IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE THE COURT *EN BANC*

UNITED STATES

v.

Jaime J. PINERO
Cryptologic Technician Administrative Second Class (E-5), U.S. Navy

NMCCA 200101373 Decided 14 January 2005

Sentence adjudged 2 February 2001. Military Judge: R.W. Redcliff. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Security Group Activity Kunia, Schofield Barracks, HI.

Maj CHARLES C. HALE, USMC, Appellate Defense Counsel
Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
LT FRANK GATTO, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

In accordance with his pleas, the appellant was convicted by a military judge, sitting as a special court-martial, of an unauthorized absence terminated by apprehension, three specifications of the wrongful use of methamphetamine, and two specifications of the wrongful use of marijuana. The appellant's crimes violated Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 72 days, and a reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

On 14 January 2003 this court affirmed the findings and sentence in an *En Banc* decision. *United States v. Pinero*, 58 M.J. 501 (N.M.Ct.Crim.App. 2003). The issue before the court at that time was whether the appellant's guilty plea to the unauthorized absence was provident where he had informed the military judge that during the period of the unauthorized absence a petty officer had shown up at his house and taken him for a fitness-for-duty exam and urinalysis test. Following the exam

and test, the petty officer took the appellant back to the appellant's home, and told him to return to duty the following morning. The appellant did not return. The appellant informed the military judge that the petty officer had arrived at his home at around 0900 and that he was with the petty officer for about 5 hours. The appellant claimed that this occurred in mid-November 2000. Under those facts, the military judge accepted the appellant's pleas and this court affirmed. On 21 June 2004 the Court of Appeals for the Armed Forces (C.A.A.F.) reversed that decision and returned the case to this court for further review. *United States v. Pinero*, 60 M.J. 31 (C.A.A.F. 2004). Additionally, the C.A.A.F. mandated that review be conducted before judges who had not participated in our 14 January 2003 decision, *citing United States v. Jenkins*, 60 M.J. 27 (C.A.A.F 2004).

Upon remand from the C.A.A.F., the appellant continues to argue that his guilty plea to the unauthorized absence is not provident and that we should set aside that charge and reassess the sentence. We have now completed our review of the entire record of trial, and have considered the appellate pleadings of both the appellant and the Government. Following our corrective action, we conclude that the findings and sentence are correct in law and fact that no further errors remain that are materially prejudicial to the substantial rights of the appellant.

Unauthorized Absence

The appellant requests that we set aside his conviction of the unauthorized absence to which he pled guilty at his court-martial. Appellant's Additional Brief dated 17 Sep 2004 at 1. In reviewing the record of trial the C.A.A.F., however, found that "[t]here is a factual basis on this record to support a nine-day absence beginning on October 23 and terminating on November 1. . . ." *Pinero*, 60 M.J. at 35. We, too, find that such a finding is supported by the providence inquiry. Thus, we reject the appellant's request to dismiss the Charge I in its entirety. We will affirm an absence of a shorter period, also terminated by apprehension,[1] consistent with the record, the decision of the C.A.A.F. in this case, *United States v. Simmons*, 3 M.J. 398, 399 (C.M.A. 1977), and *United States v. Harris*, 45 C.M.R. 364, 367-68 (C.M.A. 1972).

Use of Marijuana

[1] This is consistent with the appellant's statement to the military judge that military authorities had showed up at his house and took him for a fitness for duty exam. Record at 37. The appellant stated that the petty officer "showed up stating . . . that basically I needed to go with him because the command had issued a fitness-for-duty screening on my part, sir." Record at 41. See also Record at 87 wherein the appellant's counsel acknowledges that when appellant was picked up at 0900 by the petty officer the appellant's unauthorized absence was terminated by apprehension. Since the absence is for less than 30 days, however, the termination by apprehension is not an aggravating factor under MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 10e(2).

Although not raised as an issue by the appellant before this court, or before the C.A.A.F., we conclude that the military judge also erred in accepting the appellant's guilty plea to Specification 3 of the Additional Charge. That specification alleges that the appellant used marijuana on or about 15 December 2000 on or near the island of Oahu, Hawaii. The appellant pled guilty to this offense and the military judge accepted his plea. The appellant also entered into a stipulation of fact concerning this misconduct. Prosecution Exhibit 1. Additionally, in announcing findings the military judge made clear that he had not considered any of the drug charges against the appellant to be multiplicious.

In advising the appellant of the elements of this offense, however, the military judge apparently became confused and stated that the offense occurred on 29 August 2000. Record at 61. He also added to the confusion by telling the appellant that the offense "may also relate to the first specification under Charge III, which also alleged a violation on the 29th of August 200, related to methamphetamine." *Id*. After advising the appellant of the elements, the military judge then asked the appellant to tell him how this offense "related to the earlier offense we discussed involving methamphetamine on or about 29 August 2000." *Id*. at 62. Further discussions between the military judge and the appellant concerning this offense do not clarify this issue. *Id*. at 61-63. In fact, they became more confusing.

> MJ: And I gather with regard to the urine test for the methamphetamine on the 29th of August 2000, did your sample also test for marijuana?
>
> ACC: Yes, sir.

Id. at 63.

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 must 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 COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. Acceptance of a guilty plea requires an appellant 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). Such questioning must overcome

the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j).

For complex offenses such as conspiracy, robbery, or murder, a failure to discuss and explain the elements of the offense during the providence inquiry has been held to be fatal to the guilty plea on appeal. *United States v. Pretlow*, 13 M.J. 85, 88 (C.M.A. 1982); *United States v. Nystrom*, 39 M.J. 698, 701-02 (N.M.C.M.R. 1993). A different result occurs for less complex cases, such as simple military offenses where the elements are commonly known by most servicemembers. *Nystrom*, 39 M.J. at 701.

While it could be argued that the use of marijuana is a simple offense and that the elements are commonly known to Sailors and Marines, what we have here is a failure of the record to reflect **any** discussion of the appellant's involvement with marijuana on or about 15 December 2000. As such, the record simply fails to contain a factual basis for the appellant's guilty plea to this offense. Accordingly we find that appellant's guilty plea to Specification 3 of the Additional Charge to be improvident.

Conclusion

Accordingly, the guilty finding to Specification 3 of the Additionally Charge is set aside and the specification is ordered dismissed. The finding of guilty to the Specification under Charge I (alleging a violation of Article 86, UCMJ) is affirmed, excepting the date 15 December 2000 and substituting the date 1 November 2000. That portion of the Specification under Charge I that inferentially alleges that the appellant was in an unauthorized absence status between 2 November 2000 until 15 December 2000 is set aside and ordered dismissed. All other findings are affirmed.

As a result of our action on the findings, we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Upon reassessment of the sentence, we approve only so much of the sentence as extends to confinement 50 days, reduction to pay-grade E-1, and a bad-conduct discharge. The supplemental promulgating order will reflect the findings and sentence as modified by this decision.

Judge SCOVEL, Judge HEALEY, Judge SUSZAN, and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge CARVER, Senior Judge PRICE, Senior Judge RITTER, Judge HARRIS, and Judge REDCLIFF did not participate in the decision of this case.