Not Reported in M.J., 2005 WL 1473959
(N.M.Ct.Crim.App.)
Only the Westlaw citation is currently available.
U.S. Navy–Marine Corps Court of Criminal Appeals.

UNITED STATES
v.
Jovette NAPIER, Postal Clerk Second Class (E–5), U.S. Navy.

NMCCA 200300805.
Sentence Adjudged 4 Nov. 2002.
Decided 22 June 2005.

Sentence adjudged 4 November 2002. Military Judge: D.P. Fry. Review pursuant to Article 66(c), UCMJ, of General Court–Martial convened by Chief of Naval Education and Training, Pensacola, FL.
LT Robert Salyer, JAGC, USNR, Appellate Defense Counsel.

Maj Raymond Beal, USMC, Appellate Government Counsel.

Before CARVER, WAGNER and REDCLIFF, Appellate Military Judges.

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

REDCLIFF, Judge:

***1** A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of 4 specifications of assault with a means likely to produce grievous bodily harm by engaging in sexual intercourse without a condom, thus knowingly exposing another person to the Human Immunodeficiency Virus (HIV+), in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928. The adjudged sentence consisted of confinement for 4 years, total forfeiture of pay and allowances, reduction to pay grade E–1, and a dishonorable discharge. The convening authority, consistent with the pretrial agreement, approved the sentence and suspended confinement in excess of 36 months.

We have carefully reviewed the record of trial, including the appellant's two assignments of error contending that his guilty plea is improvident because he had no intent to harm his victim and because his trial defense counsel misinformed him as to the maximum authorized punishment. We have also considered the Government's response. We find partial merit in the first assignment of error, for a reason different than that advanced by the appellant, and will grant relief in our decretal paragraph.

After taking corrective action, we conclude that the affirmed findings and reassessed sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

Improvident Plea

1. Inconsistent Facts.
The appellant contends that his guilty pleas to aggravated assault were improvident because he intended no harm to his victim. As a result, he requests that this court set aside the findings and sentence. We agree that the appellant's guilty plea to the fourth specification of aggravated assault was improvident because the facts admitted during the providence inquiry do not support a finding of guilty. We disagree that his guilty pleas to the remaining three specifications were improvident. We will take corrective action in our decretal paragraph.

The appellant was diagnosed as HIV+ positive. He received counseling by preventive medicine personnel concerning his HIV+ status and the risks involved of infecting others. Record at 52. The appellant knew that transmission of HIV+ to another person could result in the death of such person. He was also advised to take certain precautions to minimize the risks involved. The appellant was further advised to inform any prospective sexual partner, prior to engaging in sexual activity, that he was HIV+ and of the attendant risks, as well as to use a condom to minimize those risks. Prosecution Exhibit 1,

Stipulation of Fact.

On four separate occasions, charged as Specifications 1 through 4 of the Charge, the appellant engaged in sexual intercourse with a female Sailor, Storekeeper Second Class "H" (SK2 H). During the first sexual encounter, the appellant used a condom. On the following three sexual encounters, he did not use a condom or other protective measures to prevent her exposure to HIV.

***2** There is no definitive indication in the providence inquiry or via the Stipulation of Fact, however, as to when the appellant informed SK2 H of his HIV+ status. During his unsworn statement, the appellant told the military judge that he had informed SK2 H that he was HIV+ before they first had sexual intercourse. Record at 134. No specific time-frame is mentioned, and the military judge does not further inquire. In contrast, SK2 K testified during the sentencing hearing that the appellant made no such revelation before their first sexual encounter. *Id.* at 80–81. She did confirm that the appellant used condoms during their first sexual encounter, but testified that one of the condoms broke. According to SK2 H, they engaged in sexual intercourse two to three times afterwards but did not use condoms on these occasions. She concluded her testimony by stating that after their last sexual encounter, the appellant mentioned that he was on medication for HIV. *Id.* at 85–86.

We begin by noting that a military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care,* 40 C.M.R. 247, 1969 WL 6059 (C.M.A.1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth,* 45 M.J. 172, 174 (C.A.A.F.1996); *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A.1980). Mere conclusions of law recited by the 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, 1972 WL 14158 (C.M.A.1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS–MARTIAL 910((e), MANUAL FOR COURTS–MARTIAL, UNITED STATES (2002 ed.), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer,* 37 M.J. 338, 341 (C.M.A.1993); R.C.M. 910(e).

A military judge, however, may not "arbitrarily reject a guilty plea." *United States v. Penister,* 25 M.J. 148, 152 (C.M.A.1987). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater,* 32 M.J. 433, 436 (C.M.A.1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane,* 43 M.J. 93, 94–95 (C.A.A.F.1995).

