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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Aaron M. ELKINS
Airman Recruit (E-1), U.S. Navy

NMCCA 200300045 Decided 25 October 2004

Sentence adjudged 6 September 2002. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS IWO JIMA (LHD 7).

CAPT FRANK TEZAK, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Division
LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel
LCDR MONIQUE ALLEN, JAGC, USNR, Appellate Government Counsel

RITTER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of unauthorized absence (UA), missing movement by neglect (5 specifications), and wrongful use of marijuana on divers occasions, in violation of Articles 86, 87, and 112a of the Uniform Code of Military Justice, 10 U.S.C. §§ 886, 887, and 912a. The appellant was sentenced to confinement for 60 days and a bad-conduct discharge.

The record was originally submitted to us with one assignment of error, noting that the convening authority's action purported to suspend more confinement than was adjudged at trial. The appellant did not claim to have been prejudiced from this scrivener's error, and we find no material prejudice to the appellant's substantial rights from the assigned error.

However, based on our review of the record, we specified three issues, each questioning whether the guilty pleas to three separate charges and specifications were provident. Having now considered the appellant's brief and the Government's response conceding error on all three issues, we find the appellant's guilty pleas improvident as to Charges I and II and their Specifications, alleging UA and missing movement by neglect, respectively. We also find the appellant's guilty plea to Charge III and its Specification provident only as to one incident of wrongful use of marijuana, and must therefore dismiss the language alleging use "on various occasions."

This case serves as a reminder to counsel and trial judges of the importance of careful attention to detail during the inquiry into the providence of guilty pleas. It also illustrates the importance of the appellant's rights to full review of the findings and sentence under Article 66(c), UCMJ.

Improvident Pleas

The three issues we specified were:

1) whether the appellant's guilty plea to the unauthorized absence offense was provident, where the military judge failed to inquire into a possible duress defense after evidence admitted during the presentencing hearing stated that the appellant went UA because of death threats;

2) whether the appellant's guilty plea to five specifications of missing movement by neglect were provident, where the military judge did not establish that the ship's movements were "substantial" within the meaning of MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, Paragraph 11c(1); and

3) whether the appellant's guilty plea to wrongful use of marijuana "on various occasions" was provident, where the military judge only inquired into the factual circumstances of one incident of the appellant's use of marijuana, and the only reference to multiple uses before the court came during the presentencing hearing in the form of an uncorroborated written sworn statement.

Factual Background

During the providence inquiry into 5 specifications alleging missing movement by neglect, the military judge

ascertained from the appellant only that the ship movements occurred during the charged three-month UA, and that the appellant had advance knowledge of the specific dates of those movements. The military judge made no inquiry as to whether these ship movements were substantial or merely minor changes in location, such as from one berth to another within the same harbor. Then, while discussing the specification concerning various uses of marijuana, the military judge asked only about a single incident of wrongful use.

During the presentencing hearing, the Government offered, without defense objection, the appellant's written sworn statement in aggravation of the offenses. In this statement, the appellant estimated that he had used marijuana approximately one hundred times. No other evidence was ever offered to corroborate this admission concerning multiple marijuana uses or to establish when they occurred.

The appellant's written sworn statement also discussed his reasons for going UA. In answer to the question "Why else did you go UA?" the appellant answered as follows: "After my admin board I was getting death threats. I felt I was being presacuted [sic] for something I hadent [sic] done." Prosecution Exhibit 5 at 2. The trial defense counsel quoted this language twice during the presentencing hearing: once, while questioning the master-at-arms petty officer who took the appellant's sworn statement, and a second time during his presentencing argument. At no time did the military judge inquire into the appellant's understanding of the affirmative defense of duress, or determine whether this information undermined the factual basis for the appellant's guilty plea to UA.

Applicable Law

Before accepting a guilty plea, the military judge must find that there is a sufficient factual basis to satisfy each and every element of the pled offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). If the accused discloses matters inconsistent with his plea, the military judge must either resolve the apparent inconsistency or reject the plea. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). Once the guilty plea is accepted, we will not disturb it, unless the record reveals "a substantial conflict between the plea and the accused's statements or other evidence of record." *Id.*; *accord United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Analysis

The appellant's guilty pleas to unauthorized absence, 5 specifications of missing movement, and wrongful use of marijuana "on various occasions" were improvident. The appellant's written sworn statement clearly raised, during the presentencing hearing, the possibility that his unauthorized absence might have been caused by duress, in that his receipt of death threats was one of his stated reasons for going UA. Also, in failing to inquire into the nature of the 5 ship's movements that the appellant missed, the military judge's inquiry fell short of *Care*'s requirement that a sufficient factual basis must be established to satisfy each and every element of the pled offenses. *See* MCM, Part IV, ¶ 11(c)(1)(requiring "movement" within the meaning of Article 87, UCMJ, to be substantial").

Finally, the military judge did not elicit *any* factual basis to show that the appellant wrongfully used marijuana on more than one occasion. The appellant's written sworn statement was not considered by the military judge in assessing the providence of the appellant's plea to multiple drug uses. Although this court may consider the entire record in assessing the providence of a guilty plea, the sworn statement provides no specific facts to support additional drug offenses.

We note that the trial counsel, military judge, staff judge advocate, and appellate defense counsel missed these three obvious flaws in the providence inquiry. We remind military justice practitioners that the providence inquiry is a critical part of any court-martial that includes guilty pleas. To ensure that the interests of justice and judicial economy are well-served, each participant must ensure that the providence inquiry establishes a factual basis for each element of each offense to which the accused pleads guilty, and that any matters raised that are inconsistent with those pleas are resolved at trial.

Conclusion

The findings of guilty to Charges I and II and their Specifications are set aside and dismissed. The words "on various occasions" are excepted from the Specification under Charge III and dismissed. The findings of guilty to Charge III and its Specification, as excepted, are affirmed.

We have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). In view of the remaining Charge and Specification, and considering evidence properly admitted in aggravation, we are confident that the minimum sentence for the remaining wrongful use

of marijuana, standing alone, would have included at least 15 days in confinement and a bad-conduct discharge.

Accordingly, we affirm only that portion of the sentence extending to confinement for 15 days and a bad-conduct discharge.

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court