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

BEFORE

W.L. RITTER **J.F. FELTHAM** **K.K. THOMPSON**

UNITED STATES

v.

Jeffrey H. BEEHNER
Corporal (E-4), U. S. Marine Corps

NMCCA 200500683 Decided 11 May 2006

Sentence adjudged 15 October 2003. Military Judge: S.B. Jack. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Officer Candidates School, Marine Corps Combat Development Command, Quantico, VA.

LT ANTHONY S. YIM, JAGC, USN, Appellate Defense Counsel
LT JENNIE L. GOLDSMITH, JAGC, USN, Appellate Defense Counsel
LCDR GARRETT TRIPLETT, JAGC, USNR, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USN, Appellate Government Counsel

THOMPSON, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, consistent with his pleas, of conspiracy, false official statement, willfully suffering damage to military property, drunk driving, larceny of government property, leaving the scene of an accident, and impeding an investigation, in violation of Articles 81, 107, 108, 111, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 908, 911, 921, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 180 days, forfeitures of $700 pay per month for 6 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's assignment of error, and the Government's response. We find the appellant's plea to willfully suffering the destruction of military property was not supported by the facts adduced during the providence inquiry, but find the facts sufficient to support the closely related offense of destruction

of military property through neglect. In addition, we conclude that the appellant's conviction for a violation of Article 134, UCMJ, leaving the scene of an accident, is not supported by the facts. Following our corrective action, we conclude that the remaining findings and sentence 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).

Background

The appellant and his civilian brother decided to wrongfully obtain a High Mobility Multipurpose Wheeled Vehicle from the motor pool where the appellant worked and take it for a joyride. Both the appellant and his brother were intoxicated. After driving the vehicle himself, the appellant exited the vehicle and allowed his brother to drive it around an open area. The appellant's brother lost control of the vehicle and it turned over, causing approximately $30,000.00 in damage. The appellant conceded that he knew his brother was drunk and had no training in driving this type of vehicle.

The appellant was charged (in part) under Article 108 with one specification of willfully destroying military property, and one specification of willfully suffering the destruction of military property. Pursuant to a pretrial agreement, the appellant pled not guilty to willfully destroying military property under Article 108(2) and guilty to suffering the destruction of military property under Article 108(3). However, the military judge misadvised the appellant of the elements of the specification to which he pled guilty, and instead gave him the elements of the specification to which he pled not guilty.

Improvident Plea

In his sole assignment of error, the appellant asserts that his plea of guilty to Specification 2 of Charge III, a violation of Article 108, UCMJ, is improvident because the military judge did not apply the appropriate mens rea. We agree that the appellant's plea was improvident due to the fact that the military judge misadvised the appellant concerning the elements for willfully suffering destruction to military property.

The offense of willfully suffering damage to military property requires proof of the following elements beyond a reasonable doubt: (1) certain property was lost, damaged, sold or wrongfully disposed of; (2) the property was military property of the United States; (3) the loss, damage, destruction, sale, or wrongful disposition was suffered by the accused, without proper authority, through a certain omission of duty by that accused; (4) the omission was willful or negligent; and (5) the property was of a certain value or the damage was of a certain amount. Art. 108, UCMJ. *See also United States v. O'Hara,* 34 C.M.R. 721, 727-28 (N.B.R. 1964).

"[A] provident plea of guilty is one that is knowingly, intelligently and consciously entered and is factually accurate and legally consistent." *United States v. Watkins,* 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders,* 33 M.J. 1026 (N.M.C.M.R. 1991)). A military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must ordinarily explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A. 1996); *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. Acceptance of a guilty plea requires an accused to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer,* 37 M.J. 338, 341 (C.M.A. 1993); 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. Rejection of the plea "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999) (citing R.C.M. 910(j) and Art. 59(a), UCMJ).

In this case, the military judge conducted a providence inquiry as though the offense in question was willful destruction of military property, rather than willfully suffering the destruction of military property. He advised the appellant of the elements of the offense of willfully destroying military property, tailoring them to the language of Specification 1 under Charge III (to which the appellant had pled not guilty) and providing the appellant with relevant definitions (including that of negligence). The appellant stated that he understood the elements and definitions. Record at 30-31. The military judge then inquired of the defense counsel whether he needed to address all of the negligence definitions "[b]ecause it's a plea to a willful destruction; [sic] correct?" Record at 31. The defense counsel agreed this was correct. *Id.*

We find the record of trial does not establish the essential elements necessary for a finding of guilt to willfully suffering damage to military property. Specifically, the military judge's inquiry failed to establish the existence of a duty on the part of the appellant to secure or preserve certain military property; that the appellant failed to perform his duty; that such failure was willful; and that such failure resulted in the loss of the property. *See O'Hara,* 34 C.M.R. at 726-27.

