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

BEFORE

J.W. ROLPH **C.L. SCOVEL** **J.D. HARTY**

UNITED STATES

v.

Lee E. RISNER
Sergeant (E-5), U. S. Marine Corps

NMCCA 200501643 Decided 9 August 2006

Sentence adjudged 10 February 2005. Military Judge: A.C. Williams. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 3d Force Service Support Group, Marine Forces Pacific, Okinawa, Japan.

LCDR REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT JENNIE GOLDSMITH, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LCDR IAN THORNHILL, JAGC, USNR, Appellate Government Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARTY, Senior Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial before a military judge alone of conspiracy (two specifications); violation of a general order (two specifications); dereliction of duty (two specifications); distribution, use, and possession with the intent to distribute ecstasy; and soliciting another to commit an offense, in violation of Articles 81, 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 912a, and 934. His sentence included a dishonorable discharge, confinement for 66 months, forfeiture of all pay and allowances, a reprimand, and reduction to pay grade E-1. The convening authority (CA) approved the sentence as adjudged except for the reprimand, which he disapproved. Pursuant to the plea agreement, the CA suspended all confinement in excess of 48 months for a period of 365 days from the date of his action. In an act of clemency,

and for the benefit of the appellant’s family, the CA waived adjudged and automatic forfeitures, previously deferred, in the amount of $2,800 per month for a period of six months from the date of his action.

We have reviewed the record of trial, the appellant's five assignments of error,[1] and the Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.[2] Arts. 59(a) and 66(c), UCMJ.

Fail to Allege an Offense

For his first assignment of error, the appellant claims that Specifications 3 and 4 under Charge II fail to state the offense of dereliction of duty. The appellant claims that the written order cited in Specification 3, prohibiting consumption of alcohol by Marines under the age of 21 years, does not impose a duty upon the appellant to prevent the prohibited consumption by Marines in his presence. As to Specification 4, the appellant also claims that the cited written order, establishing the Off-Base Liberty Card Program, does not impose a duty upon the appellant to ensure that subordinate Marines in his presence return to base by the time established by the written order. He further asserts that neither specification alleges that there is

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[1] I. SPECIFICATIONS 3 AND 4 OF CHARGE II FAIL TO STATE AN OFFENSE FOR DERELICTION OF DUTY BECAUSE THE SPECIFICATIONS DO NOT PROPERLY ALLEGE A DUTY.

II. APPELLANT’S PLEA TO CHARGE II, SPECIFICATION 3 . . . IS IMPROVIDENT BECAUSE THE PROVIDENCE INQUIRY DOES NOT ESTABLISH THAT ANY MARINE WAS UNDER THE AGE OF TWENTY-ONE OR THAT APPELLANT’S DERELICTION WAS WILLFUL.

III. APPELLANT’S GUILTY PLEA TO SPECIFICATION 3 OF CHARGE III ALLEGING WRONGFUL POSSESSION OF ECSTASY ON DIVERS OCCASIONS IS IMPROVIDENT AS TO DIVERS OCCASIONS.

IV. SPECIFICATIONS 2 AND 3 OF CHARGE III ARE AN UNREASONABLE MULTIPLICATION OF CHARGES WHERE SPECIFICATION 3 ALLEGES WRONGFUL POSSESSION OF ECSTASY WITH INTENT TO DISTRIBUTE AND SPECIFICATION 2 ALLEGES WRONGFUL USE OF THE SAME ECSTASY.

V. SIXTY-SIX MONTHS AND A DISHONORABLE DISCHARGE IS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF THE OFFENSES AND THE CHARACTER OF SGT RISNER AND HIS MILITARY SERVICE, WHICH INCLUDES COMBAT IN IRAQ.

[2] We have considered and reject the appellant’s fifth assignment of error claiming that 66 months of confinement and a dishonorable discharge are inappropriately severe for a sergeant who conspired with subordinates to distribute ecstasy, possessed ecstasy with the intent to distribute, distributed ecstasy, used ecstasy, and abandoned his duties as a noncommissioned officer.

a custom of the service that establishes the duty he is charged with not performing.

