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

Before
D.E. O'TOOLE, L.T.BOOKER, D.O. HARRIS
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JACOB L. JOHNSON
CORPORAL (E-4), U.S. MARINE CORPS

NMCCA 200900141
SPECIAL COURT-MARTIAL

Sentence Adjudged: 23 January 2009.
Military Judge: Col D.J. Daugherty, USMC.
Convening Authority: Commanding Officer, 2d Supply Battalion, Combat Logistics Regiment 25, 2d Marine Logistics Group, Camp Lejeune, NC.
Staff Judge Advocate's Recommendation: LtCol J.M. Henry, USMC.
For Appellant: LT Michael Maffei, JAGC, USN.
For Appellee: Maj Elizabeth A. Harvey, USMC; LCDR Clay Trivett, JAGC, USN.

25 August 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

A special court-martial comprised of a military judge alone convicted the appellant, pursuant to his pleas, of unauthorized absence, indecent language, and communicating a threat in violation of Articles 86 and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 934. Contrary to his pleas, the military judge also convicted

the appellant of assault consummated by a battery in violation of Article 128, UCMJ, 10 U.S.C. § 928. The appellant was sentenced to confinement for 7 months, reduction to pay grade E-2, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. A pretrial agreement had no effect upon the adjudged sentence.

In his sole assignment of error, the appellant asserts that his plea of guilty to the offense of indecent language is improvident. *See* Appellant's Brief at 1. After carefully considering the record of trial and the briefs of counsel, we find merit in the assignment of error and will provide appropriate relief in our decretal paragraph. The remaining findings and sentence, as modified, are correct in law and fact, and no other error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

I. Background

The appellant and Lance Corporal (LCpl) H dated for nearly a year, including several months while the couple was deployed to Iraq. The charges in this case all stem from the appellant's misconduct during that volatile relationship and its aftermath. Several specifications involve profane text messages or voice mail messages that the appellant sent to LCpl H's personal cellular telephone after the relationship ended.

The indecent language specification challenged on appeal reads as follows:

> In that Corporal Jacob L. JOHNSON, U.S. Marine Corps, 2d Supply Battalion, Combat Logistic [sic] Regiment-25, 2d Marine Logistics Group, Camp Lejeune, North Carolina, did, at an unknown location, on or about 20 June 2008, orally communicate to [LCpl H], U.S. Marine Corps, certain indecent language, to wit: "I hope sumthin happens and ur [fxxxxxx] kidney stones shoot up through ur [fxxxxxx] head and blow ur brains out u [fxxxxxx] bitch I u rot in hell," or words to that effect.

Charge Sheet, Charge V, Specification 1.

In both a stipulation of fact and during the providence inquiry, the appellant admitted sending a text message containing those words, and conceded that the language was indecent. Record at 27; Prosecution Exhibit 1 at 3. In response to the military judge's question of why the appellant believed this language to be indecent, the appellant replied, "Because I made [LCpl H] think that I wanted her – cause harm to her, sir." Record at 27. The stipulation of fact states that the language was indecent because it is "grossly offensive to the military community sense of proper decorum between individuals" and that it is "degrading, humiliating, mean spirited and outside the reasonable societal expectations for conversation between individuals." PE 1 at 3.

II. Analysis

A. Standard of Review

A military judge shall not accept a plea of guilty without making sufficient inquiry of the accused to establish that there is a factual basis for the plea. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). "[T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Discussion. Likewise, a military judge "may not arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987).

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *See United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A military judge abuses his discretion by failing to adequately elicit a factual basis for the pleas, or by erroneously applying the law. *Id.* In reviewing a trial judge's decision to accept a plea, this court must determine whether the record reveals a substantial basis in law or fact for questioning the plea. *Id.* Where the providence of a plea raises a pure question of law, appellate courts will employ a *de novo* standard of review. *Id.; see also United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007).

Our inquiry on appeal is not to determine whether the appellant might have asserted a successful defense at trial. "Had he chosen to do so, appellant could have contested his

guilt and placed the burden on the Government to prove its case. . . . Instead, appellant chose to plead guilty[.]" *United States v. Brown*, 22 M.J. 448, 451 (C.M.A. 1986). Nonetheless, an appellant's subjective belief that his conduct is criminal cannot provide the sole basis for a guilty plea; rather, the providence inquiry must elicit facts objectively establishing his guilt. *See United States v. Evans*, 35 M.J. 754, 757 (N.M.C.M.R. 1992).

B. Elements and Definitions

The elements of indecent language under Article 134, UCMJ, are:

> 1. That the accused orally or in writing communicated to another person certain language;
>
> 2. That such language was indecent; and
>
> 3. 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 (2008 ed.), Part IV, ¶ 89b. Indecent language is defined as:

> that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

Id. at ¶ 89c. The military judge correctly advised the appellant of these elements and definitions. Record at 23-25; *cf. United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)(holding providence inquiry was deficient where military judge incorrectly stated the definition of "obscene").