We must now consider whether the appellant's responses to the military judge during the plea inquiry establish any other bases for criminal liability. We conclude that they do. Based upon the appellant's plea admissions and stipulation of fact, we conclude that the appellant is guilty of the closely related offense of destruction of military property through neglect under Article 108(d)(2)(a), UCMJ. *See United States v. Felty,* 12 M.J. 438, 441-42 (C.M.A. 1982).

First, we are satisfied that the specification of willfully suffering the destruction of military property by loaning the military vehicle without authorization to the appellant's untrained, inebriated, civilian brother placed the appellant on notice that he could be convicted of negligent destruction of military property because he was charged with the most serious offense under this article. *See United States v. Bivens,* 49 M.J. 328, 331-32 (C.A.A.F. 1998). Second, the appellant admitted the elements of destruction of military property through neglect. *Id.* There is no issue of improvidence as to that offense and we can affirm findings of guilt to that offense. *See United States v. Wright,* 12 C.M.R. 187, 188 (C.M.A. 1953); *United States v. Groves*, 10 C.M.R. 39 (C.M.A. 1963). We will take corrective action in our decretal paragraph. Art. 59(b), UCMJ.

Factual Sufficiency for Leaving the Scene of an Accident

Regarding the appellant's conviction for fleeing the scene of an accident, we find that there is insufficient evidence to establish his guilt. The elements of leaving the scene are: (1) that the accused was the driver (or passenger, if charged as aiding and abetting another person under Article 77, UCMJ); (2) that the accused knew he had been involved in an accident; (3) that the accused left the scene of the accident without identifying the driver; (4) that the departure from the scene was wrongful and unlawful; and, (5) that the conduct of the accused was prejudicial to good order and discipline or service discrediting. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 82.

In this case, the appellant was charged as being the driver of the vehicle involved in the accident. The military judge did not inform the appellant of the theory of his legal liability as an aider and abettor under Article 77, UCMJ, during the providence inquiry. But the appellant was not driving the vehicle at the time of the accident, nor was he a passenger at the time. To find a servicemember guilty as an aider and abettor to fleeing the scene of an accident, mere presence at the scene is not enough; there must be an intent to aid or encourage the person who committed the crime. The aider and abettor must share the criminal intent of the perpetrator. *See United States v. Rexroad,* 34 C.M.R. 783, 786 (A.F.B.R. 1963).

Here, the appellant testified that they had driven the vehicle out "in the middle of the woods at Quantico". After

ascertaining that the vehicle was inoperable, he and his brother walked back to the motor pool where they got the appellant's personal vehicle and drove to their hotel off base. Record at 55-57. It took them half an hour to walk back to the motor pool. The appellant stated that he "should have reported the incident" and "could have gotten to a phone". However, there is no evidence to show that his failure to do so was done with the intent of protecting his brother or encouraging him to leave. *See United States v. Shearer,* 44 M.J. 330, 333 (C.A.A.F. 1996).

An inquiry into the providence of a guilty plea must establish the factual circumstances admitted by the accused, which "objectively" support his plea. *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994)(quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)). A guilty plea should not be accepted by a military judge if a military accused asserts "matter inconsistent with the plea." Art. 45(a), UCMJ; *see Higgins,* 40 M.J. at 68 (citing *United States v. Penister,* 25 M.J. 148, 151 (C.M.A. 1987)). Once accepted as provident, a guilty plea should be set aside on appeal only if the record fails to support the plea or "contains some evidence in substantial conflict with the pleas of guilty." *Id. (*citing *United States v. Stewart,* 29 M.J. 92, 93 (C.M.A. 1989) and *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991))(internal quotation marks and citation omitted). We find that the record does not support the plea for this offense.

Conclusion

Accordingly, Specification 2 under Charge III is modified by deleting "willfully suffer" and substituting the words "destroy through neglect", and deleting "to be destroyed." We dismiss Specification 1 under Charge VI. With these modifications, we affirm the findings. Upon reassessment, we conclude the approved sentence is "both appropriate and free from all prejudice" from the improvident pleas. *United States v. Cook,* 48 M.J. 434, 438 (1998); *United States v. Peoples,* 29 M.J. 426, 428-29 (C.M.A. 1990); *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986).

As a final matter, however, we note that the convening authority failed to comply with the pretrial agreement's requirement that he disapprove the punitive discharge. We will take remedial action to accomplish that which the convening authority was legally bound to do.

We affirm only so much of the sentence as provides for confinement for 180 days, forfeiture of $700 pay per month for 6 months, and reduction to pay grade E-1. The supplemental

promulgating order shall note the modification to Specification 2 of Charge III and the dismissal of Specification 1 under Charge VI.

For the Court

R.H. TROIDL
Clerk of Court