We must decide: (1) whether there is a custom of the service that imposes a duty upon noncommissioned officers (NCOs) to enforce orders, and (2) whether the specifications in question allege that the appellant's duty to act is the result of that custom of the service. *See* RULE FOR COURTS-MARTIAL 307(c)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.)("A specification is sufficient if it alleges every element of the charged offense expressly *or* by *necessary implication.*")(Empnasis added).

The appellant relies on *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986), to support his claim that a sergeant in the U.S. Marine Corps has no obligation or duty to prevent the consumption of alcohol by underage Marines or to ensure that Marines return to base prior to 2400 in accordance with the Off-Base Liberty Card Program. The appellant's reliance on *Thompson* is misplaced. There, the accused was a Technical Sergeant in the U.S. Air Force who was convicted of dereliction of duty for failing to prevent a more junior Airman from wrongfully using marijuana. The specification alleged that Thompson's duty to act was established "by virtue of his position as a noncommissioned officer in the United States Air Force." *Id.* at 40. Although our superior court dismissed the specification, it was because Thompson was using the marijuana with the more junior Airman at the time, not because the specification failed to establish a duty to act. *Id.* at 41 (citing *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) and *United States v. Marks*, 11 M.J. 303 (C.M.A. 1981)).

In dicta, however, the *Thompson* court expressed "doubts concerning whether the Government established a clear-cut duty on the part of appellant as a noncommissioned officer to prevent crime." *Id.* The court agreed that "noncommissioned officers have the responsibility to maintain high personal standards of conduct and to counsel and correct their subordinates on deficiencies." *Id.* However, it expressed reluctance to approve "criminal sanctions" for the "failure to perform a general unspecified duty to 'prevent crime'" absent "an identifiable regulation, directive, or custom of the service which would provide notice to noncommissioned officers of the legal requirements to which they are subject." *Id.* Our superior court, however, has recently recognized that 230 years of custom and tradition in the U.S. Navy and U.S. Marine Corps create a duty upon each NCO to prevent violations of the UCMJ, as

evidenced by service regulations.[3] *United States v. Simmons*, 63 M.J. 89, 93 (C.A.A.F. 2006). Simply put, the *Simmons* court put into writing what members of the naval service have known for more than two centuries. Although an NCO has a duty to enforce orders and to prevent violations of the UCMJ based on custom of the service, that does not mean that a specification alleging a failure to perform that duty sufficiently identifies the source of the duty.

The challenged specifications in this case do not specifically allege that the appellant's duty flows from a "custom of the service." However, the appellant's stated rank of sergeant in each specification is sufficient, by fair implication, to allege and to put him on notice that the duties he failed to perform flow from his position as an NCO in the Marine Corps, based on more than two centuries of custom and tradition. The military judge came to the same conclusion as evidenced by his recitation of the two specifications' elements, stating that the charged duties flowed from the appellant's status as "a Marine NCO" and as a "sergeant of Marines." Record at 64, 67.

Limiting our holding to the facts in this case, we have no reluctance in finding there is a "custom of the service" in the U.S. Marine Corps that requires an NCO: (1) to prevent underage consumption of alcohol by Marines in the NCO's presence and under his supervision, pursuant to Marine Corps Bases Japan Order 1600.1C of 17 September 2003, in part, by determining each Marine's age before providing alcohol to the Marine or consuming alcohol with the Marine; and (2) to make sure Marines in the NCO's presence and under his supervision return to base within the time proscribed by Marine Corps Bases Japan Order 1050.6 of 28 May 2004 implementing the Off-Base Liberty Card Program. We are also satisfied that the specifications in question sufficiently allege the duties the appellant failed to perform, and that those duties flow from a custom of the service. This assignment of error is without merit.

Improvident Pleas

For his second assignment of error, the appellant claims that his guilty plea to Specification 3 under Charge II is

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[3] "U.S. Marine Corps, Leading Marines, MCWP 6-11, paras. 1100.2.d.(1),(3), 1100.4.b., 1100.5. (Nov. 27, 2002); Dep't of the Navy, Regs. 1990, paras. 1023, 1034.1., 1034. 2., 1037, 1131 (Sept. 14, 1990); *see also* Dep't of the Navy, Marine Corps Manual, paras. 0002.1., 0003.2., 1000.1.b., 1002.3.a., 8.a.1., 1301.1. (Mar 21, 1980) (making Navy regulations applicable to Marine Corps personnel)." *Simmons*, 63 M.J. at 93.

improvident because the record does not establish that any of the Marines who consumed alcohol were under the legal drinking age.[4] We disagree.

