UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
FLEMING, HAYES, and MORRIS
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist MELVIN N. JONES, JR.
United States Army, Appellant

ARMY 20210623

Headquarters, U.S. Army Maneuver Support Center of Excellence
and Fort Leonard Wood
Steven C. Henricks, Military Judge
Colonel Robert E. Samuelsen II, Staff Judge Advocate

For Appellant: Major Mitchell D. Herniak, JA; Major Alexander N. Li, JA

For Appellee: Pursuant to A.C.C.A. Rule 17.4, no response filed.

13 March 2023

SUMMARY DISPOSITION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

HAYES, Judge:

Appellant asserts no errors before this Court. We write to address matters discussed by appellant in his unsworn statement that raised a potential inconsistency with his plea, and to address error stemming from disparities in the convening orders. While the providence inquiry should have been reopened to resolve the possible inconsistency, and although the correct convening order is not consistently annotated throughout the record, we find each error forfeited and harmless under these circumstances.

BACKGROUND

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of conspiracy to sell military property, sale of military property, and use of a controlled substance, in violation of Articles 81, 108, and

112a, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 881, 908, and 912a, respectively. The military judge sentenced appellant to a bad conduct discharge and confinement for 120 days. The convening authority took no action on the findings or sentence.[1]

Turning first to the convening orders, at appellant's arraignment, government counsel announced the court-martial was convened by court-martial convening order (CMCO) Number 1, *corrected copy*, Headquarters Fort Leonard Wood, Fort Leonard Wood, Missouri, dated 29 March 2021. Appellant's charge sheet reflects the court-martial was convened by CMCO Number 1, Headquarters Fort Leonard Wood, Fort Leonard Wood, Missouri, dated 29 March 2021. To identify the proper convening order, this court ordered an affidavit from the chief of military justice at Fort Leonard Wood. Far from resolving the matter, the affidavit asserted CMCO Number 1, corrected copy dated 29 March 2021 did not exist, and the proper convening order for the court-martial was CMCO Number 1, corrected copy, dated 21 April 2021. Court-Martial Convening Order Number 1, corrected copy, dated 21 April 2021 corrects the rank of panel member Sergeant Major S.A. from the improperly reflected rank of Master Sergeant listed in CMCO Number 1, dated 29 March 2021; the two documents are otherwise identical and the corrected copy does not make any change to the composition of the court-martial.

Regarding the substantive issue, in appellant's stipulation of fact, which he swore to be true in his colloquy with the military judge, appellant twice affirmed he had no defense for his conduct, and specifically disclaimed any defense of lack of mental responsibility. During the providence inquiry regarding his use of marijuana, he indicated nothing forced him to use the substance and he had no justification or excuse for the wrongful use. He indicated he was feeling "really depressed" and smoked the marijuana because he thought it would help him feel better.

In presentencing, a defense witness testified appellant was depressed during the time the offenses were committed. During appellant's unsworn statement, he stated he was "very depressed" and had "very suicidal thoughts." He then responded "yes" in response to his counsel's question, "did that lead you to smoking marijuana?" He later acknowledged receiving behavioral health treatment in the months leading up to his guilty plea and indicated he wanted to continue to "seek mental health" in confinement because he was "still not fully 100 percent." Defense counsel's argument acknowledged appellant's depression was not an excuse for his misconduct, but also acknowledged continued behavioral health treatment was warranted.

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[1] The Statement of Trial Results, incorporated into the Entry of Judgment, incorrectly reflects the minimum confinement per the plea agreement as "75" days. It is corrected to read "90" days.

LAW AND DISCUSSION

Whether the Court-Martial was Properly Convened

At the time appellant's court-martial was referred, the corrected copy of the CMCO reflected on his charge sheet had already been issued. This makes the failure to refer the charges to the court-martial convened by the corrected copy order difficult to justify. As both the trial counsel at appellant's arraignment and the chief of military justice in his affidavit referenced different "corrected copy" convening orders by date of issuance, we must first determine which corrected copy of the convening order actually amended CMCO Number 1. Army Regulation 27-10 states court-martial orders are corrected in the same manner as other orders discussed in Army Regulation 600-8-105. Army Reg. 27-10, Legal Services: Military Justice, para 11-4 *e.* (20 November 2020) [AR 27-10]. Army Regulation 600-8-105 explains when issuing a corrected copy, "[t]he number and date must be the same as the original order unless these items are being corrected." Army Reg. 600-8-105, Personnel–General: Military Orders, Para 2-26 *b.* (20 December 2022) [AR 600-8-105].

