

UNITED STATES v. Edward A. **FAHIM**, Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200600479

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2006 CCA LEXIS 284

October 30, 2006, Decided

NOTICE: [*1] AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRIOR HISTORY: Sentence adjudged 8 March 2005. Military Judge: D.M. Jones. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Combat Service Support Group 11, 1st FSSG, Camp Pendleton, CA.

COUNSEL: LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel.

LT A.M. SOUDERS, JAGC, USNR, Appellate Defense Counsel.

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JUDGES: BEFORE W.L. RITTER, E.S. WHITE, J.F. FELTHAM. Judge WHITE and Judge FELTHAM concur.

OPINION BY: W.L. RITTER

OPINION

RITTER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of two specifications of failure to obey a lawful general order and two specifications of wrongful use of marijuana, in violation of Articles 92 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 912a. The appellant was sentenced to confinement for 75 days, forfeiture of \$ 823.00 pay per month for three months, reduction to pay grade E-1, and [*2] a bad-conduct discharge. The convening authority approved the adjudged sentence, but suspended all confinement in excess of 60 days and the adjudged forfeitures, pursuant to a pretrial agreement.

We agree with the appellant's sole contention that his plea of guilty to one of two violations of a general order was improvident. The appellant pleaded guilty to wrongfully driving a motor vehicle on base with a suspended driver's license, and to driving on base without proof of insurance, respectively. During the providence inquiry into the first offense, he stated that he did not know his license had been suspended at the time of the offense

because he never received the first suspension notice in the mail. The military judge accepted the plea, without determining whether the appellant's mistake of fact concerning the status of his driver's license was both honest and reasonable. This was error. See *United States v. Mease*, 57 M.J. 686 (N.M.Ct.Crim.App. 2002) (holding mistake of fact defense applies to driving with a suspended license, but facts established that accused's ignorance of his license being suspended was not reasonable).

But we find a more fundamental problem [*3] with the providence inquiry, and it affects both orders violations in this case. That is, the general order in question was never established to be punitive in nature. See Manual for Courts-Martial, United States (2002 ed.), Part IV, P 16c(1)(e); see also *United States v. Shavrnock*, 49 M.J. 334, 336 (C.A.A.F. 1998).

HN1 Before accepting a guilty plea, the military judge must find that there is a sufficient factual basis to satisfy each and every element of the pled offense. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 253 (C.M.A. 1969). If the accused discloses matters inconsistent with his plea, the military judge must either resolve the apparent inconsistency or reject the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). Once the guilty plea is accepted, we will not disturb it, unless the record reveals "a substantial conflict between the plea and the accused's statements or other evidence of record." *Id.*; accord *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

In this case, there was no discussion of the order's punitive nature on the record. Only part of the order was attached to the record [*4] as Appellate Exhibit V, and that part contains nothing to suggest that a violation of its terms would result in criminal sanctions. Rather, the order clearly applies to civilian employees and dependents -- who are not subject to the UCMJ -- as well as service members, thus suggesting that its enforceability does not depend on the UCMJ. See Article 2, UCMJ. In fact, the actual provisions that served as the basis for both orders offenses contain nonpunitive sanctions for their violation. ¹ We thus cannot conclude, on the basis of the record, that the order in question was punitive in nature.

FOOTNOTES

¹ The specified penalties include cancellation of base registration, removal of the base decal, and, in the case of failure to maintain insurance, a loss of driving privileges for one year. Appellate Exhibit V at 4.

Finding a substantial basis in law and fact for questioning the appellant's pleas of guilty to the two orders violations, we set aside and dismiss his convictions under Specifications 1 and 2 of Additional [*5] Charge I. We have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (1998), *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). We view the dismissed offenses as relatively insignificant as compared to the appellant's two drug use offenses, and are confident that the military judge would not have adjudged any less punishment for the drug offenses, standing alone.

Accordingly, we affirm the remaining findings of guilty and the sentence, as approved by the convening authority.

Judge WHITE and Judge FELTHAM concur.