UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant DAMON L. HADDOX
United States Air Force

ACM 36648

22 August 2007

Sentence adjudged 4 November 2005 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: William A. Kurlander (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Jefferson E. McBride, and Captain Nicole P. Wishart.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of ten specifications of failing to obey a lawful general regulation, and one specification of wrongfully endeavoring to alter the testimony of a witness, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. On appeal, the appellant asserts that the military judge erred in accepting the appellant's guilty pleas as to Charge I and its Specifications in that the evidence presented at trial was insufficient to support those pleas. We find no merit in the appellant's contention.

Background

During the period of time encompassed by the various specifications, the appellant was working as an Air Force enlisted accessions recruiter at the Dimond Mall recruiting office in Anchorage, Alaska. His duties included processing applicants desiring to enlist in the Air Force. In the course of this processing, the appellant requested that the various female applicants identified in Charge I, Specifications 1 through 8, and Specification 10, shed their shirts and bras so that he could conduct a body fat measurement. The appellant stated to the applicants that he needed to measure their bare breasts. On several of these occasions, his hands would come in contact with the applicants' breasts and/or hips. The appellant admitted that the phase of the recruitment process in which he was involved did not require or permit him to request that the applicant reveal any area of her body that was beneath her clothing, or to conduct a body-fat examination.

With regard to applicant AW, Charge I, Specification 9, the appellant observed that she had several ear piercings and a stud earring in her nose. He asked her if she had any other tattoos or piercings. He then asked AW to stand up, lift her shirt, and to turn around with her shirt lifted, in order for him to conduct an inspection of her tattoos and piercings. Such an inspection is not a duty of Air Force recruiters.

The lawful general regulation which the appellant was accused of violating was Air Education and Training Command Instruction (AETCI) 36-2002, *Recruiting Procedures for the Air Force*, ¶ 1.1.2.2.5.5 (18 April 2000), which precludes recruitment personnel from, "Engaging in any verbal or physical conduct of a sexual nature that creates an intimidating, hostile, or offensive environment."

During the *Care*[1] inquiry, the trial judge attempted to clarify through the appellant which environmental adjective was appropriate in his case. The appellant responded, "Definitely intimidation, because by me being [a non-commissioned officer] in the United States Air Force and a representative – the only representative that many of them may have known as a member of the Air Force, it could have – it definitely was intimidating for [a non-commissioned officer] to request that … something be done. So yes sir, intimidation."

With regard to the references in the stipulation to the appellant's touching the victims on their breast or hip, the military judge inquired as to whether this touching was inadvertent rather than deliberate physical contact. The appellant responded that the touching was "inadvertent and incidental contact." The military judge then expressed a concern with the providency of Specifications 1, 2, 5, 6, 8, and 10 of Charge I. Trial counsel contended that the touching would have constituted a violation of AETCI 36-

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

2002, whether it was inadvertent or not, that the verbiage of the instruction proscribing "verbal or physical conduct of a sexual nature" would have been met through the request for the women to disrobe and the measuring of their bodies which constituted the touching. Trial counsel argued that, in those specifications in which the women did not disrobe, the mere request to do so constituted the proscribed verbal conduct, and was sufficient to support the finding. The defense counsel and appellant concurred.

The military judge then discussed with the appellant that portion of the stipulation which stated, with respect to 9 of the 10 victims, that, "[d]ue to the offensive actions" of the appellant, the victims decided not to enlist. He inquired of the appellant as to whether this meant that he agreed that his actions also created an offensive environment. The appellant responded stating, "They may also have been offensive to the particular women, and I can definitely concur with that, if that was their feeling."

The military judge then began to explain to the appellant the elements of the Specifications under Charge I. He inquired as to why the appellant wanted to obtain MR's body fat/chest measurement. The appellant responded:

> ACC: Being that the Air Force at this point in time is downsizing, and we were going through a strict selection of applicants that come through the Air Force, so I took it upon myself, with no right or reason, to do this to create an environment which was selecting the best applicants, as well as trying to assist applicants in coming into the Air Force, to ensure that they would meet the Air Force's qualifications. But I was totally wrong in doing so.
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> ....
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> MJ: So I'm trying to understand. Is a chest measurement different from a body fat measurement?
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> ....
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> ACC: No, Sir. A body fat measurement is a measurement that is around the neck, waist, and hips. I measured incorrectly. So I measured across the chest and I was not supposed to do it. I was not given any authorization to do it. I had no business doing it.
>
> ....
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> MJ: Did you, in fact, make contact with her upon her hips and breasts?
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> ACC: Yes, sir, incidentally and inadvertently.

....

MJ: -- did you believe that it was proper to get [MR]'s chest measurement in order to determine her suitability as a candidate for the Air Force?

....

ACC: No, sir.

....

MJ: So I take it when you say you took it upon yourself, you weren't doing it just for your sexual gratification, but you were doing it because you felt it was proper for you as a recruiter to do this, is that right?

ACC: I was not doing it for sexual gratification, but it was not proper for me to do it as a recruiter.

The military judge inquired of the appellant whether he wrote up a report following a candidate's interview. The appellant stated that information obtained during the interview would be placed in the Air Force Recruiting Information System by computer. However, he stated that he did not enter the body fat measurements, "Because I knew I was not supposed to be able to do that." After taking the measurements, he would write them down on a piece of paper which he discarded after the interview.

