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U.S. Navy-Marine Corps Court of Criminal Appeals

United States of America
v.
Randy L. Stevens, Aviation Electrician's Mate Airman (E-3), U.S. Navy

NMCCA 201300116
GENERAL COURT–MARTIAL
31 October 2013
Sentence Adjudged: 6 December 2012.

Military Judge: CAPT John K. Waits, JAGC, USN.
Convening Authority: Commander, Naval Air Force Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT F.D. Mitchell, JAGC, USN.
For Appellant: LT Carrie E. Theis, JAGC, USN.

For Appellee: CDR Christopher L. Vanbrackel, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

Before M.D. MODZELEWSKI, J.A. FISCHER, M.K. JAMISON, Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

***1** A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of three specifications of violating a lawful order and three specifications of assault consummated by a battery, in violation of Articles 92 and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 892 and 928. The appellant was sentenced to confinement for 18 months, reduction to paygrade E–1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended confinement in excess of 12 months.

The appellant now alleges that there is a substantial basis in law and fact to question the providence of his pleas to the orders violations. After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Statement of Facts

While attached to USS IWO JIMA (LHD 7) in July 2010, the appellant tested positive for the Human Immunodeficiency Virus (HIV) during routine screening. He was then transferred from the ship to the HIV Evaluation and Treatment Unit (HETU) of Naval Medical Center, Portsmouth (NMCP) on temporary duty. At NMCP, the appellant underwent additional laboratory tests and medical evaluation. In August 2010, Commander (CDR) JT, a physician attached to HETU, physically examined the appellant and briefed him on, *inter alia,* the results of his lab work, the history of HIV, treatment options, and side effects. Appellate Exhibit VII at 7–9. CDR JT then issued the appellant the "Counseling Statement" (or "safe sex order") that is the subject of this assignment of error. AE VII at 6. That Counseling Statement read, in pertinent part, as follows:

> (P)rior to engaging in sexual activity, or any activity in which my bodily fluids may be transmitted to another person, I must verbally advise any prospective sexual partner that I am HIV positive and that there is a risk of possible infection. If my partner consents to sexual relations, I shall not engage in sexual activities without the use of a condom. I must also advise my potential sexual partner that the use of a condom does not guarantee that the virus will not be transmitted. Failure to inform my partners of my condition and the associated risks will make me liable for criminal prosecution under the UCMJ....

Id.

The appellant subsequently transferred to shore duty in Florida where he engaged in unwarned and unprotected sexual activity with three individuals—two Sailors and one civilian.

At trial, the appellant moved the court to dismiss Charge I and its three specifications (the Article 92, UCMJ offenses) for failure to state an offense. Trial defense counsel argued that that the safe-sex order did not relate to the appellant's military duties; that the order unduly infringed upon the appellant's protected liberty interest as recognized under *Lawrence v. Texas,* 539 U.S. 558 (2003); and that CDR JT did not have the authority to issue the appellant a punitive order. The military judge denied the ruling. In denying the motion, the military judge relied on *United States v. Womack,* 29 M.J. 88 (C.M.A.1989) and *United States v. Dumford,* 30 M.J. 137 (C.M.A.1990) in finding that the order was lawful and that it had a valid military purpose. Record at 31–33. He found that the order did not infringe upon the liberty interest protected by *Lawrence*. Moreover, the military judge concluded that CDR JT was a superior commissioned officer assigned to the same command as the appellant and that he was acting properly within the scope of his duties when he issued the safe sex order to the appellant.

***2** Subsequently, the appellant pled guilty to the three order violations and to related assault specifications. During the guilty plea inquiry, the appellant agreed that CDR JT was a superior military officer assigned to the same unit, agreed that CDR JT was authorized to give him the safe-sex order, and agreed that it was a lawful order. The appellant specifically stated that the safe sex order was "necessary for the Navy to maintain good order in the services, safeguard other service members and to prevent the spread of HIV...." Record at 330. The appellant also articulated the potential impact on the service if other service members contracted HIV from him (i.e., removal from sea duty, inability to deploy overseas). *Id*., at 331. Additionally, in the stipulation of fact, Prosecution Exhibit 1, the appellant agreed that CDR JT was authorized to give the order and agreed that it was a lawful order, stipulating that it "was reasonably necessary to safeguard and protect the health, morale, discipline, and usefulness of members of the U.S. Navy because its goal was to prevent or decrease the risk of other Navy servicemembers being infected with HIV by the accused and to ensure that potential sexual partners are fully informed of the accused's HIV status." PE 1 at 4.

The appellant now argues that CDR JT had no authority to issue the safe-sex order, as he was the treating physician and not in the appellant's chain of command.[1] The appellant relies on SECNAVINST 5300.30D, which references the service member's "command" issuing the safe sex order.

Standard of Review

Prior to accepting a guilty plea, a military judge must make an inquiry of an appellant to ensure a factual basis exists for the plea. Art. 45(a), UCMJ; *United States v. Care,* 40 C.M.R. 247 (C.M.A.1969); RULE FOR COURTS–MARTIAL 910(e), MANUAL FOR COURTS–MARTIAL, UNITED STATES (2012 ed.). This inquiry must elicit sufficient facts to satisfy every element of the offense in question. R.C.M. 910(e). We review a military judge's decision to accept a guilty plea for an abuse of discretion and review questions of law arising from a guilty plea *de novo*. *United States v. Inabinette,* 66 M.J. 320, 322 (C.A.A.F.2008); *United States v. Eberle,* 44 M.J. 374, 375 (C.A.A.F.1996). In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *Inabinette,* 66 M.J. at 322.

The appellant's actions were charged as violations of Article 92 (other lawful order) rather than as violations of Article 90 (disobedience of the order of a superior commissioned officer). Nevertheless, the definition for the latter is most relevant and is adopted by both parties in their briefs: "The commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service." MANUAL FOR COURTS–MARTIAL, UNITED STATES (2012 ed.), Part IV, ¶ 14c(2)(a)(iii). Here, the appellant admitted both in his stipulation of fact and in a thorough providence inquiry that the safe sex order given to him by CDR JT was a lawful order issued by a superior commissioned officer at his command. In the record before us, we find no substantial basis in law or fact to question the providence of the appellant's pleas to Charge I and its specifications. Specifically, we find no substantial basis to question

whether CDR JT, as a commissioned officer and physician attached to the same command as the appellant, was authorized to issue such an order. Accordingly, we conclude that the military judge did not abuse his discretion in accepting the appellant's pleas to violating the safe sex order.

Conclusion

We hold that the assigned error is without merit and affirm the findings and the sentence as approved by the CA.

Footnotes

1 The assigned error reads: "AEAN Stevens was given a punitive order by his treating doctor to abstain from all sexual activity. This order exceeded the doctor's authority under applicable regulations. Is there a substantial basis in law and fact to question AEAN Stevens' conviction for violating Article 92?" However, the brief does not actually aver that the order prohibited all sexual activity and the record in no way supports that contention.