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

BEFORE

C.L. SCOVEL **J.F. FELTHAM** **J. D. HARTY**

UNITED STATES

v.

Matthew J. WILLIAMS
Airman Recruit (E-1), U. S. Navy

NMCCA 200400576 Decided 16 February 2006

Sentence adjudged 8 December 2003. Military Judge: W.I. Gabig. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS HARRY S. TRUMAN (CVN 75).

CAPT JERRY MASSIE, JAGC, USNR, Appellate Defense Counsel
Maj J. ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR MONTY MILLER, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel

SCOVEL, Senior Judge:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Consistent with his pleas, the appellant was convicted of making a false official statement, wrongful use of marijuana, and unlawful entry, in violation of Articles 107, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 912a, and 934. The adjudged and approved sentence consists of confinement for 45 days and a bad-conduct discharge.

After considering the record of trial, the appellant's sole assignment of error asserting that his guilty plea to making a false official statement was improvident, and the Government's response, we conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Providence of the Plea

The appellant was interrogated by the master-at-arms (MAA) aboard the ship to which he was assigned as part of an investigation into his suspected wrongful use of illegal drugs. During the interrogation, the appellant said, "I have not used any drugs since I have been on restriction." That statement was false. He now contends that his guilty plea to the charge of making a false official statement was improvident because the military judge did not determine whether the MAA advised the appellant of his rights under Article 31, UCMJ, before questioning him. We disagree.

"[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.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980); RULE FOR COURT-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. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). 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 (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 during which he advised the appellant of the elements of the offense of making a false official statement, tailoring them to the language of the specification and providing the appellant

with relevant definitions. The appellant stated that he understood the elements and definitions. Record at 16.

The military judge then discussed with the appellant the factual basis for his plea. That discussion revealed that during an investigation into his suspected wrongful use of illegal drugs, the appellant went to the MAA office where he was questioned by Master-at-Arms First Class (MA1) "S." Both were in uniform, and MA1 S also wore an MAA badge. As the appellant answered questions, MA1 S typed the answers on a computer. He told MA1 S, "I have not used any drugs since I have been on restriction," which was false because he had used drugs while on restriction. He acknowledged that he knowingly and voluntarily lied to MA1 S, and had the intent to deceive MA1 S while MA1 S was performing his official duties. He stated that he had no legal excuse or justification for providing the false statement. The military judge did not inquire into whether the appellant was informed of his rights under Article 31, UCMJ. *Id*. at 29-32.

The appellant fails to specify how the military judge's failure to determine if the appellant was advised of his Article 31 rights renders his plea improvident. His argument is stated in these terms:

> "Statements to military criminal investigators can be considered official for purposes of Article 107 . . . Where warnings under Article 31 are given to the criminal suspect, his duty to respond truthfully to criminal investigators, if he respon[ds] at all, is now sufficient to input [sic] officiality to this statement for purposes of Article 107." *United States v. Dorsey*, [3]8 M.J. 244, 248 (C.M.A. 1993), quoting *United States v. Prater*, 32 M.J. 433, 438 (C.M.A. 1991) [. . .] The reading of right[s] under Article 31, UCMJ, establishes knowledge of officiality and is sufficient by itself to overcome the "exculpatory no" doctrine. *United States v. Sanchez*, 39 M.J. 518, 520 (A.C.M.R. 1993).

Appellant's Brief of 30 Sep 2004 at 2. We deduce that the appellant may base his claim of improvidence on assertions that: (1) the military judge's failure to inquire into Article 31 warnings indicates an insufficient inquiry into the element requiring that the statement made by the appellant be "official," *see* Art. 107, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 31b(1); or (2) the "exculpatory no" doctrine acts as a defense to prosecution.

