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

Before
E.E. GEISER, F.D. MITCHELL, J.G. BARTOLOTTO
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEWART C. TOLES II
AVIATION STRUCTURAL MECHANIC (E-6), U.S. NAVY

NMCCA 200602374
GENERAL COURT-MARTIAL

Sentence Adjudged: 25 July 2006.
Military Judge: CAPT James Wynn, JAGC, USN.
Convening Authority: Commander, Navy Region Hawaii, Pearl Harbor, HI.
Staff Judge Advocate's Recommendation: LCDR E. Korman, JAGC, USN.
For Appellant: Earle A. Partington; LT Brian L. Mizer, JAGC, USN.
For Appellee: LT Justin Dunlap, JAGC, USN.

30 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

BARTOLOTTO, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of an attempt to commit disorderly conduct, violation of a lawful general regulation (sexual harassment), possession of child pornography, manufacture of child pornography, and twenty-one specifications of disorderly conduct, in violation of Articles 80, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 892, and 934. The appellant was sentenced to confinement for 60 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. The pretrial agreement had no effect on the sentence.

We have considered the record of trial, the appellant's three assignments of error,[1] and the Government's response. We conclude 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.

Improvident Pleas

The appellant's first and second assignments of error contend the military judge erred by accepting his guilty pleas to Specifications 2-21[2] and 23 of Charge IV and Charge II. Appellant's Brief of 3 Apr 2007 at 7-15. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Holmes*, 65 M.J. 684, 687 (N.M.Ct.Crim.App. 2007). We may not set aside a plea of guilty unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)(quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The appellant "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson*, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999); *see also* RULE FOR COURTS-MARTIAL 910(j), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). The factual predicate for a guilty plea is sufficiently established if "'the factual circumstances as revealed by the accused himself objectively support that plea....'" *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)(quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). When a plea is first attacked on appeal, the evidence is viewed in the light most favorable to the Government. *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, J., concurring).

1. 18 U.S.C. § 1801 offenses (video voyeurism)

The appellant's first assignment of error claims the military judge erred in accepting his guilty pleas to Specifications 2-7, 9-21, and 23, of Charge IV because those

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[1] I. THE MILITARY JUDGE ERRED IN ACCEPTING TOLES' PLEAS TO SPECIFICATIONS 2-21 AND 23 TO CHARGE IV WHEN THOSE SPECIFICATIONS HAD PREVIOUSLY BEEN DISMISSED AND, THUS, THERE WERE NO SPECIFICATIONS TO WHICH TOLES COULD PLEAD.

II. THE MILITARY JUDGE ERRED IN ACCEPTING TOLES' GUILTY PLEA TO CHARGE II AND ITS SPECIFICATION WHEN THE LAWFUL GENERAL REGULATION ALLEGEDLY VIOLATED HAD BEEN CANCELLED MORE THAN A MONTH PRIOR TO THE DATE OF THE ALLEGED OFFENSE.

III. THE CONVENING AUTHORITY'S ACTION AS TO SPECIFICATIONS 2-7, 9-21, AND 23 OF CHARGE IV WAS PREJUDICIALLY INSUFFICIENT IN THAT IT FAILED TO PROPERLY IDENTIFY THE OFFENSES FOR WHICH TOLES WAS CONVICTED, NAMELY, DISORDERLY CONDUCT, AND IMPROPERLY RECITED THE CIRCUMSTANCES OF EACH OFFENSE.

[2] The appellant actually pled not guilty to Specification 8. That specification was later withdrawn and dismissed without prejudice prior to findings.

offenses had previously been dismissed. Appellant's Brief at 7-9. We disagree.

The appellant pled guilty to, *inter alia*, twenty specifications[3] under Charge IV for violating 18 U.S.C. § 1801 (video voyeurism) and attempting to violate the same under the sole specification of Charge I. Record at 154, 251-52; Prosecution Exhibit 1. At no time prior to pleas or during the providence inquiry did the appellant's civilian defense counsel (CDC) contest the jurisdictional limits of 18 U.S.C. § 1801. Record at 153-54, 194-237; Appellate Exhibit XVII. In fact, the CDC and the appellant repeatedly agreed the appellant was subject to 18 U.S.C. § 1801, that he violated it, and that the offenses – except for Specification 23, Charge IV which occurred in a local mall – took place within the statute's required Special Maritime and Territorial Jurisdiction of the United States (SMTJUS). Record at 198-200, 204-10, 229-31, 235-37. However, after the acceptance of pleas but before findings, the CDC moved to dismiss the 18 U.S.C. § 1801 specifications for failure to allege offenses.[4] Record at 252-53; AE XIX.

