UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER J. MARTIN
United States Air Force

ACM S32035

02 May 2013

Sentence adjudged 1 February 2012 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: W. Shane Cohen.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

The appellant was found guilty in accordance with his pleas before a special court-martial comprised of officer members. He was found guilty of one specification of willfully disobeying a lawful order, one specification of dereliction of duty, and two specifications of driving a motor vehicle while drunk, in violation of Articles 90, 92, and 111, UCMJ, 10 U.S.C. §§ 890, 892, 911. The court sentenced him to a bad-conduct discharge and reduction to the grade of E–1. The convening authority approved the sentence as adjudged. The appellant argues that his plea of guilty to the specification and charge of dereliction of duty for underage drinking was improvident based on the case of

United States v. Hayes, 71 M.J. 112 (C.A.A.F. 2012), which was published after the appellant's trial.

In *Hayes*, the accused pled not guilty to a charge of dereliction of duty by consuming alcoholic beverages while under the age of 21. The issue in that case was the sufficiency of the evidence presented by the Government at trial and used to support the finding of guilty. The Court stated:

> Article 92(3), UCMJ, requires the existence of a duty. The [*Manual for Courts-Martial, United States* (*MCM*) (2008 e.d.)] states that the duty "may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." [*MCM*, Part. IV, ¶ 16.c.(3)(a)]. It is uncontested that consuming alcohol in any saloon, resort, or place where alcohol is sold while under the age of twenty-one is a violation of Nevada state law. However, even viewed in the light most favorable to the prosecution, there is insufficient evidence in the record for any rational trier of fact to conclude, for the purposes of Article 92(3), UCMJ, that Appellant had a military duty to obey Nevada state law generally.

Id. at 114 (footnotes omitted). The *Hayes* Court found the proof to be insufficient:

> 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. We, thus, conclude the evidence is insufficient as a matter of law.

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, 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 for which the military judge is entitled to much deference. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F 2008).

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. 250-51); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

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

> One, that you had a certain prescribed duty; that is: to refrain from drinking alcoholic beverages while under the age of 21 years; Two, that you actually knew of the assigned duty; and Three . . . you were derelict in the performance of that duty, by drinking alcoholic beverages while under the age of 21.

The judge told the appellant "A duty may be imposed by regulation, lawful order, or a custom of the service," and the appellant said he understood. The appellant also agreed that "the military followed the law of the . . . state where [the member is] residing with respect to drinking age." The appellant also said he knew while he was stationed in Arizona that the drinking age in the state was 21 years, and, as a military member, he had a duty to obey that law.

After discussing the type of drinks and number of times he drank alcohol, the judge asked again if the appellant admitted that he had a prescribed duty to refrain from drinking alcohol while under 21 years and that he knew of this duty. The appellant admitted this was true. Then the judge asked for the appellant to state in his own words what he did to "violate that duty." The appellant replied that he drank alcohol when he was 19 years old and stated, "As a military member, I understand that I have a duty not to drink alcohol if I'm under the age of 21 and stationed in the United States."

Appellant's Theory

The crux of the appellant's argument is that "nothing established a military duty to obey state law governing the minimum drinking age." Specifically he argues that "nothing established the source of" the duty not to drink while underage. He also argues that, like *Hayes*, there was no proof of any military duty, merely an assumption that a duty existed.

While it is true the judge never asked the appellant whether he knew the duty was imposed by either regulation, lawful order or custom of the service, that type of detail is not necessary for a provident plea. It is enough that an accused recognize that a military

duty existed and he was derelict in the performance of that duty by drinking alcoholic beverages while under the age of 21. *Cf. Carr*, 65 M.J. at 41 (The *Care* inquiry only had to establish that the accused generally lacked training and qualifications to administer gynecological exams and did not have to detail "how his actual skills were inferior to those of a real physician, and to confirm that they were.").

Importantly, the appellant's admissions and statements went much further in this case than the proof did 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. Essentially, in *Hayes*, the appellant was found guilty merely on the proof that would be needed to show a violation of the state drinking age. There was no proof of a violation of any independent military duty. Here, the appellant admitted a military duty existed; there was no omission of this issue during the *Care* inquiry nor was there the mere assumption of a military duty as occurred in *Hayes*.

We believe this case is further distinguishable from the *Hayes* case. 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. The two are not comparable. 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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court