IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.L. CARVER** **D.O. VOLLENWEIDER**

UNITED STATES

v.

Kevin M. SANCHEZCRUZ
Private (E-1), U. S. Marine Corps

NMCCA 200500313 Decided 24 January 2006

Sentence adjudged 28 October 2003. Military Judge: J.A. Goddard. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Security Battalion, Marine Corps Base, Quantico, VA.

LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LtCol TERRI Z.JACOBS, USMCR, Appellate Defense Counsel
Maj ROBERT FUHRER, USMCR, Appellate Government Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

DORMAN, Chief Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of a 7½-month unauthorized absence, terminated by apprehension, and the distribution and use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 90 days, and forfeiture of $767.00 pay per month for 3 months.

We have carefully considered the record of trial and the appellant’s assignment of error. In the assignment of error the appellant alleges that the military judge erred when he allowed the trial counsel to question the appellant during the providence inquiry. We have also considered the Government’s response to the assignment of error and the appellant's reply. Although not raised as error, we have also examined whether the appellant was afforded his right to a speedy review. Upon completion of review

and consideration of these materials, we conclude that the appellant is entitled to sentencing relief due to delay in the review of his case. Following that corrective action, we conclude that findings and sentence, as modified herein, are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Providence Inquiry

During the providence inquiry concerning the appellant's unauthorized absence, he informed the military judge that shortly after the unauthorized absence began he contacted his recruiter by phone in an effort to turn himself in. A state trooper eventually apprehended the appellant, following a routine security check. The military judge further explored the appellant's dealings with the recruiter, learning that the appellant talked with him on the phone about five times, but that he never went to see the recruiter. The appellant told the military judge that the recruiter said he "would call down to North Carolina, Camp Lejeune, and see what he can do for me, to call my unit and he would get back to me. That's all he really said; that was it." Record at 25. The appellant informed the military judge that the recruiter never called him back.

Following a brief recess during which the military judge and counsel addressed the providence inquiry concerning the unauthorized absence, the military judge called the court back into session. He then asked the trial counsel if he wanted to ask any questions of the appellant. *Id*. at 26. The trial counsel than took over questioning the appellant. That questioning takes up just over 5 pages of the record of trial.

Citing *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969) and RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (200[2] ed.), the appellant argues that the military judge committed reversible error by allowing the trial counsel to question the appellant as part of the providence inquiry. Appellant's Brief of 27 Jun 2005 at 2-3. Additionally, the appellant claims material prejudice on two grounds. First, he argues that in questioning the appellant the trial counsel far exceeded the scope of the issue that concerned the military judge. Second, by questioning the appellant, the trial counsel was "able to elicit additional statements from [a]ppellant relevant to issues in aggravation that he otherwise would not have had the opportunity to obtain." Appellant's Brief at 5. The appellant also relies upon *United States v. Hook*, 43 C.M.R. 356 (C.M.A 1971), in which our superior court stated that if the military judge did not personally explain the elements of an offense to an accused and question the accused to determine if there was a factual basis for the guilty plea, it would reverse the conviction. *Id*. at 357.

The law is well-settled as to the requirements for the acceptance of a guilty plea. A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *Care*, 40 C.M.R. at 247. Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

A military judge may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995). In considering the adequacy of guilty pleas, we consider the **entire record** to determine whether the requirements of Article 45, UCMJ, R.C.M. 910, and *Care* and its progeny have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

In our review of the record, we determined that the military judge accurately listed the elements and defined the terms contained in the elements for the appellant's unauthorized absence. Record at 19-20. We also determined that the appellant indicated an understanding of the elements of the offense and the legal definitions. *Id*. Furthermore, the military judge conducted a thorough inquiry into the providence of the appellant’s guilty plea to unauthorized absence, terminated by apprehension. *Id*. at 20-26. During this inquiry the appellant clearly stated, in his own words, the circumstances surrounding the unauthorized absence.

Even before the trial counsel asked any questions, the appellant had informed the military judge of the following facts that support the guilty plea. On 5 September 2002, the appellant was attached to the School of Infantry at Camp Lejeune, NC. At 0800 on that date he left the School of Infantry without

authority and took a train to Baltimore, MD. When the appellant left Camp Lejeune he knew he was beginning a period of unauthorized absence. The appellant's absence ended when a state trooper apprehended him on 21 April 2003 following a routine security check of the appellant, during which he discovered the appellant's outstanding military warrant. The appellant also informed the military judge that about two weeks after he left Camp Lejeune he called his recruiter and explained to him why he had left his command. While the appellant also told the military judge that he contacted the recruiter in an attempt to surrender, he never had any personal contact with the recruiter. Additionally, even before discussing the facts of the case with the military judge, the appellant had entered into a stipulation of fact that also established the factual basis for his guilty plea. Prosecution Exhibit 1. *See United States v. Sweet*, 42 M.J. 183 (C.A.A.F. 1995).

While we agree with the appellant that it was error for the trial counsel to have questioned the appellant during the providence inquiry, we find no prejudice in this case. First, even without regard to the questions asked by the trial counsel the appellant's guilty plea to the unauthorized absence, terminated by apprehension was provident. Second, while some of the questions posed by the trial counsel did exceed the scope of the military judge's apparent concern--the issue of whether the appellant had terminated his absence by contacting his recruiter--the trial counsel did not use that information in any way during the course of the trial. Third, the appellant consented to the military judge considering the matters addressed during the providence inquiry during the sentencing phase of his court-martial. Record at 50. Accordingly, we find that the irregular and erroneous procedure of the trial counsel questioning the appellant during the providence inquiry did not result in material prejudice to the appellant's substantial rights.

Speedy Review

Although not raised as error, we conclude that the appellant is entitled to sentencing relief due to dilatory post-trial processing of his case. We consider four factors in determining if post-trial delay violates the appellant’s due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant’s assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id. (*quoting *Toohey,* 60 M.J. at 102).

The following chronology outlines the post-trial delay in processing this 60-page record:

28 Oct 03	Sentencing
08 Jan 04	Authentication of record
11 Feb 05	Staff Judge Advocate's Recommendation (SJAR) signed
16 Feb 05	Defense Counsel receives SJAR
01 Mar 05	CA takes action
11 Mar 05	Record docketed at Navy-Marine Corps Court of Criminal Appeals

The record of trial was docketed at this court 500 days after trial. Of that time, over 12 months passed between the dates the record was authenticated and the SJAR was signed. The delay between those two events is facially unreasonable, triggering a due process review. The SJAR does not explain why it took over a year to prepare a two-page document concerning a 60-page record of trial. We next look to the third and fourth factors. We do not find any assertion of the appellant's right to a timely review. Furthermore, we neither find nor has the appellant alleged specific prejudice. We, therefore, conclude that there has been no due process violation due to the post-trial delay.

We are also aware of our discretionary authority to grant relief under Article 66, UCMJ, even in the absence of specific prejudice. *Jones,* 61 M.J. at 83; *United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown,* __ M.J. __, 2005 CCA LEXIS 372, No. 200500873 (N.M.Ct.Crim. App. 30 Nov 2005)(*en banc*). Applying the *Brown* factors, we conclude that the appellant is entitled to relief.

Conclusion

Accordingly, the findings are affirmed. Only so much of the sentence as extends to a bad-conduct discharge, confinement for 60 days, forfeiture of $767.00 pay per month for 2 months, and reduction to pay grade E-1, is affirmed.

Senior Judge CARVER and Judge VOLLENWEIDER concur.

For the Court

R.H. TROIDL
Clerk of Court