We find pursuant to AR 27-10 and AR 600-8-105, CMCO Number 1, corrected copy, dated 21 April 2021 was issued in contravention of Army regulation and should be properly captioned as CMCO Number 1, corrected copy, dated 29 March 2021. In other words, while the trial counsel announced the theoretically correct CMCO at appellant's arraignment, it did not exist; saying so does not make it so. With the proper convening order identified, we then turn to whether the haphazard application of convening orders constitutes jurisdictional error.

Our superior court has held "'[a]dministrative errors in the drafting of a convening order are not necessarily fatal to jurisdiction and may be tested for prejudice under Article 59(a), UCMJ, 10 U.S.C. §859(a)." *United States v. King*, __ M.J.__, slip op. at 11 (C.A.A.F. 23 February 2023) (citing *United States v. Adams*, 66 M.J. 255, 259 (C.A.A.F. 2008). While *King* is not directly on point, we find the precedent nonetheless illustrative. Appellant's charge sheet, referred to court-martial by the original CMCO Number 1 nearly five months after CMCO Number 1 was amended by the corrected copy, is plainly incorrect. Despite this error, we find appellant was not prejudiced because this amounts to administrative error. The *only* matter altered between CMCO Number 1, dated 29 March 2021, and the corrected copy which should have reflected the same date was a corrected rank for a single enlisted member. As there were no other changes in the corrected copy, we are confident that this error did not prejudice appellant, had no impact on appellant's court-martial or his forum election, and is therefore not fatal to jurisdiction.

Appellant's Providence to His Pleas

A guilty plea does not waive review of whether a plea was provident. *See United States v. Forbes*, 78 M.J. 279 (C.A.A.F. 2019). We assess whether there was a substantial basis in law or fact for questioning the guilty plea. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). "Even if a guilty plea is later determined to be improvident, a reviewing court may grant relief only if it finds that the military judge's error in accepting the plea 'materially prejudice[d] the substantial rights of the accused.'" *United States v. Moratalla*, 82 M.J. 1, 4 (C.A.A.F. 2021) (quoting Article 45(c), UCMJ).

Here, appellant in his unsworn statement raised a potential defense of lack of mental responsibility when he said his depression led him to commit the offense of wrongful use of a controlled substance. If a potential defense is raised after findings are entered, "the military judge shall inquire into the providence of the plea" to resolve the inconsistency. Rule for Courts-Martial [R.C.M.] 910(h)(2). Assuming, for now, the failure to do so in this case constituted error, appellant's plea of guilty forfeited the error. We find the error forfeited rather than waived because the potential objection regarding a lack of mental responsibility does not relate to the *factual* issue of guilt but relates to the *legal* issue of guilt. *See* R.C.M. 910(j) and discussion.

Having found the error forfeited, we review for plain error. *United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022). We find the failure to comply with R.C.M. 910(h)(2) to be an obvious error. While R.C.M. 910(h)(2) requires a military judge to inquire into the providence of the plea when inconsistent matters are raised, and we find they were sufficiently raised to merit such inquiry, the overwhelming evidence leads to the unmistakable conclusion that appellant knew what he was doing when he ingested marijuana, he knew it was marijuana, and he knew it was wrong. *See Moratalla*, 82 M.J. at 2 (finding a plea provident where appellant's responses raised "*some* questions as to...providence" but, "in the full context of the colloquy—did not give rise to a *substantial* question") (emphasis in original). We find this case similarly does not present a substantial question as to the providence of appellant's plea.

Even if this case did present a substantial question as to the providence of the plea, we find no material prejudice to a substantial right. Appellant signed and swore to the truth of a stipulation of fact in which he twice affirmed he had no defense for his conduct, and specifically disclaimed any defense of lack of mental responsibility. As previously noted, he indicated during the providence inquiry nothing forced him to use marijuana and he had no justification or excuse. While he answered affirmatively to his counsel's question during his unsworn statement regarding whether his depression led him to smoke marijuana, we find that to be an

inartful question and a self-serving answer inconsistent with his stipulation, providence inquiry, counsel argument, and the facts of the case.

Without a substantial question concerning the plea, we find an R.C.M. 706 inquiry unnecessary. This finding is buttressed by appellant's declination to raise the issue on appeal. This issue could have been quickly resolved by reopening the providence inquiry, and so we reiterate the requirement to resolve inconsistencies during a guilty plea remains both proper procedure and best practice.

CONCLUSION

On consideration of the entire record the findings of guilty and sentence are AFFIRMED.

Senior Judge FLEMING and Judge MORRIS concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court