

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

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

UNITED STATES OF AMERICA

v.

**KELVIN J.C. RODEO
AVIATION SUPPORT EQUIPMENT TECHNICIAN
AIRMAN (E-3), U.S. NAVY**

**NMCCA 201000590
GENERAL COURT-MARTIAL**

Sentence Adjudged: 14 July 2010.

Military Judge: LtCol Steven Logan, USMCR.

Convening Authority: Commanding General, Third Marine Aircraft Wing, Marine Corps Air Station Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: Col K.J. Brubaker, USMC.

For Appellant: CAPT Diane Karr, JAGC, USN.

For Appellee: CAPT M.C. Wells, JAGC, USN; Capt M.V. Balfantz, USMC; Maj William Kirby, USMC.

30 August 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of an attempt to commit indecent conduct and burglary in violation of Articles 80 and 129 of the Uniform Code of Military Justice, 10 U.S.C. §§

880 and 929. The military judge sentenced the appellant to confinement for five years, reduction to pay-grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence but, pursuant to the terms of a pretrial agreement, suspended all confinement over 14 months.

The appellant's sole assigned error is that the sentence adjudged was unjustifiably severe.¹ Upon review of the record, we specified an additional issue regarding whether the military judge abused his discretion by accepting the appellant's pleas of guilty to attempt and burglary without explaining the elements of the underlying offense for both offenses. After careful examination of the record of trial and the parties' pleadings, we conclude that the findings and the 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

At the time of the offenses, the appellant was living in a barracks at Marine Corps Air Station Miramar, California. One afternoon the appellant visited Private First Class (PFC) G, who lived in the barracks room next to the appellant, and met PFC Y, a friend of PFC G's who was visiting for the evening. PFC G introduced PFC Y as being quite the ladies' man who could get any girl he wanted. The appellant shared a beer with the other Marines then departed. However the appellant was intrigued by PFC Y's reputation and, having been less successful with the opposite sex himself, became curious as to why PFC Y was so successful with the ladies. The appellant consumed more alcohol throughout the evening and, as he was walking around the barracks, decided that he wanted to look at PFC Y's genitals to see if that would reveal the secret for PFC Y's reputed success.

At about 0200, the appellant returned to PFC G's room with the intent to examine PFC Y in his sleep. He found PFC G's door closed and, without invitation or any authority to enter, he opened the door and entered the room. The appellant walked over to the bed on which PFC Y lay sleeping. PFC Y was wearing trousers and a belt. The appellant started unbuttoning PFC Y's trousers with the specific intent to undress PFC Y enough to view his genitalia. The appellant was aware at the time that his conduct was violating PFC Y's reasonable expectation of

¹ Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

privacy. The appellant had unbuttoned all but one of the buttons on PFC Y's trouser-fly when PFC Y awoke and jumped up out of bed. When PFC Y asked the appellant what he was doing, the appellant bolted out of the room.

At trial, the parties entered into a stipulation of fact which was admitted without objection. Before admitting it into evidence, the military judge read each provision of the stipulation to the appellant. The stipulation stated the appellant was pleading guilty to, "Attempt to wrongfully commit indecent conduct in violation of Article 80 of the UCMJ," and "Burglary in violation of Article 129." The stipulation listed the general elements for both the Article 80 and Article 129 offenses and also defined "indecent conduct" as:

that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing that other person's genitalia."

Providence Inquiry

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea we review *de novo*. *United States v. Edwards*, 69 M.J. 375, 376 (C.A.A.F. 2011). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Id.* (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). A military judge's failure to explain the elements of an offense can be fatal to the guilty plea on appeal unless it is clear from the entire record that the appellant knew the elements, freely admitted to them, and pled guilty because he was guilty. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003); *United States v. Coffman*, 62 M.J. 676, 679 (N.M.Ct.Crim.App. 2006).

The offenses of attempt and burglary both require a specific intent to commit *another* offense recognized under the code. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008 ed.), Part IV, ¶¶ 4 and 55. When conducting a providence inquiry for offenses involving this level of complexity, it is a well-established requirement that military judges explain not only the elements

of the charged inchoate offense, but also the elements of the related, substantive offense. *United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982). Failure to do so creates needless risk. The military judge in this case truncated his inquiry and instead read into the record the stipulation of fact which incorporated both the definitions missing from the verbal inquiry and admissions as to the appellant's intent. The military judge did not tailor the elements to the facts set forth in the specifications. Instead, he provided only the generic elements for both the attempt and the burglary offenses. By providing only the generic elements, the military judge failed to specifically identify the intended offense for either the attempt or the burglary, i.e. indecent conduct. Likewise, the military judge did not explicitly explain the elements of indecent conduct.

Nonetheless, after considering the record as a whole, to include the stipulation of fact and the appellant's articulate responses to the military judge's open-ended questions, we are convinced that: 1) the appellant understood indecent conduct was the intended offense for both the attempt and burglary, 2) he understood the elements of indecent conduct, and 3) he provided a factual basis to support his pleas. We find no substantial basis in law or fact for questioning the appellant's pleas.

Sentence Appropriateness

The appellant characterizes the adjudged punitive discharge as "unjustifiably severe," specifically challenging the appropriateness of the dishonorable discharge and asks this court to affirm only a bad-conduct discharge. The Government characterizes the appellant's submission as a renewed attempt for clemency and asks this court to approve the sentence. We find the appellant's sentence was appropriate and affirm.

We have a duty under Article 66(c), UCMJ, to independently review the sentence of each case within our jurisdiction and we may only approve that part of a sentence which we find should be approved. *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010), *cert. denied*, ___ U.S. ___, 131 S.Ct. 669 (2010); *United States v. Baier*, 60 M.J. 382, 383-384 (C.A.A.F. 2005). In conducting this review, we consider the "nature and seriousness of the offense and the character of the offender" to determine if the punishment is proportionate. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We see nothing inherently inappropriate about a dishonorable discharge under these

circumstances and conclude that the dishonorable discharge was appropriate.

Conclusion

The findings of guilty are affirmed. The sentence approved by the convening authority is affirmed. Arts. 59(a) and 66(c), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court