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

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

UNITED STATES OF AMERICA

v.

BYRON A. PEREZ
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 201200465
SPECIAL COURT-MARTIAL

Sentence Adjudged: 23 July 2012.
Military Judge: Maj Nicholas Martz, USMC.
Convening Authority: Commanding Officer, 2d Supply Battalion, Combat Logistics Regiment 25, 2d Marine Logistics Group, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: Capt M.C. Andrew, USMC.
For Appellant: Maj S. Babu Kaza, USMCR.
For Appellee: LT Lindsay Geiselman, JAGC, USN.

21 March 2013

OPINION OF THE COURT

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of disobeying a lawful general order (sexual harassment) and two specification of assault consummated by a battery, in violation of Articles 92 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 928. The appellant was sentenced to confinement for 75 days, reduction to pay grade

E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.[1]

The appellant claims in his sole assignment of error that his statements during the plea inquiry raised the issue of mistake of fact. The appellant further claims that because the military judge failed to secure a disclaimer of the defense, an inconsistency in his guilty plea was left unresolved, thus requiring this court to set the conviction aside. We disagree. After considering the pleadings and reviewing the entire record of trial, we find no error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Background

While deployed to Afghanistan, the appellant made unwelcome sexual advances on two different female Marines in the form of deliberate and repeated unwelcome physical contact that was of a sexual nature. In the first instance, the appellant held a female Marine, Lance Corporal (LCpl) G, against the wall by her wrists and attempted to kiss her. In the second instance, the appellant tried to kiss LCpl J two times, the second attempt occurring immediately after she rejected his first attempt by turning her head. Following the second rejection, the appellant slapped LCpl J on the face in a relatively light manner.

Providence of the Plea

The appellant alleges that evidence before the trial court raised the issue of mistake of fact. First, the appellant points to the portion of his unsworn statement wherein he stated; "I'm going to say I definitely misunderstood the behavior towards me." Record at 59. Second, the appellant points to one of his answers during the providence inquiry wherein he said: "I tried to kiss [LCpl J] and she didn't want to be kissed since she turned her face as well and I still tried to kiss her not realizing that she didn't want to be kissed . . . ." *Id*. at 25. Lastly, the appellant points to Prosecution Exhibit 4, which is a statement from one of the victims, wherein she said that she did not initially report the incident because she had to work with the appellant, he was senior to her, and because she felt like she was at fault "for being too friendly with him and horse playing [and therefore she] might have given

[1] To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

him the wrong idea." The appellant asserts that these statements should have led the military judge to reopen the providence inquiry to further explore, and secure a disclaimer of, the mistake of fact defense.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea *de novo*. *United States v. Edwards*, 69 M.J. 375, 376 (C.A.A.F. 2011). "'In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea.'" *Id*. (quoting *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F. 2008)). If the facts elicited make out each element of the offense, a guilty plea will be found provident. *United States v. Harrow*, 65 M.J. 190, 205 (C.A.A.F. 2007) (citing *United States v. Garcia,* 44 M.J. 496, 498 (C.A.A.F. 1996)). However, if an accused "sets up matter inconsistent with the plea," the military judge has a duty to resolve the inconsistency or reject the plea. *Garcia*, 44 M.J. at 498 (quoting Article 45(a), UCMJ). As was recently noted by our superior court:

> To rise to the level of inconsistency contemplated by Article 45(a), matters raised at trial must have reasonably raised the question of a defense or must have been inconsistent with the plea in some respect. *United States v. Roane*, 43 M.J. 93, 98 (C.A.A.F. 1995). In determining on appeal whether there is a substantial inconsistency, this Court considers the "full context" of the plea inquiry, including Appellant's stipulation of fact. *United States v. Smauley*, 42 M.J. 449, 452 (C.A.A.F. 1995).

United States v. Goodman, 70 M.J. 396, 399 (C.A.A.F. 2011).

At issue in this case is the special defense of mistake of fact, which "is a defense when it negatives the existence of a mental state essential to the crime charged." *Id*. (citations and internal quotation marks omitted). For general intent crimes, such as the one at bar, the ignorance or mistake "must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id*. (quoting RULE FOR COURTS-MARTIAL 916(j)(1)), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.)). The "honest belief prong is subjective, while the reasonableness prong is objective." *Id*. (citation omitted). While it is possible that the appellant in this case

subjectively believed that his sexual advances were welcome, nothing in the record supports the reasonableness of such a belief.

The appellant outranked both of his victims. He was an E-4, whereas they were both E-3s. In the stipulation of fact, the appellant admits that his attempts to kiss both victims were "unwanted sexual advances." With respect to his first victim, LCpl G, he admitted grabbing her wrists and holding her against the wall in an effort to kiss her, which is not the approach one might reasonably use for a first kiss. As to the second victim, LCpl J, he admitted that he tried to kiss her despite her having turned her face to avoid an earlier kiss, and then slapped her face following her rejection. These admissions suggest that any belief the appellant may have had that his affections were welcomed was unreasonable. Accordingly, the evidence introduced during the appellant's trial did not sufficiently raise a mistake of fact defense or an inconsistency with regard to his guilty plea. There is no substantial basis in either law or fact to question the plea. *See Garcia*, 44 M.J. at 498-99.

Conclusion

The findings and sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court