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

BEFORE

C.L. CARVER **R.W. REDCLIFF** **A. DIAZ**

UNITED STATES

v.

Mark W. MIDLAM
Chief Warrant Officer 2 (W-2), U.S. Marine Corps

NMCCA 200101884 Decided 6 May 2005

Sentence adjudged 13 July 2000. Military Judge: R.C. Harris. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, New Orleans, LA.

LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
LtCol KATHLEEN K. TREMBLAY, USMCR, Appellate Government Counsel

DIAZ, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of willful disobedience of a superior commissioned officer, failure to obey a lawful general regulation, dereliction of duty, cruelty and maltreatment of a subordinate, and false official statement, in violation of Articles 90, 92, 93, and 107, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 892, 893, and 907. The military judge sentenced the appellant to restriction for 60 days, a $6,000.00 fine (and if not paid, to be confined for 60 days), a reprimand, and a dismissal. The military judge recommended that the convening authority suspend the adjudged dismissal. The convening authority approved the sentence but, as a matter of clemency, suspended the adjudged restriction and the fine.

We have carefully considered the record of trial, the appellant's four assignments of error, and the Government's response. Except as set forth below, 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. Arts. 59(a) and 66(c), UCMJ.

Providence of Pleas

In his first two assignments of error, the appellant challenges the validity of his guilty pleas to willfully disobeying his superior commissioned officer (a violation of Art. 90(2), UCMJ) and being cruel toward, and maltreating his subordinate (a violation of Article 93, UCMJ).

A military judge shall not accept a plea of guilty without making sufficient inquiry of the accused to establish that there is a factual basis for the plea. 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 explain the elements of the offense and ensure that a factual basis for the plea exists. *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).

Before this court may set aside a finding based upon a guilty plea, the record of trial must show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002)(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). This court may review the plea inquiry and the balance of the record to determine whether there is a sufficient factual predicate for a guilty plea. *United States v. O'Connor,* 58 M.J. 450, 453 (C.A.A.F. 2003); *see Jordan,* 57 M.J. at 239 (holding that when reviewing a "bare bones providence inquiry", a court may look to "the entire record to determine whether the dictates of Article 45, RCM 910, and *Care* and its progeny have been met."). Finally, we review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

With these principles in mind, we consider the appellant's assignments of error.

Providence of Plea to
Willful Disobedience of Commissioned Officer

The appellant claims that the military judge erred in accepting his plea to willfully disobeying an order of a superior commissioned officer (Charge I) because the order in question was nothing more than a statement informing appellant

of a written Instruction already in existence at his command. We agree.

At the time of the offenses, the appellant was the Inspector-Instructor (the "I&I") for a Marine reserve unit located in Sacramento, California. The appellant's superior commissioned officer was Commander J.E. Monahan, the commanding officer of the Naval and Marine Corps Reserve Center that housed the appellant's I&I staff. On 12 November 1998, Commander Monahan promulgated a written local Instruction (the "Instruction") that, in part, provided specific guidance regarding the use and possession of alcohol on the Reserve Center grounds. In that regard, the Instruction provides:

> The possession and use of alcoholic beverages by any person on this station **is prohibited** except in areas, and at times, approved by the Commanding Officer. . . .

Appellate Exhibit VII at 7 (emphasis added).

Sometime in December 1998, in direct response to the appellant's query as to whether he could bring alcohol aboard the Reserve Center for consumption during a retirement ceremony, Commander Monahan advised the appellant that (consistent with the Instruction), he could do so only with the former's prior approval. Record at 25-30. At trial, the appellant admitted that, from December 1998 through July 1999, he brought alcohol aboard the Reserve Center on numerous occasions without obtaining prior approval. *Id.* at 27-28.

In *United States v. Wartsbaugh,* 45 C.M.R. 309 (C.M.A. 1972), our superior court held that an order from a company commander to an accused directing him to remove a bracelet, which merely enforced a pre-existing battalion order, should have been charged under Article 92 (the "ultimate offense"), rather than Article 90. The President has since codified the holding in *Wartsbaugh*. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 14c(2)(b)("Violations of regulations, standing orders or directives, or failure to perform previously established duties are not punishable under this article, but may violate Article 92).