Although military judges enjoy substantial discretion in deciding to accept guilty pleas, we note with concern that the military judge in this case conducted a "bare bones" providence inquiry for the offenses of which the appellant stands convicted. Fortunately, the Stipulation of Fact, Prosecution Exhibit 1, provided amplifying details. Neither the providence inquiry nor the Stipulation of Fact, however, adequately resolve to our satisfaction whether the appellant committed an aggravated assault by engaging in unprotected sexual intercourse with SK2 H during their first sexual encounter. Having elicited facts inconsistent with the charged offense reflected in Specification 4, namely, that the appellant utilized a condom when he engaged in sexual intercourse with SK2 H, the military judge should have rejected the appellant's guilty plea to this offense absent further inquiry as to whether the appellant believed that using a condom adequately protected SK2 H from exposure to HIV.[1] We will take corrective action in our decretal paragraph.

***3** We find no merit with the appellant's contention that all of his guilty pleas were improvident because he intended no harm to his victim, SK2 H. The elements of aggravated assault for an "assault with a ... means or force likely to produce death or grievous bodily harm" pertinent to this case are as follows:

> (i) That the accused attempted to do, offered to do, or did bodily harm to a certain person;
>
> (ii) That the accused did so with a certain weapon, means, or force;

(iii) That the attempt, offer, or bodily harm was done with unlawful force or violence; and

(iv) That the weapon, means, or force was used in a manner likely to produce death or grievous bodily harm.

MANUAL FOR COURTS–MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 54b (4)(a).

First, we note that the form of aggravated assault of which the appellant stands convicted, namely, assault with a means likely to produce grievous bodily harm, does not require a specific intent to cause such harm, or proof of any actual resultant injury or harm. *See United States v. Vigil,* 13 C.M.R. 30, 1953 WL 2386 (C.M.A.1953). Second, the law does not permit a person to consent to an aggravated assault in which death or grievous bodily harm is likely. By engaging in unprotected sexual intercourse with SK2 H, the appellant knowingly and willingly exposed her to the risk of infection by HIV and its attendant, and often deadly, consequences. *See United States v. Joseph,* 37 M.J. 392 (C.M.A.1993). We find no basis in law or fact to question the appellant's guilty plea to Specifications 2, 3 and 4 of the charged offense. *See Prater,* 32 M.J. at 436. Moreover, we conclude that his pleas to these remaining violations of Article 128, UCMJ, are provident.

2. Maximum Punishment Misstatement.

The appellant also contends that his guilty pleas were improvident because his trial defense counsel misinformed him about the maximum authorized confinement punishment. In essence, the appellant asserts that a material misunderstanding of the maximum punishment rendered his guilty pleas improvident because the misunderstanding prevented him from entering knowing and voluntary guilty pleas. We find no merit in this argument.

At trial, the military judge inquired of the appellant's trial defense counsel as to the maximum authorized punishment based on the appellant's pleas. The trial defense counsel incorrectly responded that the applicable maximum authorized punishment included, among others, 6 months confinement. The Government counsel erroneously concurred. Record at 27–28. However, the military judge immediately corrected the misstatement and properly advised the appellant that, based on his guilty pleas, the appellant could be sentenced to a maximum of 12 years confinement. *Id.* at 28. The appellant responded that he understood the maximum punishment recited by the military judge. *Id.*

***4** In *United States v. Walls,* 9 M.J. 88, 91 (C.M.A.1980), it was determined that "[a]ll the circumstances presented by the record must be considered to determine whether misapprehension of the maximum imposable sentence affected the providence of guilty pleas." In *Walls,* for example, the maximum sentence was overstated by 100%, but it was determined that the "appellant's misapprehension of the maximum imposable confinement was an insubstantial factor in his decision to plead guilty." *Id.* at 92. The *Walls* court looked to the appellant's favorable pretrial agreement, as well as the overwhelming evidence of guilt reflected in the record.

We find that any initial misunderstanding the appellant may have had was immediately resolved by the military judge's proper advisement concerning the maximum authorized punishment. We reach this determination based not only on the discussion between the military judge and the appellant, but also upon our review of the terms of the pretrial agreement that suspended the appellant's confinement in excess of 36 months. Clearly, both the appellant and his trial defense counsel understood, prior to trial, that the potential punishment was well in excess of 6 months. Given the appellant's generous pretrial agreement and his unequivocal understanding of the maximum punishments as recited by the military judge, our review of the appellant's providence inquiry does not reveal the slightest doubt that his guilty pleas were provident, and knowingly and voluntarily entered.

Conclusion

Accordingly, we disapprove and dismiss the finding of guilty to Specification 4 of the Charge. The remaining findings of guilty, as approved by the convening authority, are affirmed.

We have reassessed the sentence in accordance with the principles articulated in *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F.1998). In reassessing the sentence, and in consideration of our corrective action on the findings, we conclude that the appellant is not entitled to any sentencing relief. Having thus reassessed the sentence, we affirm the adjudged sentence, as approved by the

convening authority.

We order that the supplemental promulgating order accurately reflect the pleas and findings of the offenses of which the appellant stands convicted, as modified hereby.

***5** Senior Judge CARVER and Judge WAGNER concur.

Footnotes

[1] We do not address whether, as a matter of law, use of a condom by an HIV+ infected person provides a complete bar to prosecution where there is unwarned sexual intercourse. *See United States v. Joseph,* 37 M.J. 392, 396–97 (C.M.A.1993). Our decision here is based solely on deficiencies of the providence inquiry.