UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman THOMAS L. EASON
United States Air Force

ACM 38091

30 July 2013

Sentence adjudged 13 December 2011 by GCM convened at Aviano Air Base, Italy. Military Judge: Dawn R. Eflein (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 9 years and 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

STONE, ORR, and WEBER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas before a general court-martial comprised of a military judge sitting alone, the appellant was found guilty of one specification of dereliction of duty for negligently failing to provide direct supervision of CD, a child, in violation of Article 92, UCMJ, 10 U.S.C. § 892; one specification of rape of a child less than 12 years of age, two specifications of indecent liberties with a child under the age of 16, and one specification of indecent acts, in violation of Article 120, UCMJ, 10 U.S.C. § 920; and one specification of adultery, one specification of threatening CD if she told anyone about their sexual activity, and two specifications of child endangerment, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to reduction to the grade of E-1, 12 years confinement and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority agreed to approve no

confinement in excess of 10 years. The convening authority further reduced the confinement to 9 years and 10 months, while otherwise approving the sentence as adjudged.[1] On appeal, the appellant argues that his plea of guilty to the specification and charge of dereliction of duty for failing to provide direct supervision of a child is improvident based on *United States v. Hayes*, 71 M.J. 112 (C.A.A.F. 2012), which was published after the appellant's trial.

In *Hayes*, the appellant pled not guilty to, *inter alia*, a charge of dereliction of duty by consuming alcoholic beverages while under the age of 21. *Id*. at 112. At trial, the military judge took judicial notice of a New Mexico statute establishing the lawful drinking age as 21, but the Government failed to provide evidence of a military duty to obey this state law. *Id*. Our superior court found that by failing to provide evidence of a military duty, the evidence was insufficient as a matter of law:

> There is no evidence in the record, and the Government points to none on appeal, to support the proposition that Appellant was bound by a military duty . . . and subject to sanction under Article 92(3), UCMJ, to obey Nevada's alcohol law, or in the alternative, all state laws in Nevada–an obligation imposed on all citizens within the state. In short, Article 92(3), UCMJ, requires proof of certain military duties, it does not assume such duties.

Id. at 114-15 (internal citations and footnote omitted).

Providence of the Plea

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "In reviewing the providence of Appellant's guilty pleas, we consider his colloquy with the military judge, as well any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007) (citing *United States v. Hardeman*, 59 M.J. 389,

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[1] The convening authority first signed an Action that read, in relevant part, as follows: "only so much of the sentence as provides for reduction to the grade of E-1 and confinement for 9 years and 10 months is approved, and, except for the dishonorable discharge, will be executed." Because this Action only approves "so much of the sentence as provides for reduction to the grade of E-1 and confinement for 9 years and 10 months," it likely could be read to disapprove the dishonorable discharge. *See United States v. Wilson*, 65 M.J. 140 (C.A.A.F. 2007) (holding that an action that approved "the remainder of the sentence [apart from confinement in excess of 3 years and 3 months], with the exception of the Dishonorable Discharge, is approved and will be executed" was clear and unambiguous language disapproving the dishonorable discharge). However, that same day, the convening authority signed a second Action clearly approving the dishonorable discharge as well as the reduction in grade and confinement earlier approved. Under Rule for Courts-Martial 1107(f)(2), "[t]he convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified." Given that the convening authority signed the second Action on the same day as the first, it appears that the first Action was not published and the accused was not notified of it before the second Action was signed. Therefore, we find that the second Action is the legally recognizable Action in this case, and that the convening authority approved the dishonorable discharge.

391 (C.A.A.F. 2004)). A military judge abuses this discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during the providency inquiry. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). This is an area in which the military judge is entitled to "significant deference." *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

Our reviewing standard for determining if a guilty plea is provident is whether the record presents a substantial basis in law or fact for questioning it. *Id.*; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). At trial, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, and the judge must be satisfied that the accused understands the law applicable to his acts (why he is guilty) and that he is actually guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *Care*, 40 C.M.R. at 250-51); *Jordan*, 57 M.J. at 238.

During the appellant's plea inquiry, the military judge explained the elements of the dereliction of duty offense as follows:

> First, that you had certain prescribed duties, that is to provide direct supervision for [CD], by a person who was at least 16 years of age when you were away from home. Second, that you knew or reasonably should have known of the assigned duties. And, third, that from on or about 1 June 2010 to on or about 28 August 2010, at or near Vigonovo, Italy, you were derelict in the performance of those duties by negligently failing to provide direct supervision for [CD] by a person of at least 16 years of age when you were away from home.

The judge further explained to the appellant that "[a] duty may be imposed by regulation, lawful order, or a custom of the service." Based on this definition, the appellant agreed that he had a duty to provide direct supervision for CD by a person who was at least 16 years old when he was not home. When asked how the duty was imposed, the appellant replied that this duty was briefed at newcomers' briefings and was posted around the base. The military judge asked the appellant, "All right, so is that an Italian law then," to which the appellant replied affirmatively. The military judge asked the appellant if he understood the elements and definitions of the offense, and the appellant replied that he did.

In the Stipulation of Fact the appellant signed, he admitted that he "knew of his duty to provide direct supervision for [CD] by a person of at least 16 years of age when he was away from the house …." To that end, the appellant stated that he registered CD and another child as dependents in the Defense Enrollment Eligibility Reporting System (DEERS), which enabled them to receive military dependent benefits, and that he was

aware that Italian law required supervision of those dependents, which created a duty the appellant reasonably should have known about.

Despite his repeated admissions at trial that he had a duty to provide proper oversight for the children under his care, the appellant now claims on appeal that the providency inquiry failed to establish a military duty to obey the Italian law requiring supervision of children. We disagree. The appellant's admissions and statements went much further than the proof in the *Hayes* case, where the Government only proved what the state drinking age was without any evidence that there was a military duty to obey it. In the present case, there was no mere assumption of a military duty such as occurred in *Hayes*. Instead, the appellant admitted a military duty existed, with the *Care* inquiry specifically covering the existence of that duty. In addition, unlike *Hayes*, the appellant here repeatedly admitted that the duty to provide for supervised care of children was briefed to newcomers and posted around the base and further agreed and stipulated that the duty applied to him. Therefore, the fact that host nation law ultimately formed the basis for the duty is of limited relevance. The relevant fact is that the military imposed this duty on its personnel by briefing it and otherwise notifying personnel of the requirement.

The legal standards applicable to the Government in *Hayes* to sufficiently prove every element of an offense in a contested case are vastly different than a judge's obligation to ensure that an accused understands the law and the facts during his own guilty plea. Here, the military judge had an adequate basis to conclude the plea was provident; the appellant himself detailed the duty, the basis for the duty, and his failure to meet that duty. Accordingly, we find no "substantial basis" in law or fact for questioning the guilty plea.

Conclusion

The approved 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). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court