

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**SPECIFIED ISSUE BRIEF ON
BEHALF OF APPELLEE**

Docket No. ARMY 20230345

v.

Private First Class (E-3)
ROBERT M. VIGIL,
United States Army,
Appellant

Tried at Joint Base Lewis-McChord,
Washington, on 16 December 2022 and
2 February and 15 June 2023, before a
general court-martial convened by the
Commander, 7th Infantry Division,
Lieutenant Colonel Robert Murdough
and Lieutenant Colonel Jessica Conn,
military judges, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue
WHETHER APPELLANT SET UP THE ISSUE OF
VOLUNTARY INTOXICATION WITH RESPECT
TO SPECIFICATION 3 OF THE CHARGE.

Statement of the Case

On 15 June 2023, a military judge sitting as a general court-martial found appellant guilty, in accordance with his pleas, of one specification of sexual assault of a child and one specification of sexual abuse of a child both in violation of Article 120b Uniform Code of Military Justice [UCMJ], 10 U.S.C. §920b. (R. at 72, 121; Statement of Trial Results [STR]). The military judge sentenced appellant

to six hundred and sixty-days confinement and a bad conduct discharge.¹ (R. at 248; STR). On 12 October 2023, the General Court Martial-Convening Authority [GCMCA] took no action on the findings or sentence. (Action). The military judge entered judgement on 23 October 2023. (Judgement). Appellant's case was docketed with this court on 7 December 2023. (Referral and Designation of Counsel).

On 25 April 2024, appellant filed a brief with this court submitting the case on its merits and specifying no assignments of error.² On 29 April 2024, the government replied indicating no further pleadings would be filed. On 9 August 2024, this court specified the above issue and ordered both appellant and the government to brief the issue. (Order).

Facts

Appellant, a twenty-year-old soldier, met Miss [REDACTED] at a party in the spring of 2021. (R. at 80). After communicating with her for a time, he learned that she was only fifteen years old. (R. at 80–81). Despite knowing that fact, appellant had sexual intercourse with Miss [REDACTED]. (R. at 81–82). Appellant also sent her “sexual

¹ The military judge sentenced appellant to four hundred and fifty days confinement for the sexual assault of a child and two hundred and ten days confinement for the sexual abuse of a child, to be served consecutively. (R. at 248; STR).

² Appellant personally raised one assignment of error, alleging post-trial delay, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

message[s] and nudes” on more than one occasion. (R. at 84–85). These messages also contained videos of appellant masturbating. (R. at 86).

After being charged with two specifications of sexual assault of a child and two specifications of sexual abuse of a child, appellant entered plea negotiations with the GCMCA. Appellant offered to plead guilty to one specification of sexual assault of a child (Specification 1 of the Charge) and one specification of sexual abuse of a child (Specification 3 of the Charge) in exchange for concessions, including sentence limitations. (App. Ex. XVIII). The GCMCA countered appellant’s offer with slightly different sentencing terms – which appellant agreed to. (App. Ex. XVIII). The sentence limitations significantly reduced his punitive exposure, limiting the sentence to a bad conduct discharge and a range of confinement between 365 days and 1095 days.³

Pursuant to his plea agreement, appellant signed a Stipulation of Fact with the government. (Pros. Ex. 1; App. Ex. XVIII). There he stipulated, for the purposed of sentence aggravation, to his previous convictions in state court for Vehicular Assault (Domestic Violence) and Assault in the Fourth Degree (Domestic

³ The maximum punishment for all the offenses appellant was charged with was a dishonorable discharge, total forfeiture, reduction to the grade of E-1, and ninety years’ confinement. (Charge Sheet; *MCM*, App’x. 12). The maximum punishment for the offenses he plead guilty to was a dishonorable discharge, total forfeitures, reduction to the grade of E-1, and forty-five years’ confinement. (R. at 88). Appellant negotiated to reduce the ordinarily mandatory dishonorable discharge to a bad conduct discharge. (R. at 107–09; App. Ex. XVIII).

Violence) stemming from a driving incident on 24 July 2022. (Pros. Ex. 1). He also agreed that the state court “Judgement and Sentence” was admissible. (Pros. Ex. 1). The “Chemical Dependency” box was checked in the “Sentencing Data” section of the Judgement and Sentence used to determine the appropriate punishment. (Pros. Ex. 2). Notably, according to the state court documents, appellant was not driving under the influence — nor did he have any blood alcohol concentration — at the time of the accident. (Pros. Ex. 2, pg. 10).

