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

Before
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ANTHONY M. PREST
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 200800579
SPECIAL COURT-MARTIAL

Sentence Adjudged: 02 April 2008.
Military Judge: Maj Brian Kasprzyk, USMC.
Convening Authority: Commanding Officer, Marine Aircraft Group 39, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Maj G.R. Hines, USMC.
For Appellant: Rebecca Snyder, Esq.; LtCol R.R. Posey, USMC.
For Appellee: LCDR Paul Bunge, JAGC, USN.

31 August 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, in accordance with his pleas, of two specifications of disrespect toward a superior commissioned officer, one specification of willful disobedience of a superior commissioned officer, and two specifications of wrongful use of a controlled substance, in violation of Articles 89, 90, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 889, 890,

and 912a. The military judge sentenced the appellant to 180 days of confinement, forfeiture of $500.00 pay per month for six months, and a bad-conduct discharge. The convening authority suspended all confinement in excess of 75 days and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant raised the following assignment of error: whether the promulgating order fails to comply with RULE FOR COURTS-MARTIAL 1114(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), because it does not accurately articulate the finding to Charge III, Specification 1, and misstates which specifications were treated as multiplicious for sentencing by the military judge. In an order dated 9 February 2009, we specified two issues for argument by the parties: (1) whether the appellant's plea to Charge I, Specification 2, was provident when the appellant admitted that by the time of his alleged disrespect toward Chief Warrant Officer 4 (CWO4) Mark A. Dischner, USMC, the appellant had consumed between 10 and 12 beers, ingested 24 Cordicin pills, and had been hallucinating; and (2) whether the appellant could providently plead to the knowing use of cocaine and methamphetamine when the appellant admitted that, by the time of his alleged wrongful use, he had consumed 10 to 12 beers and ingested 24 Cordicin pills.

Upon consideration of the record of trial and the pleadings of the parties, we agree with the appellant that the court-martial order fails to comply with R.C.M. 1114(c) and order remedial action in our decretal paragraph. We conclude that the findings as to the wrongful use of a controlled substance are correct in law and fact, but that the appellant's pleas to disrespect toward and disobedience of a superior commissioned officer are improvident and must be set aside, and his sentence reassessed. After our corrective action, we find that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Background

On the evening of 18 February 2008, following the use of copious amounts of intoxicants to include 24 Cordicin pills, 10 to 12 beers, cocaine, and methamphetamine, the appellant found himself on the telephone with his mother. Out of concern for her son's well-being, the appellant's mother alerted the military police to the situation, who dutifully responded to the appellant's barracks room. Upon arriving at the appellant's barracks room, the military police ordered the appellant to remain in the lounge before transporting him to his unit's

headquarters. While waiting in the lounge, the appellant stated to a chief warrant officer of the United States Marine Corps who was dressed in civilian attire, "is that supposed to mean something", immediately after the CWO4 introduced his name and rank to the appellant. Record at 69, 73-74. Once at his unit's headquarters, the appellant was ordered to sit down by the CWO4 and refused, stating in response "what are you going to do, make me." *Id*. Shortly thereafter, having been taken aside by a captain of Marines, the appellant again refused to "stand down" and stated to the captain "if this motherfxxxxx gets in my face and I get arrested." [Sic] *Id*. at 80.

Standard of Review

This court considers *de novo* the factual and legal sufficiency of a finding of guilty in those cases referred to it. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). We review the military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007)(quoting *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)). A guilty plea will be rejected on appeal only where the record of trial shows a substantial basis in law or fact for questioning the plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Discussion

In accepting a guilty plea, the military judge is required to question the accused "to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which [the accused] is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *see also* R.C.M. 910(e). In testing the acceptability of a guilty plea, the military judge is required to enter a plea of not guilty for an accused and "proceed as though he had pleaded not guilty" if the accused "sets up matter inconsistent with the plea." Art. 45 (a), UCMJ; *see also United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). "If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense." R.C.M. 910(e), Discussion.

"As a result, when, either during the plea inquiry or thereafter . . . circumstances raise a possible defense, a military judge has a duty to inquire further to resolve the apparent inconsistency." *United States v. Phillippe*, 63 M.J. 307, 310-11 (C.A.A.F. 2006). This inquiry should include a concise explanation of the elements of the defense and "[o]nly after the military judge [makes] this inquiry can he then determine whether the apparent inconsistency or ambiguity has been resolved." *Id*. at 310 (footnote omitted); *see United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004).

