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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

THOMAS H. MURPHY
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201300080
SPECIAL COURT-MARTIAL

Sentence Adjudged: 20 December 2012.
Military Judge: LtCol Leon J. Francis, USMC.
Convening Authority: Commanding Officer, 1st Supply Battalion, Combat Logistics Regiment 15, 1st Marine Logistics Group, MarForPac, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol E.J. Peterson, USMC.
For Appellant: CAPT Diane L. Karr, JAGC, USN.
For Appellee: Maj David N. Roberts, USMC; LCDR Keith Lofland, JAGC, USN.

20 June 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, consistent with his pleas, of one specification of attempted larceny and six specifications of larceny, in violation of Articles 80 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 921. The military judge sentenced the appellant to 12 months of confinement and a bad-

conduct discharge. The convening authority (CA) approved the sentence and suspended all confinement in excess of 6 months in accordance with the terms of a pretrial agreement.

The appellant now avers that the military judge abused his discretion in accepting his plea to Specification 4 of Additional Charge II because his responses during the providence inquiry were inconsistent with the stipulation of fact.

After careful consideration of the record and the briefs of the parties, we conclude that the military judge did not abuse his discretion in accepting the appellant's plea to Specification 4 of Additional Charge II. Arts. 59(a) and 66(c), UCMJ.

Background

From 5 June to 8 October 2012, the appellant was engaged in a series of thefts from the Marine Corps Exchange (MCX), Camp Pendleton, California. As a result, the appellant pled guilty to stealing three motorcycle helmets, two Coach purses, one video game, and three MCX gift cards of a value of more than $500.00 each. The appellant admitted stealing merchandise from the MCX by concealing it in shopping bags among goods he actually purchased. Other times, the appellant would enter the MCX and take merchandise from the shelf, remove the tag, and return the item in exchange for an MCX gift card, stating he did not have a receipt. This latter scheme forms the basis for Specifications 1, 2, and 4 of Additional Charge II.

Specification 4 of Additional Charge II alleges that the appellant, on or about 24 September 2012, stole an MCX gift card of a value of more than $500.00. During the providence inquiry into this specification, the appellant stated that on 24 September 2012 he acquired possession of a MCX gift card of a value of more than $500.00. When questioned by the military judge on how he obtained the gift card, the appellant stated that his actions on 24 September were similar to previous occasions in which he took a motorcycle helmet off the shelf, and brought it to the returns counter and asked to return it without a receipt. The military judge confirmed with the appellant that in this specification he returned a different helmet than the previous specifications and that the value of the gift card received was over $500.00.[1] Record at 38-39.

[1] The military judge conducted the following colloquy with the appellant with regards to Specification 4 of Additional Charge II:

As part of a pretrial agreement, the appellant and the Government entered into a stipulation of fact, Prosecution Exhibit 1. With regard to Specification 4 of Additional Charge II, the stipulation of fact reflects that, on or about 24 September 2012, the appellant "entered the [MCX] with a vacuum cleaner [he] had previously stolen from the Exchange," and "went to the returns counter and asked to return the item" without a receipt. PE 1 at 5. The stipulation of fact also indicates that he received "a gift card for the amount of the vacuum cleaner, *which exceeded $500*." *Id.* (emphasis added).

Neither the defense counsel, trial counsel, nor the military judge noted the discrepancy between the stipulation of fact and the facts elicited during the providence inquiry for Specification 4 of Additional Charge II regarding the actual item returned to obtain the gift card. The military judge then found the appellant guilty of all charges and specifications in accordance with his pleas.

During the presentencing phase, the Government called an employee of the MCX Asset Retention/Loss Prevention Division to explain the surveillance conducted during the investigation into the appellant's activities at the MCX. During her testimony,

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MJ: Please tell me why you believe you are guilty of this offense.
ACC: Because, as with all the specifications, sir, I knew it [was] wrong when I went in there to do it. My intention was to take it and use it for my own personal use.

MJ: Okay. On 24 September 2012, did you acquire possession of a Marine Corps Exchange gift card which belonged to the Marine Corps Exchange?
ACC: Yes, sir.

MJ: How was it that you acquired possession of the gift card on this occasion?
ACC: It was also back with Specification 2 and 3, sir, with the helmet. The same situation. Taking it up to the counter portraying as I bought it, it was the wrong size or it was too small or too big, and saying I would like to return it. And I would tell them the proper sizes you don't have -- that I need you don't have, and they said they could give me store credit for it. So they would do that.

MJ: Okay. And you actually did this on 24 September 2012?
ACC: Yes, sir.

MJ: Was it another helmet that you were trying to get a gift card?
ACC: Yes, sir.