C. The Test for Indecency

We note initially that the charged language obviously was not communicated orally, as was incorrectly alleged in the specification, but rather took the form of a text message, as the appellant confirmed during his providence

inquiry. Record at 25; Government Brief of 22 Jun 2009 at 2. It is well established that indecent language may be communicated in writing or, as in this case, electronically. *See* MCM, Part IV, ¶ 89b(1); *see also United States v. White* 62 M.J. 639, 642 (N.M.Ct.Crim.App. 2007). However, regardless of form, the language still must meet the legal definition of "indecent."

The precise parameters of what constitutes indecent language have been the subject of considerable debate over the years. In *United States v. Brinson*, 49 M.J. 360 (C.A.A.F. 1998), the court employed its previously adopted test for indecency of whether the language was "calculated to corrupt morals or excite libidinous thoughts." *Id.* at 364; *see also United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994); *United States v. French*, 31 M.J. 57, 60 (C.M.A. 1990). The accused in *Brinson* shouted a string of expletives, threats of violence, and racial epithets at a law enforcement officer who was arresting him. *Brinson*, 49 M.J. at 363. Absent from the charged language, however, was any sexual term or lewd subtext. *See also United States v. Herron*, 39 M.J. 860 (N.M.C.M.R. 1994). In reversing the conviction for indecent language, the court held that the accused's profane tirade was "was clearly calculated or intended to express his rage, not any sexual desire or moral dissolution." *Brinson*, 49 M.J. at 364 (citations omitted). The court also emphasized that whether the language was indecent must be evaluated in context, considering all of the surrounding circumstances. *Id.*; *see also French*, 31 M.J. at 60 (affirming servicemember's conviction for indecent language by asking his 15-year-old stepdaughter if he could "climb into bed with her").

In a concurring opinion, Chief Judge Cox recounted in detail the history behind the offense of indecent language, concluding that "[t]he bottom line is that, historically, the crime of 'indecent language' has been limited to those circumstances wherein the speech was intended to convey a 'libidinous message.'" *Brinson*, 49 M.J. at 368 (Cox, C.J., concurring). Addressing the application of this definition to profanity, Chief Judge Cox wrote:

> We have never held that profanity is *per se* indecent . . . or that words such as those uttered by appellant were indecent. From our common experience, we note that scarcely a day

> would pass without numerous violations of the Uniform Code if servicemembers were prosecuted for using the well-known 'four letter words.' Sadly, the lexicon of many servicemembers is replete with such profanity.

Id. at 367.

Two judges in *Brinson* dissented, however, stating that there are actually two separate categories of "indecent" language encompassed by the current Manual's definition. *Id.* at 368 (Crawford, J., dissenting in part and concurring in the result). In addition to language designed to corrupt morals or excite libidinous thoughts, language can also be indecent if it "is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature." *Id.* (internal quotation marks and citation omitted). The dissenters would have allowed the conviction to stand under this portion of the Manual's definition. *Id.*

Several years later the Court of Appeals for the Armed Forces (CAAF) revisited this issue, reviewing a plea of guilty to the similar offense of depositing obscene matters into the mail. *See United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004). The charged language in that case contained several graphic sexual terms, but did not appear to be "calculated to corrupt morals or excite libidinous thoughts." *Id.* at 139-40. Acknowledging the adverse holding in *Brinson*, the Government asked the court to overrule *Brinson's* definition of obscene, which parallels the definition of indecent. *Id.* at 140. In *Negron*, the court stated that, notwithstanding the disagreement by the dissenting judges in *Brinson*, the relatively narrow *Brinson/French* test correctly stated the applicable law at the time of the Negron's court-martial. *Id.* at 141. Because the military judge utilized a definition of obscene inconsistent with the standard set forth in *Brinson*, CAAF, in a unanimous decision, rejected the guilty plea and set aside the findings as to the depositing obscene materials in the mail offense. *Id.* at 144.

In an attempt to dispel any confusion caused by the multiple opinions in *Brinson*, the court went on to hold that, prospectively, either definition of "indecent" contained within the current paragraph of the Manual could form the basis for a charge of indecent language. *Id.* at

144; MCM, Part IV, ¶ 89c. "Simply stated, paragraph 89.c presents two different definitions to measure speech that may be a crime, *dependent on the context in which it is spoken*." *Negron*, 60 M.J. at 144 (emphasis added). For all cases tried after the date of the *Negron* decision, the offense of indecent language could also encompass language "grossly offensive to modesty, decency, or propriety, or [that] shocks the moral sense, because of its vulgar, filthy, or disgusting nature." *Id.*[1] (internal quotation marks and citation omitted). In so holding, the court appears to have adopted at least a portion of the dissent in *Brinson*. However, nowhere in *Negron* did the court indicate that *Brinson* was overturned, nor did the court state that this prospective ruling would have led to a different result on the specific facts presented in either *Brinson* or *Negron*.