After carefully considering the providence inquiry in this case, we conclude that *Wartsbaugh* applies to these facts, and that the gravamen of the misconduct committed by the appellant was the disobedience of that portion of the Instruction

prohibiting the use and possession of alcohol aboard the Reserve Center. The appellant's objection notwithstanding, however, we can affirm a finding of guilty to the lesser included offense of violating a lawful written order under Article 92a(2), UCMJ. *See* Article 59(b), UCMJ, ("Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.").

The appellant correctly notes that a written order or regulation may not subject a service member to criminal liability unless it contains language establishing that it is punitive in nature. *United States v. Shavrnoch,* 49 M.J. 334, 336 (C.A.A.F. 1998). The test is not, however, whether the order invokes any particular incantation expressing its punitive impact. Instead, we must determine whether the order merely provides general guidelines for the conduct of military functions (in which case it is not punitive), or is directed at the conduct of individual members of a command (in which case it is). *See United States v. Daniel*, 42 M.J. 802, 805 (N.M.Ct.Crim.App. 1995)(citing *United States v. Scott,* 46 C.M.R. 25 (C.M.A. 1972)).

In this case, Commander Monahan specifically informed the appellant of the Instruction prohibiting the use or possession of alcohol on board the Reserve Center without prior approval. Moreover, the Instruction expressly commands "[a]ll personnel assigned to the Naval and Marine Corps Reserve Center [to] strictly adhere to this instruction." Appellate Exhibit VII at 1. We conclude that the Instruction is clearly intended to regulate the appellant's individual conduct and that its punitive nature is entirely self-evident. *Daniel,* 42 M.J. at 805.

Appellant willfully disobeyed the Instruction when he brought alcohol on board the Reserve Center without obtaining prior approval. As such, we may affirm a finding of guilty to the lesser included offense of violating Article 92(2), UCMJ. In light of this modified finding, we will reassess the sentence when considering the appellant's assignment of error regarding sentence appropriateness.

Providence of Plea to
Cruelty and Maltreatment

The appellant also challenges his conviction for the offense of cruelty and maltreatment under Article 93, UCMJ. The relevant charge and specification alleges that the appellant

> was cruel toward and did maltreat Sergeant [Sgt R], a person subject to his orders, by encouraging her to consume alcoholic beverages at the work site and other locations with full knowledge that the said [Sgt R] was alcohol dependent and seeking assistance from counselors for her substance abuse problems, and by encouraging her to engage in an adulterous relationship with him that included intercourse and oral sodomy.

The appellant launches a two-pronged attack on his guilty plea to this charge. Directing our attention to this court's decision in *United States v. Goddard,* 54 M.J. 763 (N.M.Ct.Crim. App. 2000)("*Goddard II*"), the appellant first contends that his plea is legally infirm because "a consensual sexual relationship between a superior and a subordinate, without more, [does] not support a conviction for the offense of maltreatment." *Id.* at 766 (citing *United States v. Fuller*, 54 M.J. 107, 111-12 (C.A.A.F. 2000).

In light of *Goddard II* and our superior court's decision in *Fuller,* we agree with the appellant, at least with respect to that portion of the specification that attempts to criminalize what the plea inquiry and the balance of the record demonstrate was a consensual sexual relationship between the appellant and Sgt R.

The Government argues that Sgt R's alcohol dependency (and her intoxication during many, if not all, of her sexual liaisons with the appellant) puts this case outside the sphere of *Goddard II.* As we discuss later, we agree that the appellant's conviction is provident as to the second basis for the charge. However, because Sgt R's intoxication apparently never affected her ability to consent to the sexual acts, we decline to hold the appellant criminally responsible for cruelty and maltreatment on this basis.[1]

[1] We do not fault the military judge for accepting the appellant's plea. At the time of this court-martial, we had yet to decide *Goddard II*. As a result, the military judge correctly applied this court's holding in *Goddard I* (*United States v. Goddard,* 47 M.J. 581 (N.M.Ct.Crim.App. 1997), which

Accordingly, the court strikes the following language from the specification: "and by encouraging her to engage in an adulterous relationship with him that included intercourse and oral sodomy." In light of this modified finding, we will reassess the sentence when we consider the appellant's assignment of error as to sentence appropriateness.

The appellant also attacks the remaining basis for the cruelty and maltreatment charge, arguing that (a) the military judge failed to elicit a sufficient factual inquiry as to the offense; and, in any event, (b) the appellant's actions do not amount to cruelty and maltreatment as a matter of law. We disagree.

Under Article 93, UCMJ, the act that forms the basis of the offense must constitute "cruelty, oppression, or maltreatment" as "measured by an objective standard." MCM, Part IV, ¶ 17(c)(2). An accused may be guilty of this offense, "even though the proof of harm or injury to the victim might fall short of demonstrating actual physical and mental pain or suffering. The essence of the offense is abuse of authority." *United States v. Carson,* 57 M.J. 410, 415 (C.A.A.F. 2002). Whether an accused's conduct rises to the level of an offense within the meaning of Article 93, UCMJ, in a particular case "requires consideration of the specific facts and circumstances of that case." *Id.*

The evidence in this record provides ample objective support for the appellant's plea to the remaining portion of the specification. As an initial matter, the appellant admitted under oath that he encouraged Sgt R to consume alcohol at work and at various other locations with "the full knowledge that Sergeant [R] was alcohol dependent and seeking assistance from counselors for her substance abuse problem[.]" Record at 34. Contrary to the appellant's contention, this is not a mere legal conclusion but a specific admission of fact. While the military judge could have elicited further specifics from the appellant regarding the underlying facts, we conclude that this admission (together with the balance of the record) provides a sufficient factual basis to gauge whether--as a matter of law--the plea should stand.

As noted earlier, the appellant was the I&I for a reserve unit in Sacramento, California. From July 1998 to July 1999,

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sanctioned a conviction under Article 93, based on a consensual sexual relationship between a superior and a subordinate. *Goddard II* reversed that holding.

the appellant had an adulterous affair with Sgt R, a subordinate in his command.[2] Despite knowing that Sgt R was an alcoholic who was undergoing treatment, the appellant regularly plied her with alcohol to help facilitate his sexual liaisons. On numerous occasions, the appellant allowed Sgt R (and other subordinates in the appellant's command) to consume alcohol during working hours. Instead of encouraging Sgt R to attend her alcohol abuse counseling sessions, the appellant often excused her from receiving the treatment that she so desperately needed.

On one occasion, as the appellant and Sgt R were returning from a meeting with Sgt R's substance abuse counselor, the appellant pressed Sgt R to forego her normal duties so that she could accompany him on a TAD trip to Long Beach, California. During this trip, the appellant and Sgt R drank alcohol as they drove to the mission site, and the two later had sex in their hotel.

In July 1999, Sgt R called her Sergeant Major and disclosed her affair with the appellant. By this point, Sgt R was physically sick from abusing alcohol. Despite this, she felt compelled to keep a constant amount of alcohol in her system to function. At one point she contemplated suicide, but was talked out of it by her Sergeant Major and her mother. Sgt R eventually received mental health and alcohol abuse treatment at Portsmouth Naval Medical Center.[3]

In sum, rather than providing the compassionate leadership demanded of a Marine officer when dealing with a subordinate attempting to overcome an alcohol addiction, the appellant instead abused his authority to satisfy his sexual desires, and in the process, caused significant physical and mental harm to Sgt R. At trial, the appellant had no trouble admitting that this conduct "constituted maltreatment and cruelty toward a subordinate under the circumstances." Record at 35. In fact, in his unsworn statement[4] the appellant apologized to Sgt R for

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[2] Appellant regularly had sexual intercourse with Sgt. R while on TAD trips, and, on one such trip, engaged Sgt. R. and other members of his command in a game of strip poker. On a separate occasion, two of the appellant's senior staff noncommissioned officers discovered the appellant in *flagrante delicto* with Sgt R beneath a pool table located in the recreation area of the I&I staff offices.

[3] Sgt R attempted suicide while being treated at the Portsmouth Naval Hospital.

[4] We are well aware of those cases requiring appellate courts to scrutinize an appellant's unsworn statement for inconsistencies related to the plea. *See*

all the harm he had caused her. After considering the balance of this record, we conclude that the military judge did not abuse his discretion in accepting this plea.

Unreasonable Multiplication of Charges

In a summary assignment of error, the appellant also contends that the specification under Charge III (alleging a violation of Navy Regulations relating to fraternization between officers and enlisted persons) and the specification under Charge II (alleging cruelty and maltreatment), constitute an unreasonable multiplication of charges.

We consider five factors in determining this issue: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Does the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz,* 55 M.J. 334 (C.A.A.F. 2001), *on remand*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd,* 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Applying the *Quiroz* criteria, we note that the appellant did not raise this issue at trial. "[T]he failure to raise the issue at trial suggests that the appellant did not view the multiplication of charges as unreasonable . . . [and] [t]he lack of objection at trial will significantly weaken the appellant's argument on appeal." *United States v. Quiroz*, 53 M.J. 600, 607

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generally United States v. Prater, 32 M.J. 433 (C.M.A. 1991); *United States v. Jemmings,* 1 M.J. 414 (C.M.A. 1976). That said, we see no reason why this court may not also consider such statements to confirm the factual basis for a plea. *See e.g. United States v. Rios,* 33 M.J. 436, 440 (C.M.A. 1991)(where the court rejected the accused's effort to invalidate his plea to attempted robbery on the basis of statements made during the providence inquiry suggesting a defense of voluntary abandonment, finding that there were sufficient uncontested facts--contained either in the "guilty-plea responses, the stipulation of fact, or [the accused's] unsworn sentencing statement -- to demonstrate, *as a matter of law*," that the accused's plea was provident)(emphasis in original). While we recognize that the appellant was not under oath during this portion of trial, we do not find this particularly dispositive. The requirement of an oath during the plea colloquy is "not designed to benefit an accused, but to subject an accused to the possibility of a perjury prosecution for false testimony rendered in the providence inquiry." *United States v. Riley,* 35 M.J. 547, 548 (A.C.M.R. 1992)(affirming accused's conviction notwithstanding the military judge's failure to place the accused under oath during the providence inquiry).

(N.M.Ct.Crim.App. 2000)(en banc), *remanded by*, 55 M.J. 334 (C.A.A.F. 2001)(internal citations omitted).

Additionally, we find that the charges are aimed at distinct criminal conduct and, in our view, do not misrepresent or exaggerate the appellant's crimes. Moreover, under the specific facts of this case, the challenged charges did not unreasonably increase the appellant's punitive exposure, particularly in view of the lenient sentence adjudged. Finally, there is no evidence that the Government overreached or was guilty of abuse in the drafting, preferral, and referral of charges.

In sum, after a careful review of the record of trial, we find no unreasonable multiplication of charges and reject this assignment of error.

Sentence Appropriateness

We next consider the appellant's claim that his sentence was inappropriately severe. At the time of this court-martial, the appellant was a warrant officer with over 18 years of service. Over a period of one year, the appellant abused his position of trust and confidence by (a) encouraging a female subordinate, who he knew had an alcohol addiction and was undergoing treatment, to consume alcohol as a prelude to sex; (b) engaging in adulterous sexual relations with that same subordinate, and then lying about it to a fellow officer assigned to investigate the matter; (c) possessing and using alcohol in his office spaces (and allowing his subordinates to consume alcohol during the working day), despite receiving specific direction from a superior commissioned officer that he could not do so without prior approval; and (d) wrongfully using Government resources and manpower to perform repair work on privately owned vehicles.

For these offenses, the military judge sentenced the appellant to 60 days restriction, a $6,000 fine, a reprimand, and a dismissal. The convening authority granted clemency by suspending the restriction and the fine for one year. We find this sentence to be extremely lenient for the offender and his offenses.

Our final duty is to reassess the sentence in light of the modified findings above. Although we recognize that there is a significant disparity in the maximum punishment for the original charge of willfully violating the order of a commissioned

officer under Article 90a(2), UCMJ, as compared to our modified finding that the appellant was guilty only of violating a lawful order under Article 92a(2)[5], we are confident that the military judge would not have imposed a lesser sentence even had the appellant been properly charged. We further find that the sentence is appropriate for this offender and his offenses as modified. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986); *United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985).

Conclusion

Accordingly, we affirm the findings, as modified above. Upon reassessment, we affirm the sentence as approved by the convening authority. We direct that a supplemental court-martial order be issued reflecting our modified findings.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court

[5] An accused guilty of violating Article 90 may be confined for up to five years, whereas a violation of Article 92(2) is punishable by only 6 months confinement. MCM, Part IV, ¶¶ 14e(2) and 15e(2).