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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **J.D. HARTY**

UNITED STATES

v.

Robert W. DEGURSKI
Fireman (E-3), U.S. Navy

NMCCA 200101712 Decided 13 May 2004

Sentence adjudged 18 January 2001. Military Judge: D.M. White. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS SACRAMENTO (AOE 1).

CDR BREE ERMENTROUT, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
CDR BOYCE CROCKER, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

In accordance with his pleas, the appellant was convicted at a special court-martial before a military judge alone of two specifications of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The appellant’s sentence included confinement for 75 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's four assignments of error, and the Government's response. Except for the action ordered in our decretal paragraph, 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.

Deficient Legal Officer Recommendation (LOR) and Convening Authority's (CA's) Action

For his first and third assignments of error, the appellant alleges he was denied his post-trial rights when the LOR did not accurately advise the convening authority of the appellant's pleas and findings, and because the CA's action repeated these errors.[1]

Before a convening authority takes action on a court-martial that includes a sentence to a punitive discharge, that convening authority's staff judge advocate or legal officer shall forward a recommendation to the convening authority. RULE FOR COURTS-MARTIAL 1106(a), MANUAL FOR COURT-MARTIAL, UNITED STATES (2000 ed.). The purpose of the LOR is to assist the convening authority in deciding what action to take on the sentence in the exercise of command prerogative. R.C.M. 1106(d)(1). The importance of an accurate LOR is apparent: whereas the convening authority *may* consider the record of trial before taking action, he or she *shall* consider the LOR. R.C.M. 1107(b)(3).

R.C.M. 1106(d) sets forth the minimum requirements for the LOR. Among other things, the LOR shall include concise information as to the findings and sentence adjudged by the court-martial, a statement of the nature and duration of any pretrial restraint, and the effect of a pretrial agreement on the convening authority's action. Here, the LOR states the appellant plead not guilty but was found guilty of two specifications of aggravated assault under Charge I. The LOR also states the appellant plead not guilty but was found guilty of disorderly conduct and impeding an investigation under Charge II.[2] In reality, the appellant plead guilty to, and was found guilty of, two specifications of assault consummated by a battery under Charge I; he plead not guilty to Charge II and its two specifications and then were withdrawn.

Error in the LOR is waived if counsel for the accused fails to comment on it in a timely manner, unless it is plain error. This assumes, of course, the trial defense counsel has been provided a copy of the LOR. R.C.M. 1106(f)(6). Here, there is no showing that the trial defense counsel was served with a copy of the LOR. Absent such a showing, we must hold the appellant has not waived any error contained in the LOR. If plain error is present, the appellant may be entitled to relief. The appellant alleges only a nonspecific claim of prejudice based on speculation as to how the incorrect information impacted his

[1] We will assume the appellant means the error was repeated in the court-martial order.

[2] Special Court-Martial Order No. 1-00 correctly states the appellant plead not guilty to Charge II and its specifications and that they were withdrawn.

case. Appellant's Brief of 30 Dec 2002 at 4. We will test for plain error.

"Plain error" lacks a fixed definition. It has been described variously as error that is "both obvious and substantial," that is "particularly egregious," that "seriously [affects] the fairness, integrity, or public reputation of judicial proceedings," or that "requires appellate intervention to prevent a miscarriage of justice, protect the reputation and integrity of the court, or to protect a fundamental right of the accused." *United States v. Lowry,* 33 M.J. 1035, 1037-38 (N.M.C.M.R. 1991)(internal citations omitted). There is no hard-and-fast rule as to what errors in an LOR constitute plain error, but "misadvice as to both findings and pleas" has been held to constitute plain error. *Id.* at 1038 (citing *United States v. McLemore*, 30 M.J. 605 (N.M.C.M.R. 1990)). Factors to consider in determining whether an error is plain error include: (1) whether the error is an omission or an affirmative misstatement; (2) whether the matter is material and substantial; and (3) whether there is a reasonable likelihood that the convening authority was misled by the error. *Id*.

