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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

James B. DIGGS
Aviation Electronics Technician Third Class (E-4), U.S. Navy

NMCCA 200300527 Decided 10 November 2005

Sentence adjudged 16 July 2001. Military Judge: K.C. McManaman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Marianas, U.S. Naval Activities, Guam.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR D.E. BOYLE, JAGC, USNR, Appellate Defense Counsel
LCDR LUIS LEME, JAGC, USN, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel
Capt ROGER MATTIOLI, USMC, Appellate Government Counsel
CDR C.N. PURNELL, JAGC, USN, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of simple assault and two specifications of indecent assault, in violation of Articles 128 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 7 months, forfeiture of all pay and allowances for 7 months, and reduction to pay grade E-1. The pretrial agreement had no effect on the sentence. The convening authority approved the sentence as adjudged.

The appellant claims that: (1) the plea of guilty to simple assault is improvident, (2) the military judge erred in granting *Pierce* credit, (3) the military judge erred in denying

additional credit for illegal pretrial confinement, and (4) the convening authority erred in failing to grant the judicially ordered credit for illegal pretrial confinement.

After carefully considering the record of trial, the appellant's assignments of error, the Government's response, the appellant's and the Government's response to our court order regarding *Pierce* credit and other matters, we hold that the finding of guilty to simple assault must be set aside and the sentence must be reassessed. We also determine that error occurred in the awarding of credit for both pretrial and illegal confinement. We order sentence relief in our decretal paragraph. We conclude that the remaining findings of guilty and the sentence as modified are correct in law and fact and no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Improvident Plea of Guilty
Simple Assault

In his first assignment of error, the appellant contends that his plea of guilty to simple assault was improvident because the appellant did not admit to either an attempt or an offer type assault. We agree.

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, 253 (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). Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Jordan,* 57 M.J. 236, 239 (C.A.A.F. 2002)(citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). "[T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. To impart the seriousness of the *Care* inquiry, an accused is questioned under oath about the offenses to which he has pled guilty. 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).

At the beginning of the providence inquiry, the trial defense counsel stated that the plea of guilty was for an offer type simple assault. The military judge then gave the proper elements for both attempt and offer type assaults. However, the military judge failed to explain the differences between the two. Nor did he elicit information from the appellant that would lead us to affirm the conviction under either theory of liability.

An offer type assault involves an intentional or culpably negligent act resulting in a reasonable apprehension of receiving immediate bodily harm. On the other hand, an attempt type assault requires a specific intent to harm and an overt act of more than mere preparation apparently intending to effect the intended bodily harm. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 54c(1)(b).

During the inquiry, the appellant explained that he leaned over the victim and invaded her space, causing her to move back on her elbows. The appellant further admitted that by his actions, he intended to, and did, threaten her. The appellant did not explain the nature of the threat. Record at 81. The stipulation of fact was equally unenlightening, stating that the appellant offered to do bodily harm to the victim by leaning forward as if to lie on top of her. Prosecution Exhibit 1. Notably, the appellant did not admit, under an offer type assault, that his actions in invading her space caused the victim to apprehend bodily harm. Nor did he admit, under an attempt type assault, that he intended to harm her, only that he intended to threaten her in some fashion. In short, we find the providence inquiry woefully inadequate.

In our decretal paragraph, we will disapprove the findings of guilty to the charge and specification of simple assault and reassess the sentence per the principles in *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).

Pierce Credit

The appellant next contends that the military judge failed to properly award *Pierce* credit because the military judge

failed to make clear how much credit he gave for the prior punishment. We agree that relief is required.

During argument on sentence, the trial defense counsel requested *Pierce* credit for a prior nonjudicial punishment. Record at 115. In *United States v. Pierce,* 27 M.J. 367, 369 (C.M.A. 1989), our superior court held that an accused who is convicted of the same offense at a court-martial for which he had earlier received nonjudicial punishment "must be given *complete* credit [at the court-martial] for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."

The appellant received nonjudicial punishment for a similar offense 6 months before he was sentenced at the court-martial. The Government appears to have conceded that the nonjudicial punishment was for one of the same offenses for which the appellant was punished at trial. Thus, we need only determine if the military judge gave the proper credit at trial. The nonjudicial punishment included reduction from pay grade E-5 to pay grade E-4 and forfeiture of $796.00 pay per month for two months. Force Judge Advocate's Recommendation of 9 Jan 2002 at 7.

At trial, the appellant had the option either to request that the sentencing authority reduce the adjudged sentence by the equivalent nonjudicial punishment or that the convening authority later award a credit for the nonjudicial punishment. *Pierce,* 27 M.J. at 396; *United States v. Globke,* 59 M.J. 878, 881 (N.M.Ct.Crim.App. 2004). Since the appellant asked the military judge for credit at trial, it was permissible for the military judge to reduce the adjudged sentence by an amount equal to the nonjudicial punishment, rather than order a credit. In such cases, when the military judge adjudges the sentence, he must state on the record "the specific credit awarded for the prior punishment." *United States v. Gammons,* 51 M.J. 169, 184 (C.A.A.F. 1999). Although the military judge should have clearly stated the *Pierce* credit he awarded, we note that the trial defense counsel did not request a specific credit, nor did he object to the credit that was given either at trial or in the clemency petition submitted after trial. Nonetheless, we must review the facts to determine if the military judge gave the proper credit at trial.