The military judge questioned the CDC's timing, lack of candor, and advice to the appellant to plead guilty to offenses the CDC did not believe existed. Record at 253-76. The CDC admitted he did this for tactical reasons, but that it was not unethical because this was a due process issue. *Id.* at 253-54, 263. The military judge neither granted nor denied the appellant's motion to dismiss. Instead, the military judge determined he could not accept the appellant's guilty pleas to the 18 U.S.C. § 1801 offenses because the appellant did not believe he was guilty of those offenses and he set those pleas aside. *Id.* at 276-83. On the appellant's behalf, the military judge then entered pleas of not guilty to those offenses and set aside the pretrial agreement. *Id.* He did not set aside the appellant's guilty pleas to the other offenses.

Shortly thereafter, the parties recommended the appellant could plead guilty to the lesser included disorderly conduct offenses under Clauses 1 and 2 of Article 134, UCMJ. *Id.* at 285-97. The parties also agreed that should this happen, the pre-trial agreement as written would still be binding. The military judge accepted this proposal and the appellant entered pleas of guilty to the lesser included offense of disorderly conduct. Following additional inquiry, the military judge found the appellant not guilty of the charged 18 U.S.C. § 1801 offenses, but guilty of the lesser included disorderly conduct offense as to Specifications 2-7, 9-21, and 23, of Charge IV, and guilty to

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[3] That is, Specifications 2-7, 9-21, and 23, under Charge IV.

[4] Specifically, the CDC stated the specifications failed to allege offenses because they did not state the offenses "occurred at a location subject to" the SMTJUS. Record at 259.

the lesser included attempted disorderly conduct offense of Charge I. *Id.* at 293-97. He also found the appellant guilty, consistent with his pleas, to Charge II, and Specifications 1, 22, and 25, of Charge IV. The appellant did not object to the military judge's findings, nor did he further pursue his previous jurisdictional argument. The appellant now attacks those same findings.

We are troubled by the appellant's wholly unsupported allegations of error that: (1) the military judge "dismissed" the 18 U.S.C. § 1801 specifications under Charges I and IV; (2) the military judge "acquitted" the appellant as to those offenses prior to findings; (3) the military judge "ruled" that the "video voyeurism specifications did not allege that offense;" and (4) the appellant "moved for neither an acquittal nor a dismissal of these specifications." Appellant's Brief at 3-4, 7-9. We find these arguments to be disingenuous – especially in light of the fact the appellant's appellate defense counsel making these statements is the same CDC that represented him at trial.[5] He fails to cite to the record to support these assertions, misrepresents the record when he does, and strategically places quotation marks around the word "acquitted" apparently to shield himself from accepting responsibility for using it. *Id.*

Contrary to the appellant's assertions, it is evident from the record that the appellant moved to dismiss the 18 U.S.C. § 1801 offenses. Record at 252-57. It is also evident from the record that the military judge did not dismiss the 18 U.S.C. § 1801 offenses, did not acquit the appellant as to those offenses prior to the findings, and did not rule that they failed to state an offense. *Id.* at 276-82, 293-97. Initially the military judge merely set aside the appellant's guilty pleas to the 18 U.S.C. § 1801 offenses but then, upon the recommendation of the parties with the agreement of the appellant that he could plead to – and be found guilty of – the lesser included offense, allowed the appellant to enter guilty pleas to those lesser included offenses. *Id.* at 285-89. We find no substantial basis in law or fact to question the appellant's guilty pleas. The military judge did not abuse his discretion by finding the appellant not guilty of the charged 18 U.S.C. § 1801 offenses but guilty of the

[5] Based on the CDC's actions, specifically his advice to the appellant to plead guilty to offenses he did not believe existed, his lack of candor to the trial court, and the misrepresentations made here, we have *sua sponte* examined whether ineffective assistance of counsel occurred. Although the CDC appears to be "playing loose and fast" with the law, we do not believe he was ineffective at trial, nor do we find any prejudice to the appellant. *See Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). To the contrary, mainly due to an experienced military judge, the appellant benefited from these actions, in particular the reduction of potential confinement. However, because we are concerned with such unsavory tactics by counsel, we are forwarding this opinion to the Judge Advocate General of the Navy and the Navy's Rules Counsel for review and action as appropriate.

lesser included offenses. We find the appellant's guilty pleas to the lesser included offenses of Charge I and Specifications 2-7, 9-21, and 23, of Charge IV were provident. This assignment of error has no merit.

2. Orders violation (sexual harassment)

The appellant's second assignment of error claims the military judge erred in accepting his guilty plea to Charge II because the sexual harassment regulation cited in the specification had been cancelled prior to the date of the offense. Appellant's Brief at 9-15. We disagree.

