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.

JASON P. STRATTON
Corporal (E-4), U.S. Marine Corps

NMCCA 200500117 Decided 20 October 2005

Sentence adjudged 23 May 2003. Military Judge: J.G. Baker. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Aircraft Wing, Okinawa, Japan.

LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

WAGNER, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempting to commit indecent acts with a child, conspiring to commit indecent acts with a child, failure to obey a lawful general order (fraternization), committing indecent acts with a child, three specifications of contributing to the delinquency of a minor, and breaking restriction, in violation of Articles 80, 81, 92, and 134, Uniform Code of Military Justice, 10 U.S.C. § 880, 881, 892, and 934. The appellant was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to pay grade E-1, and confinement for 36 months. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 20 months in accordance with the pretrial agreement.

We have examined the record of trial, the appellant's five assignments of error asserting multiplicity between Charge I and Specification 1 of Charge II, an improvident plea to Additional

Charge I, improper trial counsel sentencing argument, factually insufficient evidence to certain language in Specifications 2 and 3 of Charge II, and error in the court-martial order. We have also considered the Government's answer. Following our corrective action in the decretal paragraph, we conclude that the remaining findings and the sentence are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Articles 59(a) and 66(c), UCMJ.

Facts

The appellant, a thirty-year-old Sergeant, rented a room at the Renaissance Hotel in Okinawa, Japan, for the evening of 18 January 2003 with one corporal (Cpl) and three lance corporals (LCpl). Among the other guests at the hotel that evening were three girls, two twelve-year-olds and one thirteen-year-old, staying in a room next door to the room occupied by one of the girl's parents. The Marines and the three girls were all at the hotel pool around 1900.

The appellant struck up a conversation with the three girls, during which he was informed of their ages. One or more of his compatriots told the appellant that it was inappropriate for him to be "hanging around" with underage girls. In spite of this warning, the appellant continued to swim with the girls and to engage them in conversation. At 2100, all the Marines except the appellant departed the pool area for their room. The appellant remained in the pool with the three underage girls. At 2230, the appellant arrived at the room with the three adolescent girls. The other Marines told the appellant he could not have the girls in the room, so the appellant gave each of the three girls a beer and departed with them for the beach area outside the hotel. One of the other Marines, LCpl T, joined them at the beach.

After consuming their beer, the appellant, LCpl T, and the three girls went to the girls' room, where LCpl T provided the girls with vodka, in addition to the beer provided them by the appellant. While the other three were on the balcony, LCpl T got into one of the beds with one of the girls, where he digitally penetrated her vagina and they performed oral sex on each other. One of the other girls became angry and left the room, at which point the third girl went into the room and lay down in the other bed. The appellant then got into the bed with the underage female and pulled her body towards him, placing his arms around her. He then rubbed her back, touched her through her clothing, and kissed her on the cheek. During the military judge's inquiry into the providence of his pleas, the appellant admits that he did these acts with the intent to engage in indecent acts with the female. She, however, rebuffed his advances and the four fell asleep in the room.

Multiplicity

The appellant claims that the offenses of attempting to commit an indecent act with a child and committing an indecent act with a child are multiplicious for findings under the facts of this case. We agree.

Absent a timely motion, an unconditional guilty plea waives a multiplicity claim absent plain error. *United States v. Hudson*, 59 M.J. 357, 358-59 (C.A.A.F. 2004); *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). To determine whether the offenses are factually the same, we review the "factual conduct alleged in each specification," *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997), as well as the providence inquiry conducted by the military judge at trial, *Lloyd*, 46 M.J. at 23. We find that these two offenses are facially duplicative.

In the instant case, the Government theory of prosecution was that the appellant committed certain acts that were, in and of themselves, indecent by rubbing and kissing the adolescent girl. The Government also believes this same conduct can be used to establish a separate offense of attempting to commit indecent acts based on the appellant's admission and corroborating circumstantial evidence that he committed the acts in an effort to commit even more egregious indecent acts such as "deep kissing" and "heavy petting." The military judge discussed multiplicity with the trial defense counsel, gaining agreement that the charges were not multiplicious for findings purposes, but went on to find them multiplicious for sentencing. The appellant now argues that military judge erred in that the two offenses are multiplicious for findings purposes, as well.

The appellant points us toward *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997), where our superior court held that the specifications of rape and assault with intent to commit rape were facially duplicative because the assault specification did no more than describe the force used to commit the rape. In that case, the assault with intent to commit rape was a lesser included offense of the rape charge. The Government theory in *Britton* was that the facts supporting the assault with intent to commit rape were separate from, and preceded, the facts supporting the rape charge. The court, in that case, found the facts to be one continuing course of conduct, all necessary force elements resulting in a rape.