Voluntary intoxication is not a defense, but may "negate the specific intent required for some offenses." *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997); *see United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996); R.C.M. 916(l)(2). Disobeying and disrespecting a superior commissioned officer are such an offenses. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 14(c)iv(c). The potential defense of voluntary intoxication does not arise simply because the appellant was drinking or was even intoxicated. In order for voluntary intoxication to be raised as a defense, "the intoxication must be to such a degree that the accused's mental faculties are so impaired that a specific intent cannot be formed." *United States v. Yandle*, 34 M.J. 890, 892 (N.M.C.M.R. 1992)(citing *United States v. Bright*, 20 M.J. 661 (N.M.C.M.R. 1985)). In ascertaining the effects of intoxication on an accused pleading guilty, courts generally recognize that they "have no way of knowing the exact extent intoxication may have interfered with [an] accused's normal mental processes." *United States v. Lacy*, 27 C.M.R. 238, 240 (C.M.A. 1959).

In the case before us, the military judge's colloquy with the appellant reveals facts indicative of severe intoxication. The appellant stated to the military judge that he had engaged in substantial drug use on the day and night in question. According to the appellant, his level of drug use was routine, as was a physiological response of hallucinating when he engaged in such use. Record at 47. Although the appellant states to the military judge that he was not hallucinating at the time of his drug use that day, he does state that he hallucinated on the day in question. *Id*. The appellant was indeed able to recite many of the facts of the relevant night and morning and states to the military judge that he understood the rank of the persons around him and the order given by the CWO4. However, there were manifest inconsistencies between the pleas of the appellant to the charges of violating Articles 89 and 90, UCMJ, and his statements to the military judge during the providence inquiry.

In addressing the circumstances supporting the charges, the appellant stated the following with regard to his alleged disrespectful behavior:

> I was under the influence of high, so – I mean, I was coherent enough to understand what was going on but with any sort of substance that you take, even alcohol or drugs, you're just a little more looser with your demeanor, so I was just going with what I thought was right at the time, sir.

Record at 33.

Under these facts, we are not persuaded that the military judge sufficiently resolved the inconsistencies and ambiguities raised by the appellant through his repeated declarations of severe intoxication/hallucination. *See Phillippe*, 63 M.J. at 310. The appellant's voluntary intoxication could have served to negate the scienter element of the charge of disobedience of a lawful order and rose above a "mere possibility of conflict between [the] guilty plea and the accused's statements."[1] *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). We are not convinced that the military judge sufficiently ensured that the appellant's guilty plea was obtained freely and voluntarily, in light of the state of the evidence on the appellant's intoxication.

We are not satisfied beyond a reasonable doubt that the appellant's voluntary intoxication did not negate his ability to form the specific intent necessary to commit the offense of disobedience of a superior commissioned officer or otherwise satisfied the knowledge element of the disrespect charge, namely Specifications 1 and 2 of Charge I and Charge II. Accordingly, we find that there is substantial basis in law and fact to overturn the pleas to those offenses.

[1] In finding the appellant's pleas improvident for the offenses against authority while affirming the appellant's pleas to the drug use, we are cognizant of the flexible approach taken by the Court of Appeals for the Armed Forces (CAAF)to satisfying the knowledge element as it appears in Article 112a, UCMJ. CAAF has elaborated on drug offenses by holding that "for possession or use to be 'wrongful,' it is not necessary that the accused have been aware of the precise identity of the controlled substance, so long as he is aware that it is a controlled substance." *United States v. Mance*, 26 M.J. 244, 254 (C.M.A. 1988).

Sentence Reassessment

As a result of our action on the findings with regard to Specifications 1 and 2 of Charge I and Charge II, we must reassess the appellant's sentence. *See United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006). We are satisfied that the sentencing landscape in this case has not changed dramatically as a result of our decision to set aside the findings of guilty to disrespect and disobedience. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). We conclude that, notwithstanding the set aside, the adjudged sentence for the remaining offenses would have been at least the same as that adjudged by the military judge and approved by the convening authority. *Id*. at 478.

Conclusion

After careful consideration of the pleadings of the parties and the record, we affirm the findings as to Charge III and Specifications 2 and 3 thereunder, and the sentence. We set aside the findings as to Charges I and II and the specifications thereunder and dismiss those charges. We direct that the supplemental court-martial order reflect that Specification 1 of Charge III was withdrawn and dismissed at trial. R.C.M. 1114.

Senior Judge VINCENT and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court