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

Before
L.T. BOOKER, J.E. STOLASZ, M.W. PEDERSEN
Appellate Military Judges

UNITED STATES OF AMERICA

v.

TIMOTHY T. HOLLMANN
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200900226
SPECIAL COURT-MARTIAL

Sentence Adjudged: 12 January 2009.
Military Judge: CDR Colleen Glaser-Allen, JAGC, USN.
Convening Authority: Commander, Marine Aircraft Group 49, Detachment B, 4th Marine Aircraft Wing, Newburgh, New York.
Staff Judge Advocate's Recommendation: LtCol R.L. Price, USMCR.
For Appellant: LCDR Anthony Yim, JAGC, USN.
For Appellee: LCDR G.R. Dimler, JAGC, USN; Maj Elizabeth A. Harvey, USMC.

25 August 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PEDERSEN, Judge:

A military judge sitting as a special court-martial convicted the appellant pursuant to his pleas of willful spoiling of nonmilitary property, drunk driving, larceny, and housebreaking in violation of Articles 109, 111, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 909, 911, 921, and 930. The convening authority approved the adjudged sentence

of confinement for four months, reduction to pay grade E-1, and a bad-conduct discharge.

Before this court, the appellant raises one assignment of error.[1] After reviewing the record of trial, we conclude that the findings as modified below and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.

Factual Background

The following facts are pertinent to the assignment of error. In reciting them, we are cognizant of Judge Cox's admonition that "where a guilty plea is first attacked on appeal, we must construe the evidence in a light most favorable to the Government." *United States v. Hubbard*, 28 M.J. 203, 209 (C.M.A. 1989)(Cox, J., concurring).

On the evening of 2 November 2008, the appellant and his date attended the Marine Corps Ball held by his unit, Marine Aviation Logistics Squadron 49, near Poughkeepsie, New York. Prosecution Exhibit 1 at ¶ 2. During the course of the evening, the appellant consumed several glasses of wine and admitted to the military judge that he was drunk.[2] Record at 27. He then drove his pickup truck from the ball and noticed that the gas gauge was near empty, so he pulled into an Exxon gas station near Poughkeepsie owned by Mr. Shahid Shamsuddin. Record at 26; PE 1 at ¶ 5. The station was closed, and the appellant, still wearing his Marine Corps dress blue uniform, threw a rock through the lower window of the door to the gas station. Record at 18, 39; PE 1 at ¶¶ 4 and 6; PE 2.

After breaking the window, the appellant entered the station. Record at 39. He gave conflicting reasons for why he entered. At first, he told the military judge that he went in to turn on the gas pumps.[3] Record at 23, 43. In his stipulation

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[1] WHETHER CHARGE IV AND ITS SOLE SPECIFICATION OF HOUSEBREAKING IN VIOLATION OF ARTICLE 130, UCMJ SHOULD BE AFFIRMED WHEN THE GOVERNMENT DID NOT ESTABLISH THAT APPELLANT ENTERED A GAS STATION WITH THE INTENT TO COMMIT A CRIMINAL OFFENSE THEREIN.

[2] The military judge conducted a thorough inquiry on the potential defense of voluntary intoxication, which the appellant stated was not applicable. Record at 19.

[3] The military judge did not inquire about whether the appellant intended to steal gasoline. *See, e.g., People v. Nance*, 102 Cal. Rptr. 266, 271 (Cal.

of fact, however, he stated that his intent at the time he entered was to "commit larceny and/or to damage property, such as the glass door." PE 1 at ¶ 5. During the providence inquiry, the military judge asked the appellant if his intent when he entered the building was to commit some crimes. He responded yes, and when asked to detail those crimes, he replied: "[d]estruction of his [the owner's] property, the ATM, lottery, cash register, and wirings [sic]." Record at 39. Still later in the providence inquiry, the military judge's asked, "[s]o, the reason that you think you are guilty of this offense [housebreaking] then was simply because you had the intent to do damage to the store before you went in there?" Record at 45. He responded, "Yes, ma'am."