By contrast, in the present case, the Government is asking this court to consider one set of facts as a sufficient predicate to support both the findings to the indecent acts charge and the findings to an attempted indecent acts charge based on the stated intent of the appellant. Here, both the facts and the elements

are identical. The appellant committed indecent acts when he got into bed with an underage female, rubbed her body through her clothing, and kissed her cheek, all with the intent to gratify his lust and sexual desires. While it is no doubt aggravating to this offense that the appellant intended to gratify his lust and sexual desires at the expense of an underage female under the influence of alcohol by engaging in "deep kissing" and "heavy petting," the facts do not support another separate and distinct offense in this case.

Improvident Plea

The appellant next alleges that his plea of guilty to conspiracy to commit an indecent act was not provident because there was no evidence of an agreement between the appellant and his alleged co-conspirator. We disagree.

We start with the premise that the appellant has the right to offer a guilty plea, and to do so pursuant to a pretrial agreement. Art. 45, UCMJ; RULES FOR COURTS-MARTIAL 705(b)(1) and 910(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). In this regard we are mindful that "a provident plea of guilty is one that is knowingly, intelligently and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders,* 33 M.J. 1026 (N.M.C.M.R. 1991)). Furthermore, "the accused must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion. A factual basis is required for a military judge to accept an accused's guilty plea and the military judge is required to question an accused to establish this factual basis. *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 1995).

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). Rejection of the plea "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999) (citing R.C.M. 910(j) and Art. 59(a), UCMJ).

In our review of the record, we find that the military judge accurately listed the elements and defined the terms contained in the elements of the offense to which the appellant pled guilty. We also find that the appellant indicated an understanding of the elements of the offense and the legal definitions, and stated that they correctly described the offense he committed.

The appellant told the military judge during the providence inquiry that, although there was never any verbal agreement between himself and LCpl T to commit the offense of indecent acts, their mutual actions that evening amounted to an understanding that they would. The stipulation of fact, admitted in support of the appellant's guilty pleas as Prosecution Exhibit 1, makes it clear that the appellant and LCpl T worked in concert to befriend the underage girls, supply them with alcohol, and maneuver them into a situation where the two could induce indecent sexual activity.

The existence of a conspiracy need not be "manifested in any formal words." *United States v. Matias*, 25 M.J. 356, 362 (C.M.A. 1987)(quoting *United States v. Jackson*, 20 M.J. 68, 69 (C.M.A. 1985)). Such an agreement can be silent. A conspiracy is generally established by circumstantial evidence and will normally be demonstrated in the conduct of the parties. *United States v. Barnes,* 38 M.J. 72, 75 (C.M.A. 1993). Conduct alone is, therefore, sufficient to show that an agreement was reached. *United States v. Layne*, 29 M.J. 48, 51 (C.M.A. 1989).

We are convinced that the providence inquiry established that the appellant believed he was guilty and that the factual circumstances revealed by him objectively support his guilty plea. *See United States v. Garcia,* 44 M.J. 496, 498 (C.A.A.F. 1996)(holding appellate court will not reject the plea unless it finds substantial conflict between plea and the appellant's statements or other evidence of record). Therefore, we conclude that the appellant's guilty plea was provident.

Trial Counsel Argument

Absent plain error, the appellant forfeited review of this issue by failing to object at trial. *See* R.C.M. 1001(g); MILITARY RULE OF EVIDENCE 103(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). During argument on sentencing, the trial counsel stated that the appellant wanted to "have sex with" the underage girl. There was no objection and the issue is forfeited upon appeal. Neither is there plain error. The word "sex" has very broad meaning, to include many sexual acts not amounting to sexual intercourse. The appellant stated during providence that he did intend to engage in "deep kissing" and "heavy petting" with the minor. Under these factual circumstances, we find no error in the trial counsel's argument. Even if error was committed, we find no prejudice to the appellant.

Sufficiency of Evidence

The appellant next claims that the evidence adduced at trial was insufficient to support his plea and the resulting finding of guilty to the word "vodka" in Specifications 2 and 3 of Charge II. The Government concedes the error. We will take corrective action in our decretal paragraph.

Court-Martial Order Error

The appellant claims in his final assignment of error that the court-martial order is incorrect in that it fails to note that Additional Charge II and its two specifications and Additional Charge IV and its sole specification were withdrawn and dismissed, rather, noting that not guilty findings were entered. Again, the Government concedes the error and we will order corrective action in our decretal paragraph.

Conclusion

The findings of guilty to Charge I and its sole specification and the word "vodka" in Specifications 2 and 3 of Charge II are set aside. The remaining findings, as approved by the convening authority, are affirmed. Upon reassessment, we find that the sentence would have been no different even considering the specification and language set aside by our court. We, therefore, affirm the sentence, as approved by the convening authority. We direct that the supplemental court-martial order correctly state the adjudged and affirmed findings and sentence.

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court