Record at 37-38.

the employee referred to her notes to refresh her recollection. Her notes were attached to the record as Appellate Exhibit V.

The MCX employee testified that there was one transaction in September 2012 where the appellant exchanged an item for an MCX gift card. The type of item and specific date were not mentioned. Record at 66. The MCX employee's notes suggest the appellant conducted three transactions on three separate days in September 2012. AE V. Two of these entries indicate that two helmets (valued at $524.99 each) were returned on 26 and 29 September, and that a vacuum cleaner (valued at $379.99) was returned on 24 September.[2] *Id.* at 1-2. Neither the military judge nor the parties addressed the apparent inconsistency between the notes, the facts elicited during the providence inquiry, and the stipulation of fact.

Matters Inconsistent with the Plea

The appellant claims the military judge abused his discretion by accepting his guilty plea as to Specification 4 of Additional Charge II because the appellant's plea responses were inconsistent with the stipulation of fact. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The appellant requests that we disapprove the guilty finding on Specification 4 of Additional Charge II and reassess the sentence. We will not disturb a guilty plea unless the record of trial shows a substantial basis in law or fact for questioning the guilty plea. *Id.*

To prevent the acceptance of improvident pleas, the military judge is required to develop, on the record, the factual bases for "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading

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[2] The MCX employee's notes, taken from reviewing video surveillance tapes and statements from fellow agents, reflect the following information:

> 24 Sep – vacuum/return, fraudulent //$379.99
>
> 26 Sep – helmet/stole & returned $524.99
>
> . . . .
>
> 29 Sep – helmet/fraud RT/$524.99
>
> . . . .
>
> 24 September 2012
> Entered the store @ 1137 with a vacuum and then proceeded to return vacuum.

AE V at 1-2; Record at 63.

guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969) (citations omitted); see *also* Art. 45, UCMJ. The appellant must admit every element of the offense to which he pleads guilty. *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006); see *also* RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). If the military judge fails to establish that there is an adequate basis in law or fact to support the appellant's plea during the *Care* inquiry, the plea will be improvident. *Inabinette*, 66 M.J. at 322; *see also* R.C.M. 910(e). "A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *Inabinette*, 66 M.J. at 322. "If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea." R.C.M. 910(h)(2).

This court "must find 'a substantial conflict between the plea and the [appellant's] statements or other evidence' in order to set aside a guilty plea. The 'mere possibility' of a conflict is not sufficient." *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, a substantial conflict in law or fact does not exist when reviewing the inconsistency between the plea colloquy, the stipulation of fact, and Appellate Exhibit V, and no substantial rights of the appellant were infringed upon.

Although the military judge did not catch the inconsistency between the appellant's providence inquiry and the stipulation of fact with regards to Specification 4 of Charge II, he nonetheless established an adequate basis in both law and fact to support the appellant's plea of guilty to larceny of an MCX gift card, property of a value of more than $500.00. Record at 36-40; *see also* Article 121, UCMJ; *Inabinette*, 66 M.J. at 322; *Care*, 40 C.M.R. at 253; and R.C.M. 910(e). The inconsistency that exists between the stipulation of fact and the providence inquiry is whether the appellant returned a vacuum cleaner or a motorcycle helmet to obtain that gift card. PE 1 at 5; Record at 36-40. Even with this inconsistency, the facts reveal that the appellant returned an item that he wrongfully obtained from the MCX in order to receive a gift card. In both the providence inquiry and the stipulation of fact, the appellant admits he stole an MCX gift card valued at more than $500.00. Further, during the plea colloquy, the appellant specifically told the military judge that the value of the gift cards (Specifications

1, 2, and 4 of Additional Charge II) were over $500.00 based on the receipt he received with each gift card. Record at 27, 30-31, 39.[3]

Although the discrepancy as to which item the appellant returned to obtain the MCX credit card should have been resolved by the military judge, we find no substantial basis in law or fact for questioning the appellant's guilty plea to the larceny of the gift card. The military judge thoroughly established that the appellant understood each element of Specification 4 of Additional Charge II and that the appellant stole a gift card valued at more than $500.00, and properly accepted his plea of guilty to this offense. We are satisfied that the appellant's guilt to this specification was clearly established on the record and that the military judge did not abuse his discretion when he accepted the appellant's plea without further inquiries.

Conclusion

The findings and the sentence as approved by the CA are affirmed. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court

[3] Although the MCX employee's notes were attached to the record during the presentencing phase, the notes were only used at trial to aid the witness during her testimony. Specific entries in the notes were not discussed on the record, and the notes were neither offered nor admitted as evidence of the type or value of the items stolen. Record at 68-69.