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

BEFORE

C.L. CARVER **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Brian D. KLINGER
Staff Sergeant (E-6), U. S. Marine Corps

NMCCA 200500688 Decided 31 January 2006

Sentence adjudged 29 June 2004. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.

Capt JEFFREY S. STEPHENS, USMC, Appellate Defense Counsel
LT BRIAN L. MIZER, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT DEBRORAH S. MAYER, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of violation of a lawful general regulation (fraternization) and forcible sodomy, in violation of Articles 92 and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 925. The appellant was sentenced to a dishonorable discharge, confinement for 4 years, total forfeiture of pay and allowances, and reduction to pay grade E-1. Under the terms of the pretrial agreement, the convening authority was required to suspend confinement over 42 months. Instead, the convening authority approved the sentence as adjudged.

The appellant claims that (1) his plea of guilty to violation of a lawful general regulation was improvident and (2) the two offenses constitute an unreasonable multiplication of charges. After carefully considering the record of trial, the appellant's assignments of error, and the Government's response, we conclude that the findings are correct in law and fact, but

that the sentence must be modified. We will order corrective action in our decretal paragraph. We find no other errors that materially prejudice any substantial right of the appellant. Arts. 59(a) and 66(c), UCMJ.

Facts

At the time of the offense, the appellant was a staff sergeant with about 9 years of active duty. He was the staff noncommissioned officer-in-charge (NCOIC) of the ordinance section of an aircraft squadron. The victim, Lance Corporal (LCpl) U, had worked directly for the appellant for about a year during which time the appellant provided his performance evaluations. LCpl U transferred to another squadron about a year before the offense occurred.

On New Year's Day 2004, the appellant called LCpl U to say that he was drinking alcohol alone in his off-base house and invited him over. LCpl U and his wife, Mrs. U, drove to the appellant's house, arriving about midnight. All three smoked and socialized over the next few hours. Mrs. U was the designated driver and did not drink alcohol. LCpl U and the appellant drank beer together. Mrs. U departed about 0200 because she had to get up the next morning to go to work. LCpl U and the appellant continued to drink until LCpl U passed out in a bathroom at about 0400 to 0430. The appellant dragged him out of the bathroom into the living room. The appellant placed a pillow under the unconscious LCpl U, then unzipped LCpl U's pants, took out his penis, and placed the penis in his mouth and sucked it. LCpl U began to move around. The appellant put LCpl U's penis back into his pants and laid down beside him, positioning himself so that LCpl U's hand was directly under and touching the appellant's penis through his clothes. The appellant admitted that he had been drinking alcohol at the time of the offense, but was not drunk and knew what he was doing.

Improvident Plea of Guilty
Lawful General Regulation

A. Standard of Review

In his first assignment of error, the appellant contends that his plea of guilty to violating a lawful general regulation, namely Article 1165, U.S. Navy Regulations (1990), (fraternization) was improvident. We disagree and decline to grant relief.

A military judge shall not accept a plea of guilty without making sufficient inquiry of the accused to establish that there is a factual basis for the plea. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). "[T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. Likewise, a military

judge "may not arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). To impart the seriousness of the *Care* inquiry, an accused is questioned under oath about the offenses to which he has pled guilty. R.C.M. 910(e). 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).

Article 1165, U.S. Navy Regulations, provides:

1165. Fraternization Prohibited.

1. Personal relationships between officer and enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Such relationships are prejudicial to good order and discipline and violate long-standing traditions of the naval service.

2. When prejudicial to good order and discipline or of a nature to bring discredit on the naval service, personal relationships between officer members or between enlisted members that are unduly familiar and that do not respect differences in grade or rank are prohibited. Prejudice to good order and discipline or discredit to the naval service may result from, but are not limited to, circumstances which —

a. call into question a senior's objectivity;

b. result in actual or apparent preferential treatment;

c. undermine the authority of a senior; or

d. compromise the chain of command.

B. <u>Discussion</u>

The appellant asserts that the plea of guilty was improvident because he had no supervisory responsibility over LCpl U at the time of the offense, did not give any preferential treatment to LCpl U, and had no authority to give preferential treatment to LCpl U since LCpl U was no longer in the same squadron and did not work for the appellant.