The Stipulation of Fact also expressly disclaimed “*any* defense” and noted “defense counsel and [appellant] have discussed other possible defenses and agree that they do not apply.” (Pros. Ex. 1) (emphasis added). The Stipulation of Fact went on to state: “[Appellant] was mentally responsible and competent at all times during the course of his misconduct. He was fully capable of understanding the nature and wrongfulness of his actions. He had no legal excuse or justification for his crimes.” (Pros. Ex. 1).

At trial, he pleaded guilty in accordance with the agreement, explained how he committed the crimes, confirmed he intentionally sent the video and photos, and noted he could have stopped himself from doing so. (R. at 72, 87; App. Ex. XVIII). During pre-sentencing, appellant called his cousin, Mr. MM, as a witness. (R. at 201–02). Mr. MM testified that around the time of the offenses appellant’s

“alcohol abuse” “had become pretty bad” and was “severe.” (R. at 204–05).

However, he also noted he “didn’t ever see him” during this time. (R. at 205).

During his unsworn, appellant stated:

In the Army, I discovered that I had a problem drinking, and I ended up making a series of very poor choices around the age of 20 years old. I ended up getting married a couple months after dating somebody; it didn't end up working out. I decided to drive the morning after a night of drinking, and I ended up crashing my vehicle and injuring my girlfriend at the time. I ended up sleeping with a 15-year old, and I should've known better.

(R. at 218). This was the only reference appellant made to his alcohol consumption.⁴ In response to appellant and Mr. MM’s statements, the military judge inquired into the “lack of mental responsibility defense” for Specification 1 and “partial lack of mental responsibility” for Specification 3. (R. at 225; 229–31). Both appellant and his counsel affirmatively disclaimed any lack, or partial lack, of mental responsibility for the offenses. (R. at 226–32). Appellant stated, “I was aware of what I was doing,” when the military judge questioned him. (R. at 228). Appellant was sentenced to a reduction to the grade of E-1, to confinement for 660 days, and a bad conduct discharge. (R. at 248).

⁴ In fact, appellant only used the word “drunk” one time in the proceedings — to describe his father. (R. at 217).

Law

“The law is clear that, in the course of a guilty-plea proceeding, ‘if an accused sets up [a] matter inconsistent with the plea’ . . . the military judge must either resolve the apparent inconsistency or reject the plea.” *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997) (citing *United States v. Garcia*, 44 M.J. 496, 498 (1996)). “However, the *mere possibility* of conflict between an accused’s statements and a guilty plea does not necessarily require rejection of the plea.” *Id.* (citing *United States v. Logan*, 22 U.S.C.M.A. 349 (1973)) (emphasis added). “Once a military judge has accepted a plea and entered findings thereon, an appellate court likewise will not disturb the findings and plea unless it finds a substantial conflict between the plea and the accused’s statements or other evidence of record.” *Id.* (citing *Garcia*, 44 M.J. at 498).

Sexual abuse of a child is a specific intent crime. *United States v. Rodriguez*, 79 M.J. 1, 3 (C.A.A.F. 2019). Rules for Courts-Martial [RCM] 916(1)(2) states:

Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Voluntary intoxication “is not a defense to a general-intent crime, but it may raise a reasonable doubt about...specific intent” when it is an element of the offense.

Peterson, 47 M.J. at 233 (citing *United States v. Hensler*, 44 M.J. 184, 187 (1996)).

However, for the defense to be raised “there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent, not just evidence of mere intoxication.”

Id. (citing *United States v. Box*, 28 M.J. 584, 585 (ACMR 1989)) (internal quotation marks omitted).

