UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic NATHANIEL J. CARVER
United States Air Force

ACM S31241

19 March 2008

Sentence adjudged 14 November 2006 by SPCM convened at Whiteman Air Force Base, Missouri. Military Judge: Eric L. Dillow (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 6 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Steven R. Kaufman.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

In accordance with his pleas, the appellant was found guilty of negligently damaging military property and wrongfully using morphine, cocaine, and methylenedioxymethamphetamine (ecstasy) in violation of Articles 108 and 112a, UCMJ, 10 U.S.C. §§ 908 and 912a. For the reasons set forth below, the appellant claims his guilty plea to negligently damaging military property is improvident. We disagree.

Background

On 28 October 2006, the appellant lost consciousness in his dorm room shower due to excessive alcohol consumption. As a result, his body blocked the shower drain, causing water to leak into his room, his suitemate's room, and into the second floor hall way. The water caused damage to the building's carpeting and sheetrock totaling $1200. During the *Care* inquiry,[*] while explaining the elements of Charge II to the appellant, the military judge stated as follows:

> "Damage" is the result of neglect when it is caused by the absence of due care, that is, an act or a failure to act by a person who is under a duty to use due care which demonstrates a lack of care for the property of others which a reasonably prudent person would of [sic] used under the same or similar circumstances.

In initially describing the events pertaining to Charge II, the appellant stated as follows:

> On or about 28 October 2006, I had too much alcohol to drink and I fell asleep in my shower. My negligence caused the water in my shower to overflow in the dorm rooms causing damage to the carpet and the ceiling below. I know that the damage to the dorm room was approximately $1,200.00 because I saw the repair estimates from the Civil Engineer Squadron. Although I can't remember being in the shower, I know that I was in the shower because I remember waking up in the shower with Security Forces personnel in the bathroom. The damage to the dorms was caused by me because I consumed too much alcohol on 28 October 2006.

During the colloquy between the military judge and the appellant, the following transpired:

> MJ: Okay. How did you find your way into the shower? What do you recall about that? Just kind of walk me through that.
>
> ACC: I remember going into my room. I remember being really drunk, ready to go to bed. It was kind of shady, but I remember -- I normally take a shower before I go to bed, so I'm guessing I got in the shower, and then I knew -- remember waking up in the shower, so I knew I was in the shower, but I don't remember exactly going in there.
>
> . . . .

[*] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

MJ: Okay. Do you remember turning the water on in the shower?

ACC: No, but I do remember my neighbor waking me up or telling me that it started to flood or something and that—

. . . .

ACC: Um, he said the Security Forces are on the way. I was really completely out of it.

. . . .

ACC: But, I remember them waking me up in the shower.

MJ: Okay. And you were in the shower, and the water was running?

ACC: Yes, Sir.

MJ: And apparently—and this is alleged in the Specification of Charge II -- you were somehow blocking the shower drain with your body, is that right?

ACC: Yes, my back was on the drain.

. . . .

MJ: Okay. But you don't recall going into the shower, turning on the shower, or anything of that nature?

ACC: It's, I mean, the whole night was in and out, and then I probably could recall if I -- by the next morning I could probably recall. But, it's a lot of gray area, but, um, the exact turning on, maybe, but it's really fuzzy.

MJ: . . . I want you to tell me in your own words why you believe your actions were -- and the damage here -- was the result of neglect on your part. In other words, how is this -- how were your actions an absence of due care?

. . . .

ACC: Um, I knew that I had consumed way too much alcohol, which caused my neglect, and I wasn't in control of my actions. I remember being in the shower and so, just me being that drunk, I could be neglect of a lot of things.

. . . .

MJ: Okay. So, in your view, a reasonably prudent person wouldn't ingest so much alcohol that they couldn't control how much, you know, what they do with the shower or where they sit in the shower or where they put their body to block a drain, is that right?

ACC: Yes, Sir.

. . . .

MJ: Okay. And would you agree that it's foreseeable in the way you're thinking now and in the way you would be thinking as a reasonably prudent person that if, indeed, you block that drain -- and you described there's just a little bit of a lip [to the shower stall] there?

ACC: Yes, Sir.

. . . .

MJ: Okay. So, it would be foreseeable that blocking that drain, causing flooding on the second floor of the military dorm, could cause some sort of damage, would you agree?

ACC: Yes, Sir.

MJ: And so if you going -- and I know this seems obvious, but I need to make this clear for the record -- so if you're going to go into a shower, you're going to want your mental faculties about you in such a degree that you could make sure that drain isn't going to be blocked, right?

ACC: Yes, sir.

Discussion

On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "However, even if the military judge did not abuse his discretion in accepting the plea, we still may set aside the plea if we find a substantial conflict between the plea and the accused's statements or other evidence in the record." *United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000) (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996). "A providence inquiry into a guilty plea must establish . . . 'not only that the accused himself believes he is guilty, but also that the factual circumstances as revealed by the accused himself objectively support that plea.'" *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367

(C.M.A. 1980)); *Rothenberg*, 53 M.J. at 662. "Mere conclusions of law recited by an 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)).