Here, the error is an affirmative statement and is material and substantial. We do not believe, however, there is a reasonable likelihood the convening authority was misled by the error. The convening authority states that he considered the results of trial and the record of trial in addition to the LOR. CA's Action of 1 Aug 2001 at 2. The record of trial and the results of trial correctly reflect the appellant's pleas and the findings. Additionally, the appellant and convening authority entered into a pretrial agreement stating the appellant would plead guilty to the lesser included offense of assault consummated by a battery, and the Government would withdraw Count II and not go forward on the greater offense. Appellate Exhibit II. Under these circumstances we do not find prejudice and therefore no plain error. We decline to order a new LOR.

The appellant correctly notes, and the Government concedes, the incorrectness of the Court-Martial Order (CMO). As with the LOR, the CMO incorrectly states the appellant's pleas and guilty findings with regard to Charge I and its two specifications. We test this error under a harmless-error standard. *United States v. Kotteakos,* 328 U.S. 750 (1946). We likewise find that this error did not affect appellant's substantial rights, since no specific prejudice was alleged or is apparent. The appellant, however, is entitled to have his official records correctly reflect the results of this proceeding. We will therefore remedy this error in our decretal paragraph. *United States v. Diaz,* 40 M.J. 335, 345 (C.M.A. 1994); *United States v. Graf,* 35 M.J. 450, 467 (C.M.A. 1992); *United States v. Moseley,* 35 M.J. 481, 485 (C.M.A. 1992).

Improvident Plea

In his second assignment of error, the appellant asserts that his guilty pleas to two specifications of assault consummated by a battery were improvident. The appellant does not specify what element was not established during the providence inquiry.

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)*; 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. 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); R.C.M. 910(e).

A military judge 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. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. Art. 59(a); UCMJ; R.C.M. 910(j).

The appellant merely asserts the military judge twice stopped asking questions when it appeared the answers would show the appellant's pleas were improvident. Appellant's Brief at 6-7. We will not speculate as to what the appellant would have said if additional questions had been asked. We will review the entire record of trial and apply the review standard stated above.

Assault consummated by a battery requires but two elements: (1) bodily harm to another person; and, (2) the bodily harm be done with unlawful force or violence. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 54b(2). Bodily harm is defined as "any offensive touching of another, however slight." *Id*. at ¶ 54c(1)(a). The record of trial is clear that there was an offensive touching to another done with unlawful force or violence.

As to Specification 1 of Charge I, the appellant stated that he was swinging his knife in an attempt to scare the individual and the knife struck another person in the chest area without going through the clothes. It was foreseeable that swinging a knife in close quarters could result in the knife striking another person. He did not have authority or legal justification to strike the victim with the knife. Record at 19-26. As to Specification 2 of Charge I, the appellant stated that after swinging the knife and striking the victim named in Specification 1, he went to another Sailor and placed the knife against the victim's throat. The victim was wearing a bandana around his neck, and the knife made contact with the bandana. The victim would have felt pressure through the bandana. The appellant did not have authority or legal justification to hold the knife against the victim's throat. *Id*. at 26-30.

We are convinced the military judge properly explained the elements of the offenses and ensured that a factual basis existed for the appellant's pleas, and that the record does not reveal a substantial basis in law and fact for questioning the appellant's pleas. This issue has no merit.

Sentence Appropriateness

In his fourth assignment of error, the appellant contends a bad-conduct discharge is inappropriately severe due to the insignificant nature of the offenses combined with the fact the appellant, to begin with, was unsuitable for military service. The appellant also alleges his bad-conduct discharge was awarded simply because he requested one. Appellant's Brief at 8-10. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

The offenses committed by the appellant were serious and deserving of serious punishment. We disagree with the appellant's assertion that he received a bad-conduct discharge simply because he requested one. The appellant had a prior non-judicial punishment for failing to obey lawful orders, had an overall evaluation trait average of 2.33, and his leading petty officer characterized his service as "mostly disrespectful," Record at 55, and that he had "little potential" for rehabilitation. *Id*. at 58.

After carefully considering the entire record of trial, we find that the sentence, as adjudged and approved below, is

appropriate for this offender and his offenses. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the convening authority. *Healy*, 26 M.J. at 395-96. As such, we decline to grant relief.

Conclusion

We direct that the supplemental CMO reflect that the appellant plead not guilty to Charge I and the two specifications of aggravated battery but plead guilty to two specifications of the lesser included offense of assault consummated by a battery, and that he was found guilty of the two lesser included offenses and of Charge I. We affirm the findings and sentence as approved on review below.

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court