The court concluded its analysis in *Negron* by cautioning Government prosecutors against reading its decision too broadly:

> To render language punishable for the offenses of indecent language and depositing obscene matter in the mail, the President has required that the language and 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. In part, it is this element of these offenses that filters out from punishment language that is colloquial vocabulary and may be routinely used by service members. As these offenses touch on *First Amendment* free speech issues, the Government must always exercise care in both charging and proving these offenses to establish that the factual predicate for these offenses is within the ambit of the narrowly limited classes of [punishable] speech.

Id. at 144 (internal quotations and citations omitted).

In the intervening five years since the *Negron* decision, we have found a paucity of case law interpreting

[1] We note, however, that this "different" definitional language appears in *French*, *Hullett*, and *Brinson*, and the relevant Manual provision is unchanged since those cases were decided. *See French*, 31 M.J. at 59; *Hullett*, 40 M.J. at 191; *Brinson*, 49 M.J. at 363-64.

the scope of CAAF's prospective definition of "indecent." Counsel for the appellant and the Government likewise cite no post-*Negron* case law on this point, although both sides correctly note that the prospective definition would apply. We now apply this body of law to the facts of this case.

D. Discussion

We have no doubt that under the pre-*Negron* line of cases, the words communicated by the appellant in this case would not meet the definition of indecent. *See Brinson*, 49 M.J. at 364; *Hullett*, 40 M.J. at 191; *French*, 31 M.J. at 60; *see also Herron*, 39 M.J. at 862. Even in *Negron*, the offensive language held insufficient by CAAF was far more sexually explicit than the words employed by the accused in this case. 60 M.J. at 137. The sole question before us is thus whether *Negron* expanded the definition of "indecent" to encompass the appellant's crude text message to his ex-girlfriend. Upon careful evaluation of the language itself and the context in which it was used, we hold that the appellant's guilty plea is improvident.

To sustain the guilty plea, the appellant's communication must be language that "is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature." *Negron*, 60 M.J. at 144. Although the stipulation of fact and the providence inquiry contained conclusory admissions by the appellant that the charged language met this standard, we are not bound by those subjective admissions. *See Evans*, 35 M.J. at 757.

When asked *why* he thought his words were indecent, the appellant replied, "Because I made [LCpl H] think that I wanted her -- cause harm to her, sir." Record at 27. We are unaware of any case law incorporating a fear of harm into the definition of indecency. While such facts would be relevant to a charge of communicating a threat, we find them largely irrelevant to a charge of indecent language. We also find no case law supporting the description of indecency set forth in the stipulation of fact. Finally, we disagree with the military judge and the Government that the one pay grade difference in rank between the appellant and LCpl H is of great significance. Clearly, this communication was of a personal nature, between two Marines who had engaged in a long-term romantic relationship. That the appellant had been advanced from lance corporal to

corporal during that time did not alter the nature of that relationship, or the impact of the appellant's text message on LCpl H.

Mindful of the guidance from *Negron*, we cannot conclude that the coarse language utilized by the appellant falls within the "narrowly limited classes of punishable speech." *Negron*, 60 M.J. at 144. The context of the charged language is particularly important here. The appellant sent a text message, a private communication while off-duty, to an adult woman with whom he had been intimate for an extended period of time. *Cf. United States v. Dudding*, 34 M.J. 975, 976-77 (A.C.M.R. 1992)(upholding indecent language conviction for servicemember who called a 7-year-old girl a "bitch"), *aff'd*, 37 M.J. 429 (C.M.A. 1993). Testimony at trial clearly established that heated arguments between the appellant and LCpl H were common during the end of their relationship. *See, e.g.*, Record at 109-10, 137-38; *see generally Hullett*, 40 M.J. at 192-93 (noting history of similar communications between alleged victim and accused). We are, frankly, skeptical that a reasonable member of the military community would be shocked or grossly offended by this profane and derogatory exchange between a couple in the midst of an acrimonious break-up.

With respect to the profanity itself, we are quite certain that the military environment is no more pristine now than it was at the time Chief Judge Cox wrote his concurrence in *Brinson* over a decade ago, noting the prevalence of certain four-letter words. While that might be a sad commentary on the state of our society (or at least the current state of the English language), we must "filter[] out from punishment language that is colloquial vocabulary and may be routinely used by service members." *Negron*, 60 M.J. at 144. We find that the language employed by the appellant, viewed in light of the specific facts and circumstances in this case, is less offensive than that deemed insufficient to sustain a conviction in either *Brinson* or *Negron*. Even to the extent *Negron's* prospective ruling may have been intended to expand the reach of an indecent language prosecution, we cannot conclude CAAF meant to criminalize the type of conduct presented in this case. Accordingly, we hold that the military judge abused his discretion by accepting the appellant's plea of guilty to the offense of indecent language.

III. Conclusion

The finding of guilty to Specification 1 under Charge V is set aside, and that charge and specification are dismissed. We have reassessed the sentence in accordance with *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986), and *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and approve only so much of the sentence as provides for confinement for 6 months, reduction to pay grade E-2, and a bad-conduct discharge. The remaining findings and the sentence, as modified, are affirmed.

Chief Judge O'TOOLE and Senior Judge BOOKER concur.

For the Court

R.H. TROIDL
Clerk of Court