UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BERNARDO L. ACEVEDO
United States Air Force

ACM 35986

21 December 2005

Sentence adjudged 11 May 2004 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major John N. Page III.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Heather L. Mazzeno.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial, by a military judge sitting alone, of one specification of conspiracy to commit an aggravated assault, in violation of Article 81, UCMJ, 10 U.S.C. § 881.[1] The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 12 months, and reduction to E-1.

[1] The appellant was acquitted of an unrelated assault.

On appeal, the appellant asserts that his plea was improvident[2] because the military judge did not elicit sufficient facts to establish the conspiracy. We disagree and affirm the findings and sentence.

Background

The appellant agreed to store an unregistered .38 caliber semi-automatic pistol in the center console compartment of his Chevy Malibu for a friend, FR. The next day, the appellant, FR, and two female acquaintances were driving in Las Vegas. At about 0045, the appellant stopped his car at a red light. A Ford Econoline van was stopped in the left lane next to the Malibu. A male in the front passenger seat of the van tried to strike up a conversation with one of the women in the back seat of the appellant's car. FR took offense and said something to the effect of "those people better stop looking at us." Then he asked the appellant to give him the "strap," meaning the gun.

The appellant knew the gun was loaded when he opened the console to allow FR, who was in the right rear passenger seat, to take the handgun. Both vehicles pulled away from the intersection when the light turned green. The appellant accelerated into the left lane and cut off the van. FR told the appellant to slow down, then positioned himself on the edge of the window and fired two shots at the van. The first shot went through the windshield and hit the dashboard; the second shot missed the van. The van's owner called 911 and described the incident and the appellant's vehicle. A short time later, civilian police stopped the appellant and arrested him.

Discussion

> The agreement in a conspiracy need not be in any particular form or manifested in any formal words. In fact, the meeting of the minds "can be silent" or simply a "mutual understanding among the parties." It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. To sustain a finding of guilty to a charge of conspiracy, the agreement need only be implied.

United States v. Phanphil, 54 M.J. 911, 916 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 6 (C.A.A.F. 2002) (internal citations omitted).

In this case, appellate defense counsel contend the record does not show a "meeting of the minds" between the appellant and FR to commit the offense of aggravated assault under Article 128, UCMJ, 10 U.S.C. § 928. The gist of the appellant's argument is that the plea inquiry failed to establish an agreement to use the weapon in a

[2] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

manner likely to produce death or grievous bodily harm because the appellant did not know exactly what FR was going to do with the handgun.

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A guilty plea should not be set aside on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *Id.* at 375 (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Further, facts contained in a stipulation of fact can be considered in determining whether a factual basis for a plea exists. *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995).

In examining the plea and the very detailed stipulation of fact, we conclude there was a factual basis for the appellant's plea. During the *Care* inquiry, the appellant did state that he was not sure how FR would use the handgun. But the appellant also repeatedly explained that he knew FR was going to use it in the argument he was having with the van occupants. The appellant admitted to arriving at a common understanding with FR when he told the military judge: "I understood that [FR] was going to use the gun in the argument . . . I opened the middle console to allow [FR] access to the gun." Further, "I knew what he was going to do. I understood what he was going to do."

The context of the *Care* inquiry shows the appellant understood that "what" FR was going to do was engage in an offer type aggravated assault. "An 'offer' type assault is an unlawful demonstration of violence, either by an intentional or by a culpably negligent act or mission, which creates in the mind of another a reasonable apprehension of receiving immediate bodily harm. Specific intent to inflict bodily harm is not required." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 54c(1)(b)(ii) (2005 ed.).[3] FR did not need to actually fire the weapon to commit an offer type aggravated assault,[4] and the appellant did not need to know exactly how FR would use the weapon to commit the assault. It is clear from the *Care* inquiry that, when he gave FR access to the handgun, the appellant expected him to use it in some manner that would constitute an offer type aggravated assault.

Finally, we may consider the conduct of the parties in assessing whether the appellant understood the object of the agreement. *MCM*, Part IV, ¶ 5c(2); *Phanphil*, 54 M.J. at 916. The appellant's actions demonstrated the existence of an agreement and his understanding of it when he changed lanes to cut off the van and then slowed down on cue to establish FR's firing position.

We conclude the appellant's plea and the stipulation of fact established that the appellant conspired with FR to commit an aggravated assault with a dangerous weapon.

[3] This provision was the same in the previous version that was applicable at the time of trial.
[4] The act of firing the weapon was alleged to have been the overt act committed to bring about the object of the conspiracy.

We find no "substantial basis" in law and fact for questioning the guilty plea. *See Eberle*, 44 M.J. at 375.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court