At the outset, we note that Article 1165 was amended in 1993 to eliminate the previous requirement that fraternization required a direct senior-subordinate supervisory relationship. Appellate Exhibit XIV. Instead, the regulation now provides that fraternization occurs when there is a personal relationship between enlisted members that is unduly familiar and does not respect differences in grade when the conduct is prejudicial to good order and discipline or of a nature to bring discredit on

the naval service. The regulation further includes examples of prohibited conduct, such as relationships that call into question the senior's objectivity, undermine the authority of the senior, or compromise the chain of command.

The military judge conducted a very thorough and exhaustive inquiry into the plea, encompassing some 38 pages in the record of trial, 16 pages of which were a detailed discussion just on the facts and circumstances of the incident. The appellant admitted that his socializing, drinking, and sex with LCpl U that evening would undermine his authority as a staff NCO when dealing with junior Marines, junior Marines would see him as a peer not as their leader, LCpl U would no longer see the appellant as his senior but would see him as an equal, others working for the appellant would no longer trust him and would assume that they could come over to his house and drink beer with him. The appellant admitted that if the public knew about this offense, public opinion would be lowered because the average civilian has some knowledge of how rank structure works and that Marines obey orders from superiors. They might perceive that this incident indicates a breakdown in good order and discipline in the Marine Corps.

We agree with the appellant's statements during the providence inquiry that the facts and circumstances of his misconduct were prejudicial to good order and discipline and also of a nature to bring discredit on the naval service. Even though LCpl U was no longer in his direct chain of command, the appellant was still a staff NCO with authority and responsibility over all junior Marines including the appellant. Clearly, such misconduct by a staff NCO and a junior Marine undermined the appellant's authority, called into question his objectivity, and compromised the chain of command. Since there is no substantial basis in law and fact for questioning the appellant’s plea of guilty, we decline to grant relief.

Unreasonable Multiplication of Charges

In his second assignment of error, the appellant contends that violation of a lawful general regulation is, under the facts of this case, an unreasonable multiplication of forcible sodomy because both offenses encompass the same sexual misconduct. We deny relief.

The appellant did not raise this issue at trial. "[T]he failure to raise the issue at trial suggests that the appellant did not view the multiplication of charges as unreasonable . . . [and] [t]he lack of objection at trial will significantly weaken the appellant's argument on appeal." *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000)(en banc), *set aside and remanded on other grounds*, 55 M.J. 334 (C.A.A.F. 2001).

Further, we find that the misconduct that constituted fraternization under the lawful general regulation prohibiting

fraternization not only included forcible sodomy, but also included an evening of socializing and drinking alcohol in which neither participant respected their differences in grade. We find that the two offenses are aimed at distinctly separate criminal acts and do not misrepresent or exaggerate the appellant's criminality. *See United States v. Quiroz,* 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Assuming *arguendo*, however, that the fraternization was an unreasonable multiplication of the charge of forcible sodomy, we would not have modified the adjudged sentence. We note first that fraternization, charged as the violation of a regulation, is a minor offense compared to forcible sodomy. The maximum punishment for violation of the regulation included confinement for only 2 years, whereas the maximum punishment for forcible sodomy included confinement for life without the possibility of parole. Further, under the facts and circumstances of this case, we are convinced that the adjudged sentence would not have been any lighter even if the appellant had not been charged with the order violation. We further find that the adjudged sentence is appropriate for this offender and the offense of forcible sodomy. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Failure to Suspend Confinement

By the terms of the pretrial agreement, the convening authority was required to suspend confinement in excess of 42 months for 42 months from the date of the convening authority's action. Nonetheless, without explanation or any indication of a vacation hearing, the convening authority approved the sentence as adjudged. There was no pretrial confinement credit. The Government concedes error and we agree. An accused that pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). Thus, the convening authority erred by failing to enforce the terms of the pretrial agreement.

The sentence was adjudged on 29 June 2004. Under the terms of the pretrial agreement, and in the absence of a vacation hearing, the appellant should be released from confinement on or before the end of 2007. Good time and other credits may further reduce the amount of time to be served. Though we do not have the power to suspend sentences, we may do that which the convening authority was bound by law to do even if that includes suspension of a part of the adjudged sentence. *United States v. Cox,* 37 C.M.R. 69, 72 (C.M.A. 1972). We will order correction below.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed. However, confinement is excess of 42 months is suspended for 42 months from the date of the convening authority's action.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court