

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

**Before
J.R. PERLAK, M.D. MODZELEWSKI, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**EDGARDO F. PABON BAEZ
NAVAL AIRCREWMAN AVIONICS THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201200218
GENERAL COURT-MARTIAL**

Sentence Adjudged: 3 April 2012.

Military Judge: CDR Lewis T. Booker, Jr., JAGC, USN.

Convening Authority: Commander, Navy Region Northwest,
Silverdale, WA.

Staff Judge Advocate's Recommendation: LCDR D.E. Rieke,
JAGC, USN.

For Appellant: LT David C. Dziengowski, JAGC, USN.

For Appellee: LT Philip S. Reutlinger, JAGC, USN.

31 October 2012

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 three specifications of violating a lawful general order, one specification of recklessly spoiling personal property, and three specifications of assault consummated by a battery in violation of Articles 92, 109, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 909, and 928. The military judge

sentenced the appellant to confinement for 32 months, reduction to pay grade E-1, forfeiture of all pay and allowances, a \$1000.00 fine, and a bad-conduct discharge. The convening authority disapproved the fine, per the terms of a pretrial agreement, but otherwise approved the sentence and, except for the punitive discharge, ordered it executed. Also pursuant to the terms of a pretrial agreement, the convening authority suspended all confinement in excess of 16 months, for the period of confinement adjudged plus 12 months.

The appellant assigns two errors. First, he argues that his plea to violating Article 92 by using "Spice" was improvident because the military judge did not define "use" correctly when describing the elements. Second, he notes that the promulgating order was inaccurate with respect to Charge IV, Specification 6. The first assigned error is without merit and we resolve the second in our decretal paragraph. We find that no error materially prejudicial to a substantial right of the appellant was committed.

Improvident Plea

A general order applicable to the appellant prohibits, "[t]he actual or attempted purchase, possession, use, manufacture, distribution, introduction onboard ship or military installation of any intoxicating substance" Appellate Exhibit III. Intoxicating substances include "[c]ontrolled substance analogues" such as "Spice," which is named in the order. The appellant pled guilty to violating the order by using Spice, stipulating that he "used Spice recreationally for the past two or three years." Prosecution Exhibit 1 at 1. He recalled that he "smoked Spice approximately three times a week at or near Oak Harbor, WA" during the charged time period. *Id.* at 2. He provided sworn statements during the providence inquiry with the military judge consistent with the stipulation, clearly establishing his use of Spice on divers occasions during the timeline charged.

As part of his inquiry, the military judge read aloud the elements of the offenses at issue and he defined several terms. As he discussed the appellant's use of Spice, the military judge instructed him that "use" meant "the ingestion or the physical assimilation of this drug into your body or system . . . by injecting, by swallowing, by smoking, by snorting, or by a variety of other methods." Record at 50. The definitions provided by the military judge are clearly based on the

explanatory paragraphs below Article 112a, UCMJ, and the appellant acknowledged that he understood them.¹

Whether a plea is provident depends first on an appellant's understanding of the elements of his crime, as explained to him by the military judge. *United States v. Craig*, 67 M.J. 742, 744 (N.M.Ct.Crim.App. 2009), *aff'd*, 68 M.J. 399 (C.A.A.F. 2010) (per curiam). If the explanation is inaccurate or incomplete, we must look to the entire record to determine whether, "the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty." *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992). Our focus is on the appellant—his awareness of the facts and the law—rather than on the military judge's "technical listing of the elements." *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

In the past, we have measured the appellant's awareness by considering stipulations of fact and the complexity of the offenses involved. For example, in another drug-use case, *United States v. Caudill*, 65 M.J. 756 (N.M.Ct.Crim.App. 2007), we found an appellant's plea provident despite glaring shortcomings by the military judge, who did not define any of the elements or terms. *Id.* at 758-59. We did so because a detailed stipulation of fact proved that the appellant freely admitted to using drugs, and we found that drug use is a simple offense commonly understood by servicemembers. *Id.* at 759. There was no reason to question this presumption, because neither the appellant nor his counsel asked any questions that might reveal a lack of understanding. *Id.*

