

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

**Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**AARON S. DURBIN
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201300161
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 12 February 2013.

Military Judge: Col G. W. Riggs, USMC.

Convening Authority: Commanding Officer, 4th Marine Corps District, New Cumberland, PA.

Staff Judge Advocate's Recommendation: LtCol R.G. Palmer, USMC.

For Appellant: LT Jessica Fickey, JAGC, USN.

For Appellee: CAPT Janis Monk, JAGC, USN; LT Philip Reutlinger, JAGC, USN.

26 November 2013

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:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of violating lawful general orders, making a false official statement, and wrongfully impeding an investigation in violation of Articles 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 934. The military judge sentenced the appellant to 4 months' confinement, reduction to pay grade E-1, forfeiture

of \$500.00 pay per month for four months¹ and a bad-conduct discharge. The convening authority (CA) disapproved the adjudged forfeitures and approved the remaining adjudged sentence. In accordance with the pretrial agreement (PTA), the CA waived automatic forfeitures for six (6) months from the date of the CA's action.

The appellant claims two assignments of error. First, he argues that the CA's action incorrectly states his plea to Specification 6 of Charge I. Second, he claims that the bad-conduct discharge is inappropriately severe when weighed against his character and service. Unrelated to the appellant's two assignments of error, we also analyze and discuss apparent factual discrepancies contained in the stipulation of fact, Prosecution Exhibit 2. After careful consideration of the record and the submissions of the parties, we conclude that no error materially prejudicial to the substantial rights of the appellant was committed. Arts 59(a) and 66(c), UCMJ.

Background

From early April 2009 to the date of trial, the appellant, a then-married staff sergeant, was assigned to a Recruiting Station (RS) in Michigan. While serving as a recruiter, the appellant became romantically involved with a prospective recruit applicant, Ms. CM. Their relationship developed into one of a sexual nature and continued until she shipped to recruit training. During this time frame, the appellant also wrongfully provided alcohol to three underage individuals, two of whom were prospective recruit applicants. In one instance, the appellant used a government vehicle to drive to the store where he purchased the alcohol.

Also during this time frame, the appellant was cited by local law enforcement for operating a vehicle under the influence of intoxicants. The appellant was driving a government vehicle when he was pulled over and cited. However, prior to sending a copy of the citation to his sergeant major, the appellant altered the document in such a way as to make it appear that he was pulled over in his personally owned vehicle.

¹ The military judge originally adjudged forfeitures of \$500.00 pay per month for four months when he announced sentence. Record at 70. However, after reviewing Part II of the pretrial agreement, the military judge attempted to void this part of the sentence. *Id.* at 72. Such a reversal is contrary to RULE FOR COURTS-MARTIAL 1009(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.), which only allows for sentence reconsideration prior to the sentence being "announced in open session of the court." The convening authority deferred and ultimately disapproved adjudged forfeitures.

Later, when formally questioned by a Marine captain appointed to investigate allegations of misconduct by the appellant, the appellant made intentionally false statements in response to questions pertaining to his sexual relationship with Ms. CM, and to his having provided alcohol to one of the underage recruit applicants.

At trial, the appellant pled guilty to the charges pursuant to a PTA. A provision of the PTA required that the appellant agree to enter into a stipulation of fact with the Government.² The military judge admitted the stipulation of fact into evidence after engaging trial counsel, trial defense counsel, and the appellant on the record as to its accuracy and purpose.³ At no time during the plea colloquy did the military judge reference PE 2 or resolve date discrepancies contained in the exhibit.

Promulgating Order Error

The appellant correctly points out that the promulgating order misstates his plea to Specification 6 of Charge 1.⁴ The appellant alleges no prejudice as a result, and we find none. However, service members are entitled to records that correctly reflect the results of court-martial proceedings. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Accordingly, we shall order the necessary corrective action.

Sentence Appropriateness

The appellant claims that a bad-conduct discharge is unjustifiably severe based on his character and record of service. We disagree.

This court reviews the appropriateness of the sentence *de novo*. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We engage in a review that gives "individualized consideration" of the particular accused "on

² AE VI, ¶ 16b.

³ Record at 16-19.

⁴ The appellant initially pled guilty to the specification and charge pursuant to the PTA. However, the military judge rejected the appellant's plea and entered a plea of not guilty on his behalf. The Government later withdrew and dismissed the offense. Record at 42.

the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After review of the entire record, we find that the sentence is appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384-85; *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268. The appellant was a 30-year-old staff sergeant recruiter when he engaged in an unprofessional and sexually intimate relationship with a prospective recruit applicant, provided alcohol to two other prospective underage recruit applicants, drove a government vehicle while intoxicated to get the alcohol, and then tried to cover up his misconduct by altering his DUI citation. Finally, when confronted, the appellant lied about his misconduct to an investigative officer. Considering the nature and seriousness of this conduct, the appellant's over 10 years of military service, and his overall performance and professional recognition, we conclude that justice was done and the appellant received the punishment he deserves by affirming the sentence as approved by the CA. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA, and we decline to do so. *Healy*, 26 M.J. at 395-96.

Matters Inconsistent with the Plea

In addition to the appellant's claims of error, we note multiple date inconsistencies between the appellant's plea and the stipulation of fact that were not resolved at trial.⁵ The court looks to whether these discrepancies, and the failure of the military judge to reconcile them prior to accepting the appellant's pleas, undermine the factual basis necessary for establishing provident pleas of guilty.

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66

⁵ Specifically, the date discrepancies between the following offenses as pled and PE 2 are noted: 1) Charge I, Specification 1 alleged the violation to have occurred "between on or about 6 April 2010 and on or about 31 July 2010," however, PE 2 states in paragraph 5c that the offense was committed "between on or about 1 November 2011 to on or about 11 April 2011;" 2) Charge I, Specification 4 alleged the violation to have occurred "on or about 1 March 2011," in contrast to PE 2, paragraph 5f, which reflects a date of "[o]n 1 March 2012;" and 3) Charge I, Specification 5 alleged the violation to have occurred "between on or about 1 March 2011 and on or about 16 November 2011," while PE 2, paragraph 5i, provides a time period of "between on or about 17 February to on or about 1 March 2012."

M.J. 320, 322 (C.A.A.F. 2008). We will not disturb a guilty plea unless the record of trial shows a substantial basis in law or fact questioning the guilty plea. *Id.* In order to set aside any of the subject guilty pleas, this court "must find 'a substantial conflict between the plea and the [appellant's] statements or other evidence.'" *United States v. Watson*, 71 M.J. 54, 58 (C.A.A.F. 2012) (quoting *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)).

In this case, the military judge more than adequately established on the record a factual basis for the appellant's pleas. To the extent PE 2 contains date discrepancies when compared to the appellant's provident pleas on the record, we are confident these discrepancies are scrivener's errors. Accordingly, we find no substantial basis in law or fact, to disturb the pleas.

Conclusion

The findings and the sentence as approved by the CA are affirmed. The supplemental court-martial order will reflect a plea of "not guilty" to Specification 6 of Charge I.

For the Court

R.H. TROIDL
Clerk of Court