Standard of Review

When reviewing the factual basis for a guilty plea, we determine whether the military judge abused her discretion in accepting it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show 'a substantial basis' in law and fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *Inabinette* also addressed the "and" in "law and fact":

> Traditionally, this test is presented in the conjunctive (*i.e.*, law *and* fact) as in *Prater*; however, the test is better considered in the disjunctive (*i.e.*, law *or* fact). That is because it is possible to have a factually supportable plea yet still have a substantial basis in law for questioning it. This might occur where an accused knowingly admits facts that meet all the elements of an offense, but nonetheless is not advised of an available defense or states matters inconsistent with the plea that are not resolved by the military judge. At the same time, where the factual predicate for a plea falls short, a reviewing court would have no reason to inquire *de novo* into any legal questions surrounding the plea.

App. 1st Dist. 1972)("Here the entry was made to turn on a switch to the gasoline pumps in order to steal gasoline. The act necessary to the theft was to be performed within the premises. In such a situation, it would not be necessary that the gasoline be inside the premises.").

Inabinette, 66 M.J. at 322 (emphasis in original).

Analysis

The appellant contends that his plea was improvident because the military judge found that he formed the intent to break a window in order to enter the gas station.[4] The specification of housebreaking charged the appellant with unlawfully entering the gas station "with intent to commit a criminal offense, to wit: larceny and willful spoiling of nonmilitary real property, therein." Charge Sheet, Charge IV, Specification. During the course of the plea colloquy, the military judge elicited sufficient evidence from the appellant to show that, in addition to breaking a window to gain entry, once inside the gas station he spoiled property as well. Record at 16-18. When the variance with paragraph five of his stipulation arose, the military judge, as required by Article 45, UCMJ, conducted further inquiry to elicit from him that he entered the gas station with the intent to spoil property therein, which was consistent with his stipulation. During that inquiry, defense counsel speculated that, "because he was intoxicated, he might not have as clear a recollection at this time as what he actually intended to do and what intent he formed and when it was formed." Record at 42. Since the military judge was present and able to observe the appellant during the plea colloquy, she was in the best position to determine the basis for the inconsistency.

As the Court of Appeals for the Armed Forces observed in *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002):

> By its nature, a guilty plea case is less likely to have developed facts, particularly where there is no accompanying stipulation of fact. Those facts that are part of the military judge's providence inquiry are not subject to the test of adversarial process. We are similarly mindful that a decision to plead guilty may include a conscious choice by an accused to limit the nature of the information that would otherwise be disclosed in an adversarial contest. Thus, this Court has declined to adopt too literal an application of Article 45 and RCM 910(e). When this

[4] Brief for Appellant of 30 Jun 2009 at 5. This critical sentence in the appellant's brief ends abruptly: "In other words, because Appellant formed the intent to break a window in order to enter the gas station, the military judge found Appellant guilty of housebreaking on the". From a reading of the entire brief, we have ascertained what we believe is his argument.

> Court has addressed a bare bones providence inquiry, we have not ended our analysis at the edge of the providence inquiry but, rather, looked to the entire record to determine whether the dictates of Article 45, RCM 910, and *Care*[5] and its progeny have been met.

Id. at 238-39. If the breaking[6] of the window had been the sole basis for the military judge's acceptance of the plea, we might agree with the appellant and find an error of law requiring *de novo* review. However, viewing, as we must, *see Inabinette*, 66 M.J. at 322, the whole record, we find instead that the basis for the military judge's acceptance of the plea was the appellant's admission that he entered with the intent to commit the crime of spoiling property inside the gas station.

We do note a variance between the military judge's description of the elements and her findings. The specification charged the appellant with entering to commit both larceny and spoiling. During the colloquy on the housebreaking charge, the military judge modified the elements of the offense to remove the intent to commit larceny, but did not reflect that modification in her findings. *Compare* Record at 45 ("Do these elements as modified correctly describe what you did on 2 November 2008") *with* Record at 59 ("Guilty of all four charges and the sole specifications thereunder."). Thus, we will take corrective action in our decretal paragraph.

We determine there is no substantial basis in law or fact to find that the military judge abused her discretion in accepting the guilty plea to housebreaking.

Conclusion

We affirm the guilty findings to Charges I-III and their specifications. With respect to the specification of Charge IV, we affirm the finding of guilty except for the words "larceny and," we affirm the finding of guilty for Charge IV itself. The approved sentence is affirmed.

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[5] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[6] Contrary to the implication of the name of the offense, "housebreaking" does not require proof of a house or a breaking. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), ¶ 56(c)(1)("The offense of housebreaking is broader than burglary in that the place entered is not required to be a dwelling house; . . . [and] it is not essential that there be a breaking . . . .").

Senior Judge BOOKER and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court