In determining whether the evidence is legally sufficient, we "'view[] the evidence in the light most favorable to the prosecution'" and decide whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Brown*, 55 MJ 375, 385 (C.A.A.F. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The assessment of the legal sufficiency of the evidence is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The appellant finds fault with the providency inquiry on two grounds. First, he argues that, for a violation of Article 108, UCMJ, it must be proven that the appellant's actions were the proximate cause of the damage in question, citing, among others, *United States v. Fuller*, 25 MJ 514, 516 (A.C.M.R. 1987) and *United States v. Foster*, 48 C.M.R. 414, 415 (N.C.M.R. 1973). From this, the appellant contends that the military judge needed to address the issue of causation during the providency inquiry. He then asserts that the military judge failed to do so. We disagree. As is clearly indicated in that portion of the inquiry referenced above, the military judge expressly addressed the issue of foreseeability – if you block the shower drain, you will eventually flood the floor and damage will ensue. There is no indication that the appellant failed to grasp this concept.

The second prong of the appellant's attack is that the record fails to provide a factual basis sufficient to sustain a finding that the damage was caused through the appellant's neglect. In support of this contention, he cites an unpublished opinion, *United States v. Sprague*, NMCM 911266, (N.M.C.M.R. 21 Nov 1991) (unpub. op.). In that case, the accused pled guilty to a violation of Article 108, UCMJ, consisting of willfully damaging a glass case in which a fire extinguisher was stored. The facts adduced during the providence inquiry were that the accused was intoxicated at the time and could not remember damaging the glass case. He indicated that he had read the incident reports of his activities during the night and, thus knew that he had caused the damage. The court held that not only was there insufficient evidence to support a finding that the accused had willfully damaged the case, but that it was also insufficient to sustain a finding by the court of the lesser included offense of negligently causing the damage. The court reasoned that the damage could as easily been caused by accident or by the accused being pushed into the case by another.

Our own precedent serves to refute the appellant's contention. In *United States v. Whelehan*, 10 M.J. 566 (A.F.C.M.R. 1980), the accused also was charged with and pled guilty to a violation of Article 108, UCMJ, which alleged willful destruction caused by the accused having kicked the door to another airman's room. On appeal, the accused

argued that the plea was improvident in that the accused stated that he was drunk at the time of the incident and could not remember committing the offense. His knowledge of the incident was derived from subsequent conversations with two people he had been drinking with that night. The military judge inquired of the defense counsel whether he believed intoxication was a defense, to which counsel erroneously replied, "No, Your Honor, there is no specific intent involved." *Id.* at 568. In addition, a stipulation of fact, admitted without objection but without any advice, laid out the factual basis supporting the plea.

We held that an accused's inability to recall the factual basis for the charge does not cause an improvident plea when the accused is in fact convinced of his guilt based upon the evidence against him and he has otherwise been properly advised. *Whelehan*, 10 M.J. at 568 (citing *United States v. Luebs*, 43 C.M.R. 315 (C.M.A. 1971); *United States v. Butler*, 43 C.M.R. 87 (C.M.A. 1971); *United States v. Olson*, 7 M.J. 898 (A.F.C.M.R. 1979)). We also observed that the record of trial must establish a factual basis for a determination by the military judge that the acts of the accused constitute the offense to which he is pleading guilty. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Finally, we stated "[w]hen the accused does not recall the offense clearly, this may be done by close reliance on the stipulation of facts." *Whelehan*, 10 M.J. at 568.

In *Whelehan*, because the record reflected that the accused's capacity to form the requisite specific intent was impaired by intoxication, and the accused's lack of memory concerning the event, we found that the military judge erred by not conducting a more thorough inquiry into the relevancy of the intoxication. *Id.* at 569. Nonetheless, we affirmed a finding of guilty to the lesser included offense of negligently damaging military property. *Id.*

A review of the providency inquiry in the instant case clearly establishes that the military judge advised the appellant on the issue of intoxication and causation, and that the appellant expressed that he understood the concept. It is also clear that the appellant recalled being awoken while still in the shower with the water running, and as a result was convinced of his guilt. The military judge properly advised the appellant concerning the nature and meaning of the stipulation of fact. Based on the stipulation of fact and the information adduced during the providency inquiry, we find that there was a sufficient factual basis to support the charge of negligent damage to government property.

We find that no substantial conflict existed between the appellant's plea of guilty to the negligent damage charge and the facts adduced at trial. *Eberle*, 44 M.J. at 375. Further, viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the essential elements of the negligent damage charge beyond a reasonable doubt. *Brown*, 53 M.J. 375. Accordingly, the military judge's acceptance of the guilty plea to Charge II did not constitute an abuse of discretion.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court