The military justice system is a "notice pleading jurisdiction." *United States v. Farano,* 60 M.J. 932, 934 (N.M.Ct.Crim.App. 2005)(quoting *United States v. Gallo*, 53 M.J. 556, 564 (A.F.Ct.Crim.App. 2000), *aff'd*, 55 M.J. 418 (C.A.A.F. 2001)). A specification is sufficient if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense...." *Id. See also United States v. Russell,* 47 M.J. 412, 413 (C.A.A.F. 1998)("A specification is sufficient 'so long as [the elements] may be found by reasonable construction of other language in the challenged specification.'")(citations omitted).

"A specification must expressly or by fair implication allege all the elements of an offense." *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990)(citing *United States v. Bryant*, 30 M.J. 72, 73 (C.M.A. 1990)). Defective specifications are viewed with "maximum liberality" when the appellant pleads guilty to the offense and only challenges the specification for the first time on appeal. *Bryant*, 30 M.J. at 73. In those cases, the appellant must demonstrate that the charge was "so obviously defective that by no reasonable construction can it be said to charge the offense for which conviction was had." *United States v. Watkins*, 21 M.J. 208, 210 (C.M.A. 1986)(quoting *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965)(internal quotation marks omitted)). The appellant's standing is considerably less when he "knowingly and voluntarily pleads guilty to the offense" at trial. *Id.* at 210 (citing *United States v. Hoskins*, 17 M.J. 134, 135 (C.M.A. 1984)).

The sole specification under Charge II involved a violation of Secretary of the Navy Instruction (SECNAVINST) 5300.26C dated 17 October 1997. The specification states the appellant "sexually harass[ed]" a female Sailor in violation of "SECNAVINST 5300.26C" but does not otherwise quote any specific regulation language. The appellant entered pleas of guilty to that specification and charge pursuant to a pretrial agreement.[6] AE

[6] Similar to the CDC's advice to plead guilty to Charge I and Specifications 2-7, 9-21, and 23, of Charge IV, we are concerned the CDC – now the appellant's appellate counsel – advised his client to plead guilty to violating an order that he did not believe existed. *See* fn. 5, above. The

XVII. During the providence inquiry, the appellant acknowledged that while at work he entered the female locker-room because he suspected a female co-worker was showering, placed his head under the shower curtain, watched the naked female co-worker showering for some time, and quickly left the building when she caught him looking at her under the curtain. Record at 165-70; PE 1. He also admitted that at the time of the offense he knew of the regulation and that his conduct violated it.

This court has taken judicial notice[7] that SECNAVINST 5300.26C was cancelled and superseded by SECNAVINST 5300.26D prior to the commission of the offense. We note that SECNAVINST 5300.26D is a near verbatim reiteration of SECNAVINST 5300.26C. The new version of the instruction includes the identical operative language regarding sexual harassment as the version cited in the specification.[8] The conduct described by the appellant during the providence inquiry violated both versions of the instruction equally.

We find, therefore, that the appellant was not misled, that the specification to which he pled guilty informed him of the offense, and that he is not subject to further prosecution for the offense. The scrivener's error in the specification did not prejudice the appellant. We find no substantial basis in law or fact to question the appellant's guilty plea to Charge II and its specification, that the plea was provident, and that the military judge did not abuse his discretion when he accepted that plea. This assignment of error has no merit.

Convening Authority's Action

The appellant's third assignment of error claiming the convening authority's action as to Specifications 2-7, 9-21, and 23, of Charge IV failed to properly identify the offenses which the appellant was convicted lacks merit. *United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987)). However, although not raised as error, the court-martial promulgating order did not indicate that the appellant entered pleas of not guilty to Charge I and Specifications 2-7, 9-21, and 23, of Charge IV, or that he entered pleas of guilty to their lesser included offenses as

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CDC had no problem with Charge II when he represented the appellant at trial, but now he claims it did not allege an offense. Appellant's Brief at 15.

[7] The SECNAV Instructions at issue were neither exhibits to the record, nor enclosures to the briefs.

[8] Specifically: "Sexual Harassment. A form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: ... [s]uch conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive working environment. ... [A]ny military member ... who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature in the workplace is ... engaging in sexual harassment."

indicated above. The findings are correct. The appellant does not assert, and we do not find, prejudice from this error. *See* Art. 59(a), UCMJ; *see also United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998). Nevertheless, the appellant is entitled to accurate records of his court-martial. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). We will therefore remedy the error in the court-martial order in our decretal paragraph. *United States v. Diaz*, 40 M.J. 335, 345 (C.M.A. 1994).

Conclusion

The findings and the sentence, as approved by the CA, are affirmed. The supplemental court-martial promulgating order will correctly reflect the appellant's pleas.

Senior Judge GEISER and Judge MITCHELL concur.

For the Court

R.H. TROIDL
Clerk of Court