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

Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges

UNITED STATES OF AMERICA

v.

KYLE W. GRATE
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200700346
GENERAL COURT-MARTIAL

Sentence Adjudged: 23 January 2007.
Military Judge: CAPT Edward Smith, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR F.T. Katz, JAGC, USN.
For Appellant: CAPT Stephen White, JAGC, USN.
For Appellee: Capt Geoffrey Shows, USMC.

29 April 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

The appellant was convicted, pursuant to his pleas, by a military judge sitting as a general court-martial, of violation of a lawful order, wrongful use and distribution of cocaine, six specifications of making checks with intent to defraud, and obstruction of justice, in violation of Articles 92, 112a, 123a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, 923a, and 934. The appellant was sentenced to confinement for 54 months, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the findings and the sentence as adjudged, but suspended all confinement in excess of 36 months pursuant to the terms of a pretrial agreement.

In his sole assignment of error, the appellant claims that his plea to the obstruction of justice charge was improvident because the record failed to show the acts alleged were wrongful. After reviewing the record of trial, the appellant's assignment of error, and the Government's response, we conclude that the findings and 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.

Background

While stationed at Naval Submarine Base New London, Groton, Connecticut, the appellant became aware that he was a suspect in a larceny investigation being conducted by Navy Criminal Investigation Division (CID). After learning of the investigation, the appellant met and befriended Seaman Apprentice (SA) Adam Henke, who worked for prosecutors assigned to the Trial Department of the Region Legal Service Office Mid-Atlantic Detachment, Groton, Connecticut.

In October 2006, the appellant approached SA Henke and asked him to covertly monitor the case being developed against the appellant by the Government, to include any information that would allow him to impede the CID investigation. Prosecution Exhibit 1 at 5. The appellant knew that the information he was asking SA Henke to provide him was privileged. Record at 103. A few weeks later, SA Henke provided the appellant with a list of witnesses and potential charges against him, prepared by the prosecutors in SA Henke's office. The appellant learned from this list that Fire Control Technician Third Class (FT3) Joseph G. K. McPalmer had implicated him in a larceny of personal property.

Based upon this information, the appellant angrily approached FT3 McPalmer. The appellant told FT3 McPalmer that he was not telling the truth and that he needed to go back to the investigators and change his statement. By his conversation with FT3 McPalmer, the appellant intended to influence FT3 McPalmer not to testify in support of the charge against him. *Id.* at 106. The appellant's interactions with SA Henke and FT3 McPalmer form the basis for the obstruction of justice charge and specification.

Providence of Guilty Plea

A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Carr*, 65 M.J. 39, 40-41 (C.A.A.F. 2007); *United States v. Phillippe*, 63 M.J. 307, 309 (C.A.A.F. 2006)). The standard of review for the providence of a guilty plea is abuse of discretion, where the issue is whether a factual basis exists to support the plea. *United States v. Holmes*, 65 M.J. 684, 686 (N.M.Ct.Crim.App. 2007)(citations omitted).

In reviewing the providence of the appellant's guilty pleas, we consider his colloquy with the military judge, as well as any inferences that may reasonably be drawn from it. *Carr*, 65 M.J. at 41 (citing *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)). A military judge may only accept a guilty plea if there is a factual basis for it, and must reject it if the accused sets up matter inconsistent with the plea or if the plea appears improvident. Art. 45, UCMJ; RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); *Phillippe*, 63 M.J. at 309. Whether a factual basis exists for a guilty plea is not a strict legal question, but rather a mixed question of law and fact. *Holmes,* 65 M.J. at 687. We will review the military judge's decision to accept the appellant's guilty pleas to that offense for an abuse of discretion. *United States v. Shaw,* 64 M.J. 460, 462 (C.A.A.F. 2007)(citing *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F. 1996); *see also Phillippe*, 63 M.J. at 309 (citations omitted).

The elements of obstruction of justice are:

(1) That the accused wrongfully did a certain act;

(2) That the accused did so in the case of a certain person against whom the accused had reason to believe there were or would be criminal proceedings pending;

(3) That the act was done with the intent to influence, impede, or otherwise obstruct the due administration of justice; and

(4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 96b.

The appellant alleges that the military judge failed to establish in the providence inquiry that his interactions with FT3 McPalmer or SA Henke were in any way "wrongful" so as to meet the elements of obstruction of justice under Article 134, UCMJ. The appellant claims that neither his exhortation to FT3 McPalmer to "tell the truth," nor his request to SA Henke to "keep his ears open, and just let me know if he hears anything about my case," were in any way illegal, and therefore do not constitute wrongful acts. Appellant's Brief and Assignment of Error of 18 Jun 2007 at 9.

Based upon our review of the entire record, we find this argument to be disingenuous. In his stipulation of fact, the appellant stated that he "requested that SA Henke *collect* information related to any potential criminal proceeding" against him. Prosecution Exhibit 1 at 5 (emphasis added.). The appellant admits that his request of SA Henke was for information

that he would not have had access to or was otherwise privileged, and he wanted SA Henke to find out the information "without [the] trial counsel knowing. . . ." Record at 103. As for his intent behind this request, the appellant admits that what he was having SA Henke do was wrong because it could "affect what charges [the Government] is trying to bring against me." *Id.* Further, the appellant admits that he wanted the information from SA Henke so he could actively interfere with the prosecution. *Id.* at 115.

The appellant received a list of potential charges from SA Henke that listed FT3 McPalmer as a victim of a larceny. *Id.* at 106. When the appellant angrily confronted FT3 McPalmer about his statement to investigators, he admits that it was an attempt on his part to influence FT3 McPalmer not to testify in support of the charge against him. *Id.* The appellant admits that he did not want FT3 McPalmer to talk to law enforcement, except to retract McPalmer's earlier statement and give them the appellant's version of the facts. *Id.* at 108-09. The appellant admits that his conduct was wrongful because he "went to [FT3 McPalmer] when I shouldn't have." *Id.* at 111. The military judge confirmed with the appellant that, taking all of his actions together, he held the specific intent to impede the due administration of justice because he dissuaded FT3 McPalmer from testifying against him. *Id.* at 116-17.

Considering all of the contextual factors surrounding the appellant's actions, including the method with which he obtained information through SA Henke, and the tone of his discussions with FT3 McPalmer, we find that the appellant's actions were indeed wrongful. *United States v. Reeves,* 61 M.J. 108, 110 (C.A.A.F. 2005). Contrary to his assertions now on appeal, we find that his actions were anything but "honest, uncorrupt, or disinterested." *Id.* In the absence of a substantial basis in law or fact for questioning the appellant's guilty plea, we find the military judge did not abuse his discretion in accepting it.

Conclusion

We affirm the findings and the sentence as approved by the CA.

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court