Here, as distinguished from *Caudill*, there are no shortcomings to the definitions or instructions of the military judge. If anything, the military judge properly expanded the discussion to include educating the appellant on wrongful use in the context of scheduled, controlled substances, en route to accepting his plea to violating an order pertaining to their synthetic analogues. Like in *Caudill*, the appellant here asked no questions and freely stipulated that he used Spice on multiple occasions. PE 1 at 2. He repeated these admissions

¹ The military judge's reliance on Article 112a was proper because the order in question did not define "use." "Although general orders and regulations are not in and of themselves statutes . . . such orders and regulations are subject to the same rules of construction as are statutes and the punitive articles of the UCMJ." *United States v. Cochrane*, 60 M.J. 632, 634 (N.M.Ct.Crim.App. 2004) (citation omitted). When a term is undefined, these rules of construction encourage us to consider the "guidance, if any, the UCMJ may provide through reference to parallel provisions of law." *United States v. Kuemmerle*, 67 M.J. 141, 143 (C.A.A.F. 2009) (citations omitted).

during the providence inquiry, even adding specific details that leave us with no doubt that he was fully aware of the facts of his case. See, e.g., Record at 52 (explaining that he used spice on "[t]he 13th and the 31st, on my birthday, and pretty much every weekend in August."). He was also aware of how those facts fell under the law, making this a far easier case than *Caudill*.

The appellant's explanations about his synthetic drug use, in violation of the general order, were straightforward. There was no lingering inconsistency or ambiguity, as he clearly established the violation of the order on divers occasions. The military judge, applying additional context and definitions found in violations of Article 112a, ascertained with the appellant that the use of synthetic drugs were properly within the scope of a general order, regardless of the location of their consumption. The providence inquiry included a discussion of the residual presence of chemicals in one's system, whether on or off base. The appellant casts this greater context and depth of inquiry as error, unhelpfully referring to it as, "the military judge's quixotic attempt to find Appellant provident to the Article 92 violation." Appellant's Brief of 26 Jul 2012 at 12. This assignment of error is without merit, because the providence inquiry satisfactorily met the requirements of *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969) in establishing a violation of a lawful general order.

The appellant posits the untenable position that the general order in question only prescribes on-base synthetic drug use. This interpretation of the order is unpersuasive. A plain reading of the order reveals that the phrase "onboard ship or military installation" pertains only to the obviously related concept of "introduction" and does not modify "use" in the greater context of prohibited conduct. See generally *JRG Capital Investors I, LLC, v. Doppelt*, 2012 U.S. Dist. LEXIS 89742 at *14 (explaining *reddendo singula singulis*, or the doctrine of the last antecedent, "under which a limited or restrictive clause . . . is generally construed to refer to the immediately preceding clause . . ."). We find no basis, much less substantial, in either law or fact, for questioning the appellant's guilty pleas. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008).

Correction to the Court-Martial Order

We concur with the parties that the promulgating order fails to reflect the text of Specification 6 of Charge IV, as

modified during the trial. The Government withdrew aggravating language which alleged that the appellant caused grievous bodily harm. Record at 79. The finding of guilty entered by the military judge was to an assault consummated by a battery, without the withdrawn aggravating language and after the appellant was advised of a reduced maximum punishment authorized following the withdrawal of that language. We will order corrective action in our decretal paragraph. See *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Conclusion

The findings and the approved sentence are affirmed. The supplemental court-martial order will reflect that as to Specification 6 under Charge IV, the appellant was found guilty except for the words "and did thereby intentionally inflict grievous bodily harm upon her, to wit: a broken facial bone," those words having been withdrawn by the Government post-arraignment.

For the Court

R.H. TROIDL
Clerk of Court