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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

John R. HARCROW
Fireman Recruit (E-1), U.S. Navy

NMCCA 200300913 Decided 16 May 2005

Sentence adjudged 24 October 2002. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Submarine School, Groton, CT.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel
LCDR RUSSEL CONROW, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of failure to go to his appointed places of duty (4 specifications), unauthorized absence (2 specifications), willful dereliction of duty, willful damage to military property, wrongful use of marijuana (2 specifications), breach of the peace, larceny (2 specifications), and disorderly conduct. These offenses violated Articles 86, 92, 108, 112a, 116, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 908, 912a, 916, 921, and 934. The appellant was sentenced to confinement for 150 days and a bad-conduct discharge.

We have carefully considered the record of trial and the appellant's three assignments of error, contending that his guilty pleas to dereliction of duty and breach of the peace were improvident, as well as his contention that the adjudged sentence is too severe. We have also considered the Government’s response. After taking corrective action as reflected below, we

conclude that the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the accused remains. Arts. 59(a) and 66(c), UCMJ.

Providence of Pleas

The appellant contends that his guilty pleas to dereliction of duty and breach of the peace were improvident. As a result, he requests that his bad-conduct discharge be set aside. We agree that the appellant's guilty plea to dereliction of duty was improvident. We disagree that the guilty plea to breach of the peace was improvident. Lastly, we find that, although not raised as error, the appellant's guilty plea to disorderly conduct is partially improvident. Thus, we will take corrective action in our decretal paragraph.

We begin by noting that 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 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. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)). The 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 (2002 ed.), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES, (2002 ed.)

A military judge, however, may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). 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 rejection 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 materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995).

Although military judges enjoy substantial discretion in deciding to accept guilty pleas, we note with concern that the military judge conducted a "bare bones" providence inquiry for

the numerous offenses of which the appellant stands convicted. And the Stipulation of Fact, Prosecution Exhibit 1, merely recites the elements of the offenses without further elaboration of any supporting facts, providing little assistance in evaluating the providence of these pleas.

A. Willful Dereliction of Duty (Charge II and its specification)

During the providence inquiry, the appellant stated that he was assigned to stand duty as a "fire watch" but had made "other plans." The appellant reported for duty as ordered, but when he couldn't find a replacement to take over the watch, he left his post before being properly relieved. Record at 39. The Government charged the appellant with dereliction of duty by "failing to maintain his watch." PE 1 at 3.

After confirming that the appellant had a watch-standing duty and knew of his assignment, the military judge inquired as follows:

MJ: Did you perform the duty?

ACC: In partly (sic), yes, sir.

MJ: So you performed the duty, but incompletely?

ACC: Yes, sir.

MJ: So why did you only partially perform the duty?

ACC: I had--it's no excuse, but I had plans to do something else that day, and I tried to make arrangements to do that but also stand my watch.

MJ: So you began your watch but you left in the middle of it?

ACC: Yes, sir.

MJ: So, if you had wanted to, could you have performed the entire watch?

ACC: Yes, sir.

MJ: Did you have any permission or authority to leave your watch?

ACC: No, sir.

MJ: Was this a conscious decision on your part?

ACC: Yes, sir.

Record at 39-40.

We concur with the appellant that the providence inquiry clearly established his conduct violated Article 86, UCMJ. As to the charged offense, dereliction of duty, the military judge failed to elicit any facts outlining the responsibilities of a fire watch-stander, as well as how the appellant was specifically derelict in performing those duties. Therefore, we find that the facts the appellant admitted support a finding of guilty only that he went from his appointed place of duty, without authority, in violation of Article 86, UCMJ. We will take corrective action in our decretal paragraph.

B. Breach of the Peace (Charge V and its specification)

The appellant also contends that his conduct disclosed during the providence inquiry that forms the basis for the breach of the peace offense falls short of the mark. We disagree.

While on restriction, the appellant intentionally discharged a fire extinguisher in the barracks. As a result, the fire alarm sounded in the building, causing fire and emergency personnel to respond to the scene of the alarm. Record at 47.

After being appropriately apprised of the elements and applicable definitions of the offense of breach of the peace, the appellant admitted that his act of discharging the fire extinguisher was intentional. Although he apparently did not intend that a disturbance ensue, such was the direct and proximate consequence of his conduct. The appellant conceded, and we have no difficulty concluding, that his conduct was of a "violent, boisterous, or turbulent" nature." Record at 47. In as much as Article 116, UCMJ, is not a specific intent crime, we find no basis in law or fact to question the appellant's guilty plea to the charged offense. *Prater*, 32 M.J. at 436. Moreover, we find that his pleas to breach of the peace are provident.

C. Disorderly Conduct (Charge VII and its specification)

On yet another occasion, the appellant stated that he "wasn't thinking" when he decided to pull the fire alarm in Building 161 on board Naval Submarine Base, Groton. As he left the building, he observed fire department personnel responding to the scene to inspect the building. He subsequently was charged with, and convicted of, disorderly conduct that brought discredit upon the armed forces.

Although not raised as error, we find that the providence inquiry does not fully support the appellant's disorderly conduct conviction. The military judge appropriately apprised the appellant of the elements and applicable definitions of the offense of disorderly conduct. Record at 29-30. In the subsequent providence inquiry, the appellant admitted that his conduct was prejudicial to good order and discipline and adversely affected the firefighters' mission readiness and

performance of duties. *Id.* at 52. The military judge, however, neither addressed, nor elicited from the appellant, facts that support the finding that the appellant's conduct was of such a nature as to bring discredit on the armed forces. Thus, we will take corrective action in our decretal paragraph.

Sentence Appropriateness

The appellant contends that his sentence is inappropriately severe. We disagree.

Sentence appropriateness involves the "'*individualized* consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(emphasis added)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

After carefully considering the evidence admitted on the merits, in aggravation, and in mitigation, including the appellant’s unsworn statement, we conclude that the appellant’s sentence is not inappropriately severe. Art. 66(c), UCMJ. Over the course of nearly four months, the appellant committed numerous violations of the UCMJ. Contrary to his contention, we find his offenses were serious indeed, spanning multiple breaches of military discipline, as well as common law offenses such as larceny from shipmates and the wrongful use of marijuana. We have no difficulty concluding that the adjudged sentence is appropriate for this appellant and his many offenses. This assignment of error is without merit.

Conclusion

Accordingly, we affirm only so much of the finding of guilty to Charge II and its Specification that reflects a violation of Article 86, UCMJ, namely, the offense of "going from appointed place of duty without authority." We also affirm the findings of Charge VII and its Specification, except for the language "which conduct was of nature to bring discredit upon the armed forces." The remaining findings of guilty, as approved by the convening authority, are affirmed.

We have reassessed the sentence in accordance with the principles articulated in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). In reassessing the sentence, and in consideration of our corrective action on the findings, we conclude that the appellant is not entitled to any sentencing relief. Having thus reassessed the sentence, we affirm the adjudged sentence, as approved by the convening authority.

We order that the supplemental promulgating order accurately reflect the pleas and findings of the offenses of which the appellant stands convicted, as modified hereby.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court