Shortly thereafter, the military judge called for a recess during which he held two conferences with counsel pursuant to Rule for Courts-Martial 802. Upon reconvening, the military judge explained that his concern was with the appellant's explanation that recruiters were not supposed to be doing body measurements, but that he did it with the best interest of the Air Force at heart. The military judge expressed difficulty finding that the appellant's conduct was wrongful. Upon further questioning by the military judge, the appellant conceded that, since he was not permitted to conduct body fat measurements, his conduct was unwarranted, unjustified, and unnecessary for any lawful purpose. In fact, the appellant admitted that body fat measurements were taken at the neck, waist, and hips – not at the breasts.

Later, while discussing Specification 3 of Charge I, the military judge asked the appellant how his comments to MW were of a sexual nature. The appellant responded:

ACC: By definition under Webster's, sexual is the difference between a male and a female. So because I'm a male and she is a female, and I asked

to perform a body fat measurement, it can be construed as sexual nature, based upon the definition in Webster's.

MJ: So do you believe that asking [MW] to remove her shirt and brassiere, was that verbal conduct of a sexual nature?

ACC: Yes, sir.

Discussion

If an accused, after entering a guilty plea, sets up matters inconsistent with the plea the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a). 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); *United States v. Prater*, 32 M.J. 433, 436 (C.MA. 1991). However, even if the military judge did not abuse his discretion in accepting the plea, we may still 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 MJ 661 (A.F. Ct. Crim. App. 2000) (citing *United States v. Garcia*, 44 M.J. 496, 498 (A.F. Ct. Crim. App. 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); *Rothenberg*, 53 M.J. at 662 (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). "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 must view the evidence in the light most favorable to the prosecution' and determine 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) (citing *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).

On appeal, the appellant stresses those portions of the plea inquiry in which he attempted to portray his body fat measurement activities within the framework of assisting the applicants in their desire to enter the Air Force, in view of the more exacting recruitment limitations brought about by downsizing. While this is an admirable goal for a recruiter, asking a female applicant to strip from the waist up in order to place a measuring tape around her bare breasts is hardly the equivalent of handing out a sheet containing Air Force weight standards and suggestions for changes in diet.

While the appellant's explanation for his conduct appears somewhat tortured, nonetheless, his description of the activities he engaged in with the applicants can leave little doubt in any reasonable mind that they constituted, "verbal or physical conduct of a sexual nature that creates an intimidating, hostile, or offensive environment." In fact, the appellant's somewhat simplistic explanation of what constituted conduct of a sexual nature - "sexual is the difference between a male and a female" - is actually on the mark in this case. Clearly, had the applicants been male, the same activity would have raised little or no consternation. Nor does the appellant's denying that his activities were premised on his sexual gratification serve to buttress his appeal, since such a motive is not an element of the charge in question. The appellant's testimony clearly established that the taking of body fat measurements was not a recruiter's responsibility and that it was wrong for him to do so.

In the stipulation of fact, the parties agree that the appellant's conduct created "an intimidating, hostile, or offensive environment." Nothing in his testimony serves to substantially contradict that conclusion. According to *Webster's Third New International Dictionary*, (3d. ed. 1966), "Intimidate suggests a display or application (as of force or learning) so as to cause fear or a sense of inferiority and a consequent submission." The victims were all seeking employment as potential members of the Air Force. As a recruiter, it would be logical for the applicants to perceive the appellant as an individual who could have an impact on the success of that endeavor. Therefore, the circumstances were ripe for intimidation. The appellant testified that he perceived the applicants as being "uncomfortable" in complying with his request to disrobe and subjecting themselves to having their breasts measured by him, or, in the case of AW in Specification 9, lifting her shirt to expose her brassiere. It is, therefore, reasonable to assume that they would not have acquiesced had there not been some sense of authority arising from the appellant's official position.

In *United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006), our Superior Court upheld a conviction for the violation of AETCI 36-2002, ¶ 1.1.2.2.5.5, where the appellant, a 35-year-old staff sergeant, was accused of inappropriate conduct with three teenage applicants, consisting of placing his hand on an applicant's knee while riding alone with her in a car, inviting another applicant to his apartment at night to take pictures, and telling a third applicant that her appearance was driving him crazy and that she was so sexy. By any objective standard, the actions of the appellant in the instant case were far more egregious than those committed by the recruiter in *Pope*.

The Court in *Pope* observed that, "Proper relations between recruiters and applicants in the armed forces are indispensable in attracting young people to serve their country and in maintaining military discipline. Intimidating, hostile, or offensive conduct of a sexual nature by recruiters drives potential applicants away from military service and undermines the effectiveness of the armed forces." *Pope*, 63 M.J. at 75. In fact, the

record in this case reflects that all but one of the ten applicants dropped out of the recruitment process following their interactions with the appellant.

Based on the above observations, we conclude that the military judge did not abuse his discretion in accepting the plea, that there was no substantial conflict between the testimony of the appellant during the plea inquiry and the facts presented in the stipulation of fact, and that the factual circumstances revealed by the appellant's testimony objectively support his pleas of guilty as to Charge I and its Specifications.

The approved findings and the 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 approved findings and the sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court