The military judge's providence inquiry, in which the setting and subject matter of MA1 S's interrogation of the appellant were fully described, established the official nature of the appellant's statement. Our superior court at one time held that a criminal investigator's questioning of a suspect, who had no independent duty to answer, was not official within the meaning of Article 107, UCMJ. *See United States v. Aronson*, 25 C.M.R. 29 (C.M.A. 1957); *United States v. Osborne*, 26 C.M.R. 235 (C.M.A. 1958). That position, however, has been long abandoned. *United States v. Jackson*, 26 M.J. 377, 379 (C.M.A. 1988)("Thus, even if not subject to an independent 'duty to account,' a service member who lies to a law enforcement agent conducting an investigation as part of his duties has violated Article 107."); *see United States v. Teffeau*, 58 M.J. 62 (C.A.A.F. 2003); *United States v. Czeschin*, 56 M.J. 346 (C.A.A.F. 2002).

Our superior court addressed the lack-of-officiality argument in *Prater*. It reiterated that statements to military criminal investigators can be considered official for purposes of Article 107, and then noted, "Finally, where warnings under Article 31 are given to the criminal suspect, as in the present case, his duty to respond truthfully to criminal investigators, if he responds at all, is now sufficient to impute officiality to his statements for purposes of Article 107." *Prater*, 32 M.J. at 438. We do not construe this reference to Article 31 warnings as requiring that the military judge inquire into the administration of those warnings during the providence inquiry into a guilty plea to a charge of making a false official statement to military criminal investigators. Rather, we read it as stating that in cases like *Prater,* where the record indicates that the appellant received Article 31 warnings, the link between the appellant's duty to respond truthfully (because he had waived his right to remain silent) and the official nature of his statement may be considered firmly established.

In any event, we note, as did our superior court in *Prater*, that the appellant's lack-of-officiality argument contradicts his admission at trial that he provided a false official statement. *See id*. at 437; Record at 31. We also note the court's pronouncement that statements to military criminal investigators can now be considered official for purposes of Article 107. *Prater*, 32 M.J. at 438. The appellant's statement in this case was to a petty officer aboard his ship whom he knew to be an MAA, and concerned a matter that the appellant knew was under official investigation. These facts, elicited by the military judge during the providence inquiry, clearly establish the officiality of the appellant's statement, notwithstanding

the military judge's omission of questions into whether the statement was preceded by Article 31 warnings. *Watkins*, 35 M.J. at 713-14.

The "exculpatory no" doctrine has been applied by several Federal circuit courts in their interpretation of a separate false-statement statute, 18 U.S.C. § 1001. That doctrine states that a person who merely gives a negative response to a law enforcement agent cannot be prosecuted under § 1001. Although addressed by some military appellate courts, *see, e.g., Prater*, 32 M.J. 433 and *Sanchez*, 39 M.J. 518, our superior court has settled the question of this doctrine's applicability in courts-martial by holding that it is not supported by the language of Article 107, UCMJ, and is not compelled by any self-incrimination concerns. *United States v. Solis*, 46 M.J. 31 (C.A.A.F. 1997).

We return to the question of whether this record reveals a "substantial basis" in law and fact for questioning the plea. Based on these facts and applying applicable case law, we conclude that none exists. We note that the appellant did not move to suppress his statement and entered an unconditional guilty plea, which opened the door to consideration of his statement without a judicial determination of its admissibility on Article 31 grounds. *See* R.C.M. 801(g); *cf. United States v. Swift*, 53 M.J. 439, 450-51 (C.A.A.F. 2000). In pleading guilty, the appellant relieved the Government of the necessity of proving the element of the appellant's intent to deceive, which it might have done through evidence of his knowledge of officiality conveyed to him through a reading of his rights under Article 31. *See Sanchez*, 39 M.J. at 520. Finally, we are mindful that administration to a suspect of Article 31 rights establishes not only knowledge of officiality, but also ensures that he knows of his right to remain silent. We note, however, that the appellant does not now assert that he was not advised of his Article 31 rights or that his trial defense counsel was ineffective for failing to investigate whether he was advised of his rights and to move for the suppression of his statement. Under these circumstances, we find the appellant's plea of guilty provident.

Conclusion

The findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge FELTHAM and Judge HARTY concur.

For the Court

R.H. TROIDL
Clerk of Court