UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JUSTIN G. WHITT
United States Air Force

ACM S30158

29 September 2003

Sentence adjudged 18 June 2002 convened at Rhein-Main Air Base, Germany. Military Judge: Linda S. Murnane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Lance B. Sigmon.

Before

PRATT, ORR, W.E., and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E., Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his plea, of one specification of committing indecent acts with a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934. As part of a pretrial agreement, the convening authority withdrew one charge and its specification of disobeying a lawful order, in violation of Article 92, UCMJ, 10 U.S.C § 892. The convening authority approved a sentence of a bad-conduct discharge, confinement for 4 months, and reduction to E-1.

On appeal the appellant asserts that his guilty plea to indecent acts with a minor under the age of 16 years was improvident. For the reasons stated below, we hold that the appellant's plea was improvident and we set aside the findings and the sentence.

I. Background

The appellant was convicted of committing indecent acts with NW, the 14-year-old adopted daughter of a civilian employee who worked at Rhein-Main Air Base (AB) in Germany. The appellant stipulated that during the summer of 2001, he worked as a part-time maintenance worker at the Rhein-Main AB Youth Center. He met NW at the Youth Center in early August of 2001. In mid-August the appellant volunteered to chaperone a Youth Services trip to the Warner Brothers Movie World Amusement Park, in Bottrop-Kirchhellen, Germany. While chaperoning the trip, he sat with NW on a number of rides. The appellant put his arm around NW's waist and shoulders, touched her thighs and knees with his hand and kissed her on the forehead. On the return trip to the base, the two of them held hands on the bus.

Approximately one week later, the appellant and NW went to the apartment of one of NW's friends. While there, they kissed for several minutes. Later that evening, they went to the Youth Center because the appellant had to go to work. During his work shift, the two of them went out to a storage shed and kissed for several minutes. That evening, NW arranged to spend the night with a friend who lived in the appellant's apartment building. The appellant and NW arranged to meet in the laundry room at 2300. They met three times during the night and engaged in heavy petting. The next day, NW and the appellant went to the movies together on base. During the movie, the two of them kissed and the appellant rubbed her private parts over her clothing.

A few days later, the appellant saw NW at the Shoppette and offered her a ride to one of her friend's apartment. While inside the car, they engaged in heavy petting and she gave him a good-bye kiss when they arrived at their destination. The next day, the appellant volunteered to chaperone a Youth Center trip to Ramstein AB, Germany. On this trip, they engaged in heavy petting and the appellant touched NW's buttocks under her clothes with his hands. The appellant also stipulated that he was sexually aroused on at least two occasions while touching NW, and that his actions were wrongful and service discrediting.

At trial, the appellant stated under oath that all the matters contained in the stipulation were true. After the military judge completed her inquiry under *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), she accepted the appellant's guilty plea without objection from either counsel. During the sentencing phase of the trial, the appellant elected to make an unsworn statement. In his statement, the appellant said he found out NW's age on 25 August 2001, after all of the charged indecent acts occurred, when he saw a note at the Youth Center advertising NW's babysitting services. The

military judge appropriately reopened the *Care* inquiry to determine whether the appellant had any reservations about his guilty plea. Specifically, she stated:

> MJ: Let me talk with you for a minute, though, Airman Whitt. In your unsworn statement, and this is in the context of reopening the *Care* inquiry, counsel. Obviously, I can't ask any questions regarding an unsworn statement, but I am required to follow-up any issues that may give rise to some question about the plea. In your unsworn statement, Airman Whitt, you indicated that the first time that you learned that the victim in this case was 14 years old was on the 25th of August, which is after the last offense, apparently--or either the day of or after the last offense that you committed and that you've pled guilty to. Is that what you're telling the court?
>
> ACC: Yes, Ma'am.
>
> MJ: All right. And you understand that, as to indecent acts on a minor under the age of 16, that it is, in essence, not relevant whether you knew or didn't know the age of the child at the time that you engaged in these indecent acts upon her body. You understood that?
>
> ACC: Yes, Ma'am.
>
> MJ: And you understand that now?
>
> ACC: Yes, Ma'am.
>
> MJ: Now, if you had actually engaged in sexual intercourse with this child, then you would have an affirmative defense if the child was over the age of 12 but under the age of 16, but the law doesn't recognize that defense as it applies to indecent acts. You understand that?
>
> ACC: Yes, Ma'am.
>
> MJ: And you understand that the law requires that any adult who engages in any pre-intercourse sexual activity with a person is obliged to understand the age of the person before they do that? You understand that?
>
> ACC: Yes, Ma'am.
>
> MJ: And you agree that, regardless of whether you knew or didn't know, that you are still guilty of the offense listed in the Specification of Charge I?

ACC: Yes, Ma'am.

MJ: And you agree that your acts upon her body, under all the circumstances, were indecent, as I defined that term for you?

ACC: Yes, Ma'am.

The military judge then ruled that the appellant's guilty plea remained intact.

II. Discussion

The appellant claims that the military judge's decision to accept his guilty plea was error because his plea was improvident. The government concedes that the appellant's guilty plea was improvident. We agree. In determining whether a guilty plea is provident, the standard of review 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 (1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (2001); *United States v. Bickley*, 50 M.J. 93, 94 (1999). 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 (1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

Here, the appellant's original version of the factual circumstances was sufficient to support his guilty plea. But, once he raised a potential defense during his unsworn statement, the military judge had a duty to resolve the inconsistent matter or reject his plea of guilty. Article 45, UCMJ, 10 U.S.C. § 845. In her attempt to resolve the inconsistent matter, the military judge gained a clear understanding of the appellant's version of the factual circumstances. Unfortunately, she misapplied the law and accepted his guilty plea.

The appellant identified a possible affirmative defense to the military judge. Specifically, he told the military judge he was not aware of NW's age prior to committing the charged offenses. In her response, the military judge told the appellant that a mistake of fact relating to the victim's age was not a defense to committing an indecent act with a child. In *United States v. Strode*, 43 M.J. 29 (1995) our superior court held that an accused's alleged mistake of fact as to the age of the victim would render his guilty plea improvident to a charge of committing indecent acts with a child under the age of 16, absent prosecution under a theory of foreplay leading to carnal knowledge or sodomy. The Court went on to state that knowledge of the accused as to the age of the victim is relevant. *Id.*at 32. *See also United States v. Baker*, 57 M.J. 330, 335 (2002). After reviewing the stipulation of fact in this case, we are unable to conclude that the prosecution was proceeding on a theory that the charged indecent acts were leading to

sodomy or carnal knowledge. Accordingly, a mistake of fact defense would be available to this appellant.

Since the military judge's explanation to the appellant at trial was contrary to the holding in *Strode*, we hold that her explanation was plain error. Even though it is clear that the appellant committed the acts charged, it is not clear that the appellant would have pled guilty to these acts if he knew that a mistake of fact defense was available to him. Thus, we also hold that the appellant was materially prejudiced by the explanation he received from the military judge. As a result, the appellant's guilty plea was improvident and he is entitled to a new trial.

Accordingly, the findings of guilty to Charge I and its specification and the sentence are set aside. The record of trial is returned to The Judge Advocate General of the Air Force to forward to the convening authority for a rehearing or other appropriate disposition. Rule for Courts-Martial (R.C.M.) 1203(c)(2).

OFFICIAL

HEATHER D. LABE
Clerk of Court