UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ALLEN C. TROTT
United States Air Force

ACM 36077

18 July 2006

Sentence adjudged 5 August 2004 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Lance B. Sigmon (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 30 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major John N. Page III, Major David P. Bennett, