UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KEVIN H. STEIN
United States Air Force

ACM 38142

10 September 2013

Sentence adjudged 6 April 2012 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Michael J. Coco.

Approved Sentence: Dishonorable discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

At a general court-martial, the appellant was convicted, consistent with his pleas, of one specification of disobeying a superior commissioned officer, three specifications of false official statement, one specification of damaging non-military property, two specifications of assault consummated by a battery, and one specification of aggravated assault with a dangerous weapon, in violation of Articles 90, 107, 109, and 128, UCMJ, 10 U.S.C. §§ 890, 907, 909, and 928. A panel of officer and enlisted members adjudged a sentence of a dishonorable discharge, confinement for 90 days, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts his plea to disobeying a superior commissioned officer was improvident. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Providence of Guilty Plea

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "In order to establish an adequate factual [basis] for a guilty plea, the military judge must elicit "'factual circumstances as revealed by the accused himself [that] objectively support that plea[.]'" *Id*. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)) (second and third alterations in original). The providency inquiry must reflect the accused understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). A military judge must explain the elements of the offense and ensure that a factual basis for each element exists. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). Further, when reviewing the providency, this Court does not end its analysis with the providence inquiry, but looks to the entire record. *Jordan*, 57 M.J. at 239.

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). 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 *Jordan*, 57 M.J. at 238).

On 7 January 2012, the appellant's wife reported to the Air Force Office of Special Investigations that the appellant had physically assaulted her on 5 January 2012. On 9 January 2012, the appellant's commander issued an order to him not to have any contact with his wife. On 19 January 2012, the appellant called his wife two times and, when she did not answer the phone, left a voicemail message for her each time. His wife reported the phone calls to the appellant's first sergeant. Based on these two phone calls, the appellant was charged with disobeying the order of a superior commissioned officer on divers occasions.

During the *Care* inquiry, the appellant admitted to calling his wife in violation of the no-contact order. He told the military judge that although he did not directly speak with his wife, he had contacted her by leaving two voicemail messages on her cell phone. The appellant further stated that he had intended to contact her and that he was aware that she eventually received the messages because she reported them to his first sergeant.

The word "contact" has many meanings. However, in the context of a no-contact order, "contact" means "to get in touch or communication with." *Webster's New World Dictionary of American English* 300 (College) (3d ed. 1988). Considering the no-contact order as a whole, it is clear to this Court, as it was to the appellant as evidenced by his responses during the *Care* inquiry, that the order prohibited him from leaving voicemail messages for his wife. The order prohibited the appellant from contacting his wife via telephone. He did not actually have to talk with her in order to contact her. Had he called her and, upon receiving no answer, hung up, then it could be said that his act was an attempt. Here, however, he communicated with her in the form of leaving a voicemail message. His voicemail message achieved its intended result; it was listened to by his wife, who reported the contact. This constituted "contact" just as a letter, e-mail, or text would have constituted written contact even if his wife did not immediately receive such communication. Leaving voicemail messages, where the appellant stated he was in violation of the no-contact order, is sufficient to support the trial judge's acceptance of the plea as provident. The trial judge did not abuse his discretion. *See United States v. Perez*, ACM 36799 (A.F. Ct. Crim. App. 12 September 2007) (unpub. op.).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court