In the context of a panel instruction, this court determined that “evidence that an accused consumed intoxicants, standing alone, is insufficient.” *United States v. Hearn*, 66 M.J. 770, 777 (Army Ct. Crim. App. 2008) (citing *United States v. Watford*, 32 M.J. 176, 179 (C.M.A. 1991)). The *Hearn* court went on to state “[p]ut more concisely: the evidence must reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” *Id.* (quotation marks and internal citation omitted). The court then created a three-part test to determine if the voluntary intoxication defense is reasonably raised: “[a] defendant is entitled to a voluntary intoxication jury instruction when: (1) the crime charged includes a mental state; (2) there is evidence of impairment due to the ingestion of alcohol or

drugs; and (3) there is evidence that the impairment affected the defendant's ability to form the requisite intent or mental state.” *Id.*

Argument

Appellant did not reasonable raise a defense of voluntary intoxication to the specific intent crime of sexual abuse of child, as he did not show “evidence that the impairment affected the defendant's ability to form the requisite intent or mental state.” *Hearn*, 66 M.J. at 777.

A. Appellant waived this defense.

Appellant expressly disclaimed “the existence of *any* defense” and stipulated that he discussed “other possible defenses” with his defense counsel and agreed they did not apply. (Pros. Ex. 1). Since he is not claiming ineffective assistance of counsel, appellant and his attorney must have discussed voluntary intoxication. Therefore, this disclaimer of any defense results in waiver of this issue. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (“waiver is the intentional relinquishment or abandonment of a known right that leaves no error to correct on appeal.”); *see United States v. Robinson*, ARMY 20150088, 2017 CCA LEXIS 93 (Army. Ct. Crim. App. 06 Feb. 2017) ([mem. op.](#)) at *fn 3 (when an accused signs a document expressly agreeing to waive an issue, with the express advice of counsel (who also signed the stipulation), that fact would certainly be relevant in

determining whether the accused had knowingly waived an issue.) (parenthetical in original).

B. The evidence did not set up a voluntary intoxication defense.

Even if not waived, appellant did not “set[] up [a] matter inconsistent with the plea.” *Peterson*, 47 M.J. at 233. This court must apply the *Hearn* test to determine if “some evidence” of voluntary intoxication was raised to set up the “matter inconsistent with the plea.” This court should only examine whether the military judge abused her discretion in not inquiring into the defense if an application of the *Hearn* test indicates that voluntary intoxication was raised. Here, at the very least, there is no evidence satisfying the third *Hearn* prong and thus the defense was not raised. *Hearn*, 66 M.J. at 777.

It is uncontroverted that appellant was charged with a specific intent crime, thus fulfilling the first *Hearn* prong. *Id.* (Charge Sheet). For the second prong, perhaps the state court documents and the testimony referencing non-specific alcohol abuse could possibly be construed as “evidence of impairment due to the ingestion of alcohol” and thus would meet the second prong. *Id.* (R. at 209, 218; Pros. Ex. 2). Importantly however, this evidence is, at the very most, a *mere possibility* of alcohol impairment at the time of the crime. (R. at 209, 218; Pros. Ex. 2). This is especially true considering appellant’s own statements make reference to only the *general intent* crime. (R. at 218). Since the record contains

no evidence stating appellant was at all impaired at the time of the sexual abuse of a child, this mere possibility does not establish a “substantial conflict” between the plea of guilty and the evidence in pre-sentencing. *Peterson*, 47 M.J. at 233.

Furthermore, a reasonable reading of *Peterson* and *Hearn* indicates the military judge did not abuse her discretion in determining no further inquiry was needed as it is not “outside the range of choices reasonably arising from the applicable facts and the law.” *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008).

Finally, even assuming the evidence fulfilled the first two *Hearn* prongs, it fails to establish the level of impairment necessary for the third prong. 66 M.J. at 777. There is not even a scintilla of evidence that appellant’s ability to form the requisite intent was affected. He explained in the mental responsibility inquiry for Specification 1 of the Charge that he was “aware of what [he] was doing” and that there would be “consequences” for his action. (R. at 228). He went on to disclaim any “mental disease, defect, impairment, condition, deficiency, or character or behavioral disorder that would have prevented [him] from forming the specific intent” necessary for Specification 3 of the Charge. (R. at 229). This is consistent with his Stipulation of Fact that stated he was “fully capable of understanding the nature and wrongfulness of his actions [and] he had no legal excuse or justification for his crimes.” (Pros. Ex. 1).

