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.

Joseph A. COOPER
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200401699 Decided 24 February 2005

Sentence adjudged 26 July 2004. Military Judge: A.F. Williams. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Transportation Support Battalion, 2d Force Service Support Group, Camp Lejeune, NC.

LCDR GARRETT TRIPLETT, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
CDR CHARLES PURNELL, JAGC, USN, Appellate Government Counsel

CARVER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of violating a lawful general order, making a false official statement, willful destruction of private property, two specifications of reckless driving, two specifications of wrongful appropriation, and unlawful entry, in violation of Articles 92, 107, 109, 111, 121, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, 909, 911, 921, and 934. The appellant was sentenced to a bad-conduct discharge, confinement for 3 months, forfeiture of $795.00 pay per month for 3 months, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement in excess of time served (53 days).

The appellant submitted the record without assignment of error. After review, we conclude that one specification must be set aside and that two specifications must be merged. We will

take corrective action in our decretal paragraph. We find no other error materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Reckless Driving

In the Specification of Additional Charge I, the appellant pled guilty to, and was found guilty of, recklessly driving a passenger car by rear-ending another vehicle. We find the plea of guilty to be improvident.

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 (2002 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).

In our review of the record, we have determined that the military judge accurately listed the elements of the specification of reckless driving and explained the definition of recklessness. We have also determined that the appellant indicated a clear understanding of the elements and definitions and stated that the elements correctly described the offense he committed. But we find that the providence inquiry did not establish a factual basis for the element of recklessness:

MJ: What happened?

ACC: I was driving, sir. It had been raining prior -- previously, so I reduced my speed to approximately 40 miles per hour; and a vehicle pulled in front of the three cars in front of me, sir; and they locked their brakes up; and when I put my brakes on, I didn't have enough space to stop -- adequate space to stop before colliding with the vehicle in front of me, sir.

MJ: Now do you consider this particular incident to be a case where you were physically controlling the vehicle in a reckless or wanton manner?
ACC: Yes, I was following too close to the car in front of me, sir.

MJ: What type of speed were you at?
ACC: I was traveling 40-miles [sic] per hour, sir.

MJ: And that's within the speed limit?
ACC: Yes, sir.

MJ: Could you have avoided operating your vehicle in this manner if you had wanted to?
ACC: Yes, sir.

MJ: How could you have done that?
ACC: I could have slowed down a little bit more, sir, and given an adequate space between the vehicle in front of me and my vehicle and take into thought [sic] the facts the that [sic] roads were still wet, sir.

MJ: All right. Now you mentioned another vehicle pulling in in [sic] front of the other cars?
ACC: Yes, sir.

MJ: Do you believe that it was the fault of the other vehicle --
ACC: No, sir.

MJ: -- that you did this?
You think this was your fault?
ACC: Yes, sir.

MJ: Do you believe you had any legal justification or excuse at all for operating the vehicle in this fashion?
ACC: No, sir.

MJ: Very well. That concludes the Court's inquiry.

Record at 34-35. As reflected above, the appellant only admitted to simple negligence, not gross negligence or recklessness. Thus, we find a substantial basis in fact for questioning the appellant's plea of guilty.

Wrongful Appropriation of Multiple Articles

In Specifications 1 and 2 of Additional Charge IV, the appellant pled guilty to, and was found guilty of, two specifications of wrongful appropriation. We find that the two offenses are multiplicious and must be merged.

Absent a timely motion, an unconditional guilty plea, such as the appellant's, waives a multiplicity claim absent plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). "Appellant may show plain error and overcome [waiver] by showing that the specifications are facially duplicative," *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001), "that is, factually the same," *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997).

We find that the two specifications are facially the same. During the providence inquiry, the appellant admitted that he wrongfully appropriated all the articles in both specifications at the same time from the same barracks room, but from different owners. A wrongful appropriation of several articles at substantially the same time and place is but one offense, even though the articles belong to different persons. See MCM, Part IV, ¶ 46c(1)(h)(ii).

Reassessment

Upon reassessment, in light of our action, we find that the sentence received by the appellant would not have been any lighter even if he had not been found guilty of those offenses. We further find that the sentence is appropriate for this offender and the remaining offenses. *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, the Specification of Additional Charge I is set aside and dismissed. Both Specifications of Additional Charge IV are merged into one specification. The remaining

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

Judge WAGNER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court