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

Before
M.D. MODZELEWSKI, E.C. PRICE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

SCOTT E. RYDER
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201300042
SPECIAL COURT-MARTIAL

Sentence Adjudged: 18 October 2012.
Military Judge: LtCol Chris J. Thielemann, USMC.
Convening Authority: Commanding Officer, Marine Light Attack Helicopter Training Squadron 303, MAG 39, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Capt J.A. Atkinson, USMC.
For Appellant: CAPT Randy C. Bryan, JAGC, USN.
For Appellee: Maj Crista D. Kraics, USMC.

29 August 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 one specification of assaulting a superior commissioned officer, one specification of damaging military property valued at less than $500.00, and one specification of larceny in violation of Articles 90, 108 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 908, and 921. The military judge sentenced the

appellant to confinement for seventy five days and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence.

The appellant alleges a single assignment of error: that the military judge abused his discretion by accepting the guilty plea to Charge I, assaulting a superior commissioned officer, because there was a substantial basis in law and fact to question the plea.[1]

After careful examination of the record of trial and the pleadings of the parties, we are satisfied that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Factual Background

After removing a global positioning system from an unlocked car in the barracks parking lot, the appellant was confronted by two Marines who were suspicious of the appellant's actions. They asked the appellant to identify himself. The appellant ignored the request and briskly walked away. The two approaching Marines then proceeded to alert First Lieutenant (1stLt) G, the command duty officer. 1stLt G approached the appellant from behind and ordered him to stop. The appellant stopped and pulled a knife out of his pocket as he turned around to face 1stLt G. The appellant held the knife by the side of his leg as he faced 1stLt G, but did not press the button that would have released the blade. 1stLt G drew his service pistol and ordered the appellant to drop the knife. The appellant complied. Record at 38-39.

Law

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette,* 66 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 for questioning the guilty plea. *Id.* To prevent the acceptance of improvident pleas, the Court of Appeals for the Armed Forces has long placed a duty on the military judge to establish, on the record, a factual basis establishing that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v.*

[1] The issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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 and 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). However, there is no requirement that any witnesses testify or that any independent evidence be produced to establish the factual predicate for the plea. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

In considering the adequacy of guilty pleas, we consider the entire record, including the stipulation of fact and the full range of the appellant's responses during the plea inquiry to determine whether the requirements of Article 45, UCMJ, R.C.M. 910, and *Care* have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002); *see also United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009) (examining the "totality of the circumstances"); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995). If an accused is unable to remember the facts surrounding the offense with which he is charged, a military judge may still accept his guilty plea as provident if the accused is convinced of his guilt based upon the evidence available to him. *See United States v. Jones*, 69 M.J. 294, 300 (C.A.A.F. 2011); *United States v. Moglia,* 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Luebs,* 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler,* 43 C.M.R. 87 (C.M.A. 1971).

The appellant argues that the facts elicited during the providence inquiry fail to establish the elements of the offense: specifically, he asserts that the facts do not establish that he raised the knife in an aggressive manner or brandished it in a threatening manner; that the knife was never actually opened to the point that it could inflict bodily harm; or that he knew 1stLt G was in the execution of his office at the time of the confrontation. Appellant's Brief of 6 May 2013 at 6-9. The appellant further argues that the record is devoid of a stipulation of fact or witness statements to support an adequate basis in law and fact for the plea. *Id.* at 5.

Analysis

The assault in question was defined by the military judge as an offer with unlawful force or violence to do bodily harm to another. Record at 36. An offer to do bodily harm is an intentional act or failure to act which foreseeably causes another to reasonably believe that force will immediately be applied to his or her person. *Id.* We are satisfied that the facts as developed during the providence inquiry establish that the assault in question was an offer-type assault, and that it was reasonable for 1stLt G to believe that force would be applied to him when the appellant turned to face him while holding a knife by his side near his leg.

We agree that the appellant's responses during the providence inquiry were, at times, lacking in detail. We also note that the appellant's ability to recall specific details may have been impacted by the alcohol he consumed. *Id.* at 41. However, we do not believe there is a substantial basis in law or fact to question the plea. We note, for instance, that the appellant indicated that he had read witness statements that described him with the knife in his hand. *Id.* at 40-41. Further, the appellant responded affirmatively when asked by the military judge if he was convinced that the witnesses observed him brandishing or holding a knife in his hand in the direction of 1stLt G. *Id.*

We are likewise not persuaded by the appellant's contention that the knife was never opened to the point that it could inflict bodily harm. The appellant indicated that he turned to face 1stLt G with the knife at his side by his leg, and further explained that in order to engage the blade he needed only to remove the safety and press a button, a process taking three seconds. *Id.* at 39-40. The salient point is that when he turned to face 1stLt G, the appellant had a knife in his hand with instantaneous access to the blade simply by pressing a button. 1stLt G's response of drawing his service pistol clearly suggests he believed force was about to be applied to him.

Finally, we also reject the appellant's claim that he did not know 1stLt G was in the execution of his office. The appellant admitted he knew 1stLt G was his superior commissioned officer by the grade insignia on his collar and by the red duty sleeve indicative of a position in authority on duty. *Id*. at 46-47.

Promulgating Order Error

The promulgating order contains an error: it indicates that the appellant pled guilty to and was found guilty of Charge IV and its sole specification. In fact, the appellant pled not guilty to this offense, which the Government later withdrew and dismissed. Record at 70.

Because 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), the supplemental court-martial order shall reflect that the appellant pled not guilty to Charge IV and its sole specification, which were then dismissed upon motion of the Government.

Conclusion

The findings and the sentence as approved by the CA are affirmed.

For the Court

R.H. TROIDL
Clerk of Court