A guilty plea may not be accepted unless an inquiry of the accused satisfies the military judge that there is a factual basis for the plea. R.C.M. 910(e). *See United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). During that inquiry, the accused must admit every element of each offense to which he or she pleads guilty. R.C.M. 910(e) Discussion. We apply an abuse of discretion standard when reviewing a military judge's decision to accept a guilty plea. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996)(citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). A guilty plea should not be set aside on appeal unless there is a substantial basis in law and fact for questioning that plea. *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)(quotation marks omitted)). *See Simmons*, 63 M.J. at 92.

We agree with the appellant that there is no evidence in the record that any of the Marines who consumed alcohol were under the age of 21 years. That fact, however, is not dispositive. The appellant had two NCO duties under Marine Corps Bases Japan Order 1600.1C of 17 September 2003: (1) to determine the Marines' ages; and (2) if a Marine was underage, to prevent his or her consumption of alcohol. Failure to perform either duty could be an act of willful dereliction.

The appellant entered into a stipulation of fact, stating, in part, that he hosted a beach party for his platoon at which alcohol was provided without regard for anyone's age. He later drove four lance corporals from the beach party into town where they went from bar to bar consuming more alcohol. Although the appellant knew that many lance corporals are not yet 21 years of age, he never asked anyone what his age was. Prosecution Exhibit 1 at 2. In response to the military judge's inquiry, the appellant agreed that he had a duty to determine each Marine's age. Record at 65. Regardless of whether a Marine was under 21 years of age or not, the appellant had the duty to make that determination. We must decide whether the appellant's failure to determine a Marine's age was willful or merely negligent.

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[4] The appellant's third assignment of error, claiming his plea to "divers occasions" in Specification 3 under Charge III was improvident is without merit. The record reflects the appellant twice possessed ecstasy with intent to distribute. Record at 85; Prosecution Exhibit 1 at 4.

The record before us is sparse on the issue of willfulness. During providence, the appellant stated:

> "I did not check their IDs, sir; and if I would have thought to check their IDs and -- I could have stopped the whole thing before it even happened . . . I left it up to the trust system. When I announced it at formation, I left it up to the trust system, but I should have stopped it. Sir, after the -- after the Motor-T barbeque, sir, we -- we all willfully went out, and we all drank together; and I should have checked their ID's (sic).

Record at 66. By stating that he left the issue of underage drinking "up to the trust system," the appellant indicates that he made an affirmative decision not to check the age of those Marines who were consuming alcohol. The appellant admitted that he could have checked the Marines' ages if he wanted. *Id*. Apparently, the appellant did not want to check the Marines' IDs and chose not to do so. This is sufficient evidence that the appellant's failure to check IDs was the result of his affirmative decision not to perform that duty, and, therefore, willful.

We simply do not find a substantial basis in law and fact for questioning the appellant's guilty plea to Specification 3 under Charge II. This issue is without merit.

Unreasonable Multiplication of Charges

In his fourth assignment of error, the appellant asserts that Specification 2 of Charge III, alleging wrongful use of ecstasy, and Specification 3 of Charge III, alleging wrongful possession of ecstasy with the intent to distribute, are an unreasonable multiplication of charges. We disagree.

To determine whether there has been an unreasonable multiplication of charges, we consider five factors set forth in *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). Applying these factors to the appellant's case, we find no unreasonable multiplication of charges.

First, the appellant failed to raise this issue at trial. Second, the appellant admitted to possessing ecstasy with the intent to distribute on more than one occasion, and that he used the ecstasy he possessed on the second occasion because he did

not find anyone to whom to distribute it. Clearly, these specifications involved separate acts and are, therefore, directed at separate and distinct criminal conduct. Third, for the same reason, we conclude that the separate specifications do not exaggerate the appellant's criminality. With respect to the last two factors, the method of charging the appellant did not unreasonably expose him to greater punishment, nor is there any evidence of prosecutorial overreaching. This assignment of error is without merit.

Conclusion

The findings and sentence approved by the CA are affirmed.

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court