

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic ROBERT O. TURPIN
United States Air Force**

ACM S30649

30 March 2006

Sentence adjudged 25 May 2004 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Kirk R. Granier (sitting alone).

Approved sentence: Bad-conduct discharge.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Mark R. Strickland, Major Sandra K. Whittington, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Major Michelle M. McCluer, and Clayton O'Connor (legal intern).

Before

**BROWN, MOODY, and FINCHER
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A military judge, sitting alone as a special court-martial, convicted the appellant, in accordance with his pleas, of one specification of failure to obey a lawful command and one specification of disrespect to a noncommissioned officer, in violation of Articles 90 and 91, UCMJ, 10 U.S.C. §§ 890, 891. The appellant was sentenced to a bad-conduct discharge and the convening authority approved the findings and sentence as adjudged.

The appellant has submitted one assignment of error, whether there is an unreasonable multiplication of charges. In addition, this Court has sua sponte considered the providence of the plea of guilty as to Charge II, alleging disrespect to a

noncommissioned officer. Finding error as to this second issue, we order corrective action.

Providence of the Plea of Guilty to Disrespect to a Noncommissioned Officer

The standard of review for the providence of a guilty plea is whether there is a “substantial basis’ in law and fact for questioning the guilty plea.” *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). If the “factual circumstances as revealed by the accused himself objectively support that plea,” the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996). 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). “Disrespectful behavior is that which detracts from the respect due the authority and person of a [noncommissioned officer].” *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶¶ 13c(3) and 15c(5) (2005 ed.).¹ A noncommissioned officer “whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that [noncommissioned] officer’s rank or position under similar circumstances loses the protection of [Article 91, UCMJ].” *MCM*, Part IV, ¶ 13c(5). *See also United States v. Richardson*, 7 M.J. 320 (C.M.A. 1979).

The military judge found the appellant guilty of being “disrespectful in . . . deportment toward MSgt [JTK] . . . by balling his hands into fists, rolling his eyes, moving back and forth from foot to foot after being told to stand at attention, and simulating being handcuffed by putting his wrists together and holding them out in front of himself.” During the *Care*² inquiry, the appellant stated to the military judge that he had been transported from his home duty station at Pensacola Naval Air Station, Florida to Keesler Air Force Base (AFB), Mississippi. The reason for this was the appellant’s having been assigned 14 days of correctional custody pursuant to nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815.

The appellant stated that upon arrival at the Keesler AFB correctional custody facility he panicked and refused to cooperate or otherwise participate in the correctional custody program. The appellant was summoned into the correctional custody building to speak with his commander on the telephone. After concluding this conversation, the appellant returned outside.

ACC: I came back outside and I stood at attention and then [MSgt JTK] came outside to address me and tell me how much of a fool I had made out of myself in doing this, and that I had made a wrong choice. And, then he

¹ This provision is the same as contained in the 2002 edition which was in effect at the time of trial.

² *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

-- ordered me to get down on my knees. So, I stood on my knees and then I looked up at him. And, then he told me to look away but I didn't look away. I continued to look up at him so he flipped my hat on the ground. And, it was at that point that I got up and I did not stand at attention. He ordered me to stand at attention and I did stand at attention. And, then he - - I don't remember the conversation we had but I was disrespectful.

...

MJ: What were you arguing about?

ACC: I don't remember, sir. I think it had something to do with my future and that I was going to be unsuccessful or something to that extent. And, it was at that point that I took my fist and like kind of struck like I was going to hit him -- like kind of flinched and then I drew back and I took a couple of steps back. And then he told me, "Come on, hit me." "I want you to hit me." "That way I can call the [security police] and have you escorted off base and taken to jail." And, so I put my hands out [in] front of him and I said, "Fine, go ahead and take me, then."

Further on, the appellant described in greater detail his conversation with MSgt JTK.

ACC: I believe I was standing at attention and he came up to me and he started --

MJ: What did he say?

ACC: Something to the effect of, "Look what you've really gone and done." "You don't care about the Air Force." "You're a disgrace to the Air Force." "The way you're headed you're not going to be successful in life." "You've just ended your military career right now." . . . To me it felt like he was -- he was kind of taunting me, trying to get me to do something stupid that I would totally regret.

MJ: Did he order you to kneel down?

ACC: He did.

MJ: Did he tell you why?

ACC: No, he did not.

MJ: Did he order you to kneel down after you were making the movements that we talked about, and the gestures?

ACC: He did.

MJ: This was after your gestures and your movements or was it before?

ACC: He came up to me and started talking to me, and while he was talking to me I was standing at attention. But, then, like as the argument grew, I started moving around because I started getting more angry. And, when I get angry I tend to move. So, he took that as a sign of disrespect so he ordered me to get on my knees, so I got on my knees. And, I looked up at him and he told me to look away, but I looked up at him and I rolled my eyes.

MJ: From a kneeling position?

ACC: From a kneeling position. And, that's when he flicked my hat off my head.

We do not question the duty of a noncommissioned officer to counsel an offender, and we find nothing objectively wrong with the words which MSgt JTK directed toward the appellant, viewed in and of themselves. However, we conclude that the *Care* inquiry as a whole raises the issue of whether MSgt JTK had substantially departed from the standards appropriate to his position. For example having the appellant kneel before him, knocking the appellant's hat off his head when the appellant failed to avert his eyes, and taunting him to throw a punch so that the appellant may be imprisoned, coupled with the appellant's opinion that MSgt JTK was trying to induce the commission of misconduct, sounds less like exercises of legitimate military authority than acts of gamesmanship. We conclude that the *Care* inquiry seriously raises the question of whether MSgt JTK's behavior divested him of the protections of Article 91, UCMJ.

We are not concluding that MSgt JTK had actually so divested himself, only that the appellant's statements raise that issue, which the military judge failed to satisfactorily resolve. "A court shall not accept a plea of guilty where 'an accused . . . sets up matter inconsistent with the plea . . .'" *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (quoting Article 45(a), UCMJ, 10 U.S.C. § 845(a)). Military judges must "resolve inconsistencies and defenses during the providence inquiry or 'the guilty plea[] must be rejected.'" *United States v. Perron*, 58 M.J. 78, 81-82 (C.A.A.F. 2003)(quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). "[I]n deciding a providence issue, the sole question is whether appellant made a statement during the trial which was in conflict with his guilty plea. It is unnecessary that his statement be credible; instead, it only need be inconsistent." *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983).

Looking at the record as a whole, we conclude that there exists a “‘substantial basis’ in law and fact for questioning the guilty plea.” *See Milton*, 46 M.J. at 318. Therefore, Charge II and its Specification are set aside.

In light of this holding, we need not address the question of unreasonable multiplication of charges.

Conclusion

Charge I and its Specification are affirmed. Charge II and its Specification, and the sentence, are set aside. A rehearing is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court