prior belief or expectation that this disclosure would cause the civilian authorities to

[1] The appellant does not ask that we vacate his conviction. We would be required to reassess the appellant's sentence if we concluded that his unauthorized absence lasted 30 days or fewer. An unauthorized absence of more than 3 days but not more than 30 days does not make one eligible for a punitive discharge. The maximum punishment is confinement for six months and forfeiture of two-thirds pay per month for six months. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 10e(2)(b). The maximum punishment for an unauthorized absence of more than 30 days terminated by apprehension is a dishonorable discharge, confinement for 18 months, and forfeiture of all pay and allowances. MCM, Part IV, ¶ 10e(2)(c).

discover his unauthorized absence status. The civilian authorities eventually did discover his absentee status and informed the appellant that the Navy had issued a warrant for him. The appellant remained in civilian custody until he was made available to the military on 15 April 2011.

In the sole specification of Charge I, the Government alleged that the final day of the appellant's unauthorized absence was "on or about 15 April 2011." On 21 September 2011, trial defense counsel provided the military judge with notice of an anticipated plea of guilty to Charge I and its specification. Appellate Exhibit XVI. There are no exceptions or substitutions noted. *Id.* The appellant entered an unconditional plea of guilty to the specification and charge as written, stating no exceptions or substitutions, and the military judge, following an adequate and unremarkable inquiry pursuant to *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969), accepted the plea. The maximum punishment for an unauthorized absence in excess of 30 days and terminated by apprehension was confirmed by the parties to be reduction to pay grade E-1, total forfeitures, a fine, 18 months confinement, and a dishonorable discharge. Record at 202. The providence inquiry was played for the members without any defense objection or qualification as to the timeline supporting the plea. No legal error was raised by trial defense counsel in her response to the recommendation of the staff judge advocate.

The Providence of Appellant's Guilty Plea

The appellant argues on appeal that he was improvident to any period of unauthorized absence exceeding 29 days. We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A military judge is afforded "significant deference" in accepting a guilty plea, and there must be a "substantial basis" in law or fact for us to question his decision. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

There is no substantial basis in law or fact to question the appellant's guilty plea. The central question is whether we can determine, from the record, on which side of the 30-day mark the appellant's unauthorized absence lies. We can.

In the appellant's situation, the unauthorized absence ended when the civilian authorities notified the military that he was available to be returned to military control. MANUAL FOR

COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 10c(5). For any time prior to that, he was either in a state of unauthorized absence or being held by civilian authorities while remaining in a state of unauthorized absence. *Id.* He neither surrendered to, nor was he apprehended by or on behalf of military authorities. We can therefore determine whether the appellant's unauthorized absence exceeded 30 days if the record reveals when the civilians notified the military of the appellant's availability. The appellant's exchange with the military judge during the providence inquiry is instructive:

> MJ: So when did it—-your absence according to the charge sheet ended on the 15th of April 2011. What happened on the 15th of April 2011?
>
> DC: Sir, may we have a second?
>
> MJ: Yes.
>
> ACC: [Conferring with defense counsel.] Sir, I had been apprehended by civilian authorities. I was in custody and on April 15th, I was available to the military to be picked up, sir.

.

Record at 211. At this point, the providence inquiry fully comported with the dates and particulars of the specification and the military judge did not ask any additional questions to challenge the appellant's statements as to the date. This exchange confirms that the appellant believed he became available on 15 April 2011. He recognized that date from the charge sheet and had already been advised of the maximum punishment implicated by that date. He conferred with counsel one last time, and if for any reason he did not believe 15 April 2011 was truly the date that his unauthorized absence ended, he had ample incentive and opportunity to modify his plea or otherwise correct the record. This did not occur.

The military judge can always inquire further, but he is not required to do so when faced with a "mere possibility" of a defense. *United States v. Hayes*, 70 M.J. 454, 458 (C.A.A.F. 2012). Here, no possibility of a defense whatsoever was raised at trial. Rather, we have a challenge to the factual assertion of the dates within the specification, to which he entered an unconditional guilty plea, first raised on appeal. The line requiring further inquiry is "amorphous," but an appellant's "vague speculation" about events outside his control is a mere possibility, not a possible defense. *United States v. Olinger*,

50 M.J. 365, 367 (C.A.A.F. 1999); *see also United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995) ("We must again decline the invitation of the defense to speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas."). Here, there was no vague speculation or equivocation by the appellant. It was clear to him, without revealing any of the circumstances of his civilian arrest, that he became available on 15 April 2011. The record provides an adequate factual basis for the appellant's plea and provides context for his statements. The available facts and the appellant's own words indicate that when he said he was made available to the military on 15 April 2011, and after conferring with counsel, he meant it, knowing that was the end date for his period of unauthorized absence.

These facts support the appellant's unconditional plea of guilty to a period running from 7 March 2011 to 15 April 2011, confirmed by his admission at trial that he was available on 15 April 2011. We note that "facts are by definition undeveloped" at guilty plea hearings, in part because the appellant often limits what he will talk about. *Inabinette*, 66 M.J. at 322. Here, the appellant purposefully did not discuss the specifics of his civilian arrest, which further limited the colloquy. That same vagueness does not now create an avenue for appellate relief. We are left with no basis in law or fact to question the military judge's decision to accept this plea. *Id.* The assigned error is without merit.

Conclusion

The finding and the sentence are therefore affirmed.

For the Court

R.H. TROIDL
Clerk of Court