Even without these statements of mental clarity, appellant’s “drinking problem” falls well short of the *Hearn* third prong. In *Hearn*, evidence was presented “that appellant consumed a substantial amount of alcohol — in particular ‘Everclear’ (190-proof grain alcohol) — within approximately one hour of the charged offense.” 66 M.J. at 777 (parenthetical in original). The appellant there “consistently maintained he could not recall a significant portion” of the crime because he “was feeling the effects of alcohol” and the “room began to spin.” *Id.* The appellant also testified, “I remember her coming up to me, and I don’t know whether I passed out or what. I remember kissing her and then it just went black.” *Id.* This court held that evidence reasonably raised the affirmative defense of voluntary intoxication and the military judge erred by not instructing the panel accordingly.

Recently, in *United States v. Watkins*, this court examined if the military judge inappropriately instructed the panel on the voluntary intoxication defense. ARMY 20210638, 2023 CCA LEXIS 416 (Army Ct. Crim. App. 27 Sep. 2023) ([mem. op.](#)) at *24. The court stated as “the only evidence of intoxication ...[referred] to episodes of alcohol consumption at a time and place apart from [the charged offenses]...it did not reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” *Id.* Ultimately, the military judge’s decision to

instruct the panel on the defense was deemed an error. *Id.*; see also *United States v. Lara*, ARMY 20170025, 2018 CCA LEXIS 604 (Army Ct. Crim. App. 27 Dec. 2022) ([mem. op.](#)) at *15–16 (Holding that a voluntary intoxication instruction was necessary when evidence showed the appellant consumed alcohol *on the night in question* and there was testimony that appellant told a witness he “didn’t realize what he was doing at that time” but the error was not plain or obvious.) (emphasis added), *United States v. Martin*, ARMY 20110345, 2014 CCA LEXIS 137 (Army Ct. Crim. App. 28 Feb. 2014) ([mem. op.](#)) at *15 (appellant’s actions during the offense, including masturbating, “provided an abundance of evidence” to show he was aiming to gratify his sexual desires and negated any claim that he was too intoxicated to form the requisite intent.); *But see United States v. Skagg*, ARMY 20140099, 2016 CCA LEXIS 592 (Army Ct. Crim. App. 29 Sep. 2016) ([mem. op.](#)) at *3 (suggesting that “testimony from government witnesses and appellant himself [which] indicated appellant was regularly intoxicated by alcohol during the time period covered by the charged misconduct” may have been sufficient to raise the defense and require a panel instruction).

Here, there are only general references to alcohol abuse, dependency, and/or a “drinking problem” that fail to connect intoxication to the specific crimes. (R. at 204–05, 218). Those references make no mention of a level of intoxication, much less the extreme level needed to impact the ability to form intent when appellant

sent the messages and videos to Miss [REDACTED] (R. at 204–05, 218). That scant evidence places this case much closer to *Watkins* than *Hearn*.⁵ Simply put, when evidence of a *dependency* is mentioned in mitigation during pre-sentencing it does not equate to *intoxication* at the time of the offense to reasonably raise the voluntary intoxication defense. The military judge, presumed to know and apply the law correctly, would have applied the *Peterson* analysis and determined that — at the very least — the *Hearn* third prong was not satisfied. *United States v. Raya*, 45 M.J. 251, 253 (1996). As such, appellant did not raise that defense, the military judge did not abuse her discretion, and appellant’s convictions should stand.⁶

⁵ Furthermore, even if the court determines appellant was intoxicated at the time of the offense his statements about his mental state, his ability to understand what he was doing, and his actions in the photos and videos places this case in line with *Martin*. 2014 CCA LEXIS 137 at *15. Applying the *Martin* analysis, this evidence fails to establish the “substantial conflict” required to disturb the finding of guilty. *Id.*, *Peterson*, 47 M.J. at 233.

⁶ Should this court disagree and deem appellant not provident to the offense, the case should be returned to the convening authority to exercise his or her authority to withdraw from the plea agreement pursuant to RCM 705(e)(4)(B) and paragraph 3(b)(4) of the plea agreement. (Pros. Ex. VIII), see *United States v. Cook*, 12 M.J. 448, 450 (C.M.A. 1982). *Contra United States v. Kibler*, 84 M.J. 603 (Army Ct. Crim. App. 2024).

Conclusion

WHEREFORE, the government respectfully requests this honorable Court affirm the findings and sentence as approved by the convening authority.



PATRICK S. BARR
MAJ, JA
Branch Chief, Government
Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
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