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

Before
E.E. GEISER, E.C. PRICE, D.O. VOLLENWEIDER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

ERNEST K. TANNER
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200900092
SPECIAL COURT-MARTIAL

Sentence Adjudged: 22 October 2008.
Military Judge: LtCol Robert Q. Ward, USMC.
Convening Authority: Commanding Officer, Marine Attack Squadron 542, 2d Marine Air Wing, U.S. Marine Forces, Atlantic, Cherry Point, NC.
Staff Judge Advocate's Recommendation: LtCol M.P. Gilbert, USMC.
For Appellant: Maj Rolando R. Sanchez, USMC.
For Appellee: Mr. Brian K. Keller, Esq.

29 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of assault on a noncommissioned officer, two specifications of willfully disobeying a noncommissioned officer, two specifications of disrespect towards a noncommissioned officer, one specification of provoking speech, one specification of provoking speech or gestures, three

specifications of assault consummated by a battery, one specification of disorderly conduct, and one specification of drunk and disorderly conduct, in violation of Articles 91, 117, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 917, 928, and 934. The military judge sentenced the appellant to confinement for four months, forfeiture of $898.00 per month for a period of four months, reduction to pay grade E-1, and a
bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged. A pretrial agreement in the case had no effect on the sentence.

After careful consideration of the record, submitted without assignment of error, we affirm the findings and sentence as approved by the convening authority.[1] Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c). We direct that the supplemental court-martial order reflect the appellant's pleas as to Specification 4 under Additional Charge I, and the plea and finding as to the specification under Additional Charge II.

Chief Judge GEISER concurs.

VOLLENWEIDER, Senior Judge (concurring in part, dissenting in part):

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[1] With respect to our dissenting brethren's first proposed specified issue, we note that during the providence inquiry the appellant admitted "I screamed . . . I used a hateful tone of voice when I said [do you have something to say]," and also admitted that those words were unprovoked and constituted fighting words. Record at 25-28; *see United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008)("rejection of [a guilty] plea requires that the record of trial show a 'substantial basis' in law [or] fact for questioning the guilty plea")(citations omitted); *United States v. Adams*, 49 M.J. 182, 185 (C.A.A.F. 1998)(citations omitted)("all the circumstances of a case must be considered in determining whether certain words are provoking"). With respect to our dissenting brethren's remaining proposed specified issues, we note that the appellant entered unconditional pleas of guilty to each offense, that the relevant specifications each state an offense and are not "facially duplicative;" that the military judge merged all three specifications under Charge II, Specifications 1 and 2 of Additional Charge I, Specifications 3 and 4 of Additional Charge I, and Specifications 5 and 6 of Additional Charge I for sentencing purposes. Record at 76-79; *see United States v. Campbell*, 66 M.J. 578, 580-83 (N.M.Ct.Crim.App 2008), *rev. granted,* 67 M.J. 416 (C.A.A.F. 2009). Finally, we are aware of our authority to grant relief under Article 66(c), UCMJ, and chose not to exercise that authority in this special court-martial. *See also United States v. Quiroz*, 57 M.J. 583, 586 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

I concur in the majority's upholding of the appellant's conviction for the specification under Charge III (disorderly conduct on 26 August 2008), and for the specification of Additional Charge II (use of provoking words on 30 September 2008). I respectfully dissent from the remainder of the opinion upholding the appellant's conviction of all other charges and specifications, and the sentence.

This case was submitted on the merits, without any assignment of error. Nonetheless, based on my careful reading of the record, rather than acting on the case at this time, as the majority has chosen to do, I would specify for briefing the following issues raised by the record, if not the appellant:
1. Whether appellant's plea to using provoking speech, as alleged in the specification of Charge I, was provident under the circumstances elicited by the trial judge, where the words alleged ("Do you have something to say") are not on their face provoking.[2]

2. Whether the assaults charged in Specifications one through three of Charge II are multiplicious for findings and/or constitute an unreasonable multiplication of charges, where the trial judge found they occurred at substantially the same time.[3]

3. Whether the assaults charged in Specifications one and two of Additional Charge I are multiplicious for findings and/or

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[2] It would be difficult to assert that the words "Do you have something to say?" are *per se* provoking. Nothing in the providence inquiry in this case illustrates *why* the words were said, or *why* they were provoking, other than the volume with which they were delivered. The appellant's agreeing with the trial judge's conclusory statements as to whether the words constituted fighting words brings no light to the evaluation of the critical question as to *why* Corporal T (or any reasonable person for that matter) would have been induced to violence by the speech. I note that the case cited by the majority, *United States v. Adams*, 49 M.J. 182, 185 (C.A.A.F. 1998) was an affirmance of this court's unpublished decision that even clearly incendiary words did not support a conviction under Article 117, even where the facts showed preceding conduct that was considerably more volatile than in Lance Corporal Tanner's case. *See also* this Court's most recent unpublished case citing *Adams, United States v. Zapp*, No. 200700844, 2008 CCA LEXIS 390, *7-8 (N.M.Ct.Crim.App. 30 Oct 2008)(finding insufficient factual basis to support a plea of guilty to using provoking words, and highlighting the relevant factors to consider), *rev. denied*, 68 M.J. 92 (C.A.A.F. 2009).

[3] The record indicates that these three acts occurred in a matter of seconds; essentially a left cross-right cross-left cross situation, immediately after the words alleged in Charge I were uttered. *See* Record at 28-32.

constitute an unreasonable multiplication of charges, where the trial judge found they occurred at substantially the same time.

4. Whether Charge I and Charge II represent an unreasonable multiplication of charges for findings where all acts were part of a single incident, and where the alleged assaults occurred immediately after the alleged provoking words.

5. Whether the offenses charged in Specifications three and four of Additional Charge I are multiplicious for findings and/or constitute an unreasonable multiplication of charges, where the trial judge found they occurred at substantially the same time.

6. Whether the offenses charged in Specifications five and six of Additional Charge I are multiplicious and/or constitute an unreasonable multiplication of charges, where the trial judge found they occurred at substantially the same time.

7. Whether the offense charged in the specification of Additional Charge III constitutes an unreasonable multiplication of charges, in light of the offenses charged in Additional Charge I, where the trial judge found they occurred at substantially the same time.

For the Court

R.H. TROIDL
Clerk of Court