After the military judge announced the court-martial sentence of a bad-conduct discharge, confinement for 7 months, total forfeiture of pay and allowances for 7 months, and

reduction to pay grade E-1, the trial defense counsel asked about *Pierce* and R.C.M. 305 credit. In a confusing dialog, the military judge responded that he reduced the sentence (presumably both confinement and forfeitures) by 3 months for *Pierce* credit, R.C.M. 305 credit of 9 days, and pretrial confinement credit of 52 days. Record at 118-19. In response to our court order, counsel for both sides agreed that the military judge gave *Pierce* credit of 29 days of confinement and total forfeitures for one month. We agree that the record, as it is, can be interpreted to support that finding of fact and we adopt it.

The question then becomes: was the reduction in the adjudged sentence equivalent to the nonjudicial punishment? In other words, did the appellant receive adequate *Pierce* credit? Since the President has not promulgated a Table of Equivalent Punishments, we have little guidance upon which to determine the proper credit to be given for a reduction in grade from E-5 to E-4. We cannot simply disapprove a one-grade reduction below pay grade E-2 because (1) the appellant would nonetheless be reduced to pay grade E-1 by operation of the automatic reduction rule in Article 58a, UCMJ, and (2) reduction from pay grade E-2 to pay grade E-1 does not equate to the loss in pay from being reduced from pay grade E-5 to pay grade E-4 for 6 months (from the date of the nonjudicial punishment to the date of the court-martial sentence). The record does not reveal how much money the appellant forfeited as a result of his reduction from pay grade E-5 to E-4 for the 6 months prior to the date he was sentenced by the court-martial. Nor does the record reveal the dollar amount of one month of the appellant's pay and allowances at pay grade E-1.

By court order, we directed both appellate counsel to advise us as to what *Pierce* credit should have been given by the military judge and, if the credit he awarded was insufficient, what relief should now be granted. The appellant contends that his loss of pay at nonjudicial punishment both for the forfeiture of pay and the reduction in pay grade equals approximately 48 days of confinement and total forfeitures, or an additional 19 days of confinement and one-half month's total forfeitures above what the military judge awarded. Since the appellant has already served the confinement portion of his sentence, he requests that we either disapprove the bad-conduct discharge or grant 2-for-1 credit for the additional confinement served.

On the other hand, the Government contends that the enactment of the automatic forfeiture rule and the automatic reduction rule after the date of the *Pierce* case has eliminated the requirement of "stripe-for-stripe" and "dollar-for-dollar" relief. Alternatively, the Government argues that the military judge should have reduced the sentence by 44 days of confinement and total forfeitures in order to effect *Pierce* credit in this case. The Government has made a compelling argument that the two automatic sentence rules have made it very difficult to apply *Pierce* credit literally. But we think the wiser course of action is to attempt to apply the *Pierce* credit as literally as possible under the circumstances.

We therefore find that the military judge erred by failing to grant full *Pierce* credit. In order to make the appellant whole, and in consideration that he has already served all of the confinement portion of his sentence, in our decretal paragraph we will disapprove 2 months of confinement and 2 months of total forfeitures, in addition to the credit already awarded by the military judge.

R.C.M. 305 Credit

The appellant next argues that the military judge erred by only awarding an extra 9 days of confinement credit for an R.C.M. 305 violation. The appellant requests that we order an additional day of credit for each of the remaining 43 days of pretrial confinement. We decline to grant relief.

We adopt the military judge's findings of fact. Record at 61-64. Upon review of those facts, we conclude that no additional credit is appropriate.

Failure to Grant Confinement Credit

Finally, the appellant contends that the convening authority erred by failing to grant the judicially-ordered credit of 9 days for a violation of R.C.M. 305. We agree. We also find that the convening authority failed to grant relief for the 52 days of pretrial confinement. We will grant relief.

As the appellant correctly points out in his brief, the convening authority did not direct the judicially-ordered R.C.M. 305 credit in his action as required by R.C.M. 1107(f)(4)(F). Appellant’s Brief of 15 Oct 2004 at 11. The Government contends that such action was unnecessary since the military judge stated that he had already reduced his adjudged sentence by that amount. We note that the failure to direct the credit in the

convening authority's action is a common error, which we test for prejudice. If the appellant actually received the credit, even though it was not mentioned in the convening authority's action, we would have no difficulty in concluding that the error was not materially prejudicial to any substantial right of the appellant. But, here, as explained below, we hold that the appellant did not receive the benefit of either the 9 days of R.C.M. 305 credit or the 52 days of pretrial confinement credit.

The proper application of sentence credit is a question of law, which we review *de novo. United States v. Spaustat,* 57 M.J. 256, 260 (C.A.A.F. 2002). In order to determine the proper application of the credit, we must first determine as a fact what sentence was actually adjudged. The military judge's comments on the record make this issue far more difficult than it should have been. The military judge initially stated that the adjudged sentence included a bad-conduct discharge, reduction to pay grade E-1, confinement for 7 months, and total forfeitures for 7 months. The trial defense counsel then asked if the *Pierce* and R.C.M. 305 credits had been applied to the "sentence." The military judge replied that

> . . . I started with 10 months and went down from there. So, in essence, you got 30 days credit--excuse me, 3 months credit, 90 days credit. That's why I ended up giving you 7 months instead of 10 months.

Record at 118. The trial counsel asked if the appellant would serve 7 months or if the "52 days credit" applied to the 7 months. The military judge said, "That's already been applied." *Id.* at 119.

The military judge and both counsel referred to "sentence" throughout this tortured discussion, without differentiating between confinement and forfeitures. We previously found that the military judge gave *Pierce* credit of 29 days confinement and 1 month's total forfeitures. Did the military judge intend to adjudge both confinement and total forfeitures for 10 months, but deducted 61 days confinement *and 2 months forfeitures* for the 61 days of R.C.M. 305 and pretrial confinement credits? That may well be what he intended, but the record is so confusing that we are not certain.

During the military judge's review of the terms of the pretrial agreement, after his discussion of the various "credits" as reflected above, he repeated that he adjudged confinement for 7 months and total forfeitures. The trial

counsel then requested, "that the wording of the confinement be set to include any pretrial credits so that we may avoid confusion at the brig and later on. . . ." Record at 121. The military judge readily agreed, and said that the appellant would actually serve 7 months of confinement. But when the trial defense counsel suggested that the appellant would actually serve under 6 months of confinement due to good time and pretrial confinement credits, the military judge replied, "I'm confused." *Id.* at 121. So are we.

The trial counsel then suggested to the military judge that he must have intended to adjudge 7 months (confinement?) plus the credits of 61 days, equaling 9 months and 1 day. The military judge agreed, "Yeah, that's correct then, if you look at it that way." *Id.* at 122. But, then corrected it to, "Nine months, period." *Id.* At that point, the military judge may have been referring to the effect of a term in the pretrial agreement that required the convening authority to suspend confinement over 9 months, but, again, the entire discussion remains unclear.

In his recommendation, the force judge advocate wrote that the sentence included confinement for 7 months and total forfeitures for 7 months. Further down in the document, the force judge advocate stated that 61 days of judicially-ordered credit was "to be applied to confinement." Force Judge Advocate's Recommendation of 9 Jan 2002 at 7. He then repeated the military judge's quote above regarding the application of the various credits and concluded by stating that he concurred "with the Judge's determination and sentence with credit." *Id.* As a result, we are not certain what the force judge advocate recommended to the convening authority on this subject. Nor do we have the benefit of the trial defense counsel's comments in response. Although not assigned as error, there is no indication in the record that the force judge advocate's recommendation was ever served on the trial defense counsel. Further, the force judge advocate's recommendation is dated the same date as the convening authority's action and court-martial order. The court-martial order stated that the adjudged sentence included confinement and total forfeitures for 7 months. The convening authority approved the sentence as adjudged and ordered it into execution.

In a similar case of obfuscation by the trial judge, our superior court, citing R.C.M. 1007(b), held that the military judge could correct his adjudged sentence by a new announcement made before the record was authenticated, concluding that the "the record clearly reflects that the military judge adjudged a

sentence including confinement for ten months," rather than confinement of 202 days as initially announced by the military judge. *Spaustat,* 57 M.J. at 261. Unfortunately, however, we cannot say that the record in our case "clearly reflects" the adjudged sentence.

Under the facts and circumstances of this case, we are compelled to find as a fact that the military judge adjudged a sentence that included a bad-conduct discharge, reduction to pay grade E-1, confinement for 7 months, and total forfeitures for 7 months. The total administrative credit of 61 days must then be applied against the lesser of either the adjudged sentence or the approved sentence, rather than by reducing the adjudged sentence itself. *United States v. Rock,* 52 M.J. 154, 156-67 (C.A.A.F. 1999). This method allows the appellant the advantage of full good time credit for the entire adjudged sentence instead of good time only for the reduced sentence.

Thus, we conclude that the appellant served an additional 49 days of confinement beyond that which was adjudged, as reduced by the various credits. *See* Government Response to Court Order of 29 Aug 2005 at 1. In order to provide full relief, we will, in our decretal paragraph, disapprove an additional 3 months of confinement and 3 months of total forfeitures.

Conclusion

Accordingly, the findings of guilty of Charge V and its specification of simple assault under Article 128, UCMJ, are disapproved. The remaining findings of guilty are affirmed. We affirm only so much of the sentence as provides for a bad-conduct discharge and reduction to pay grade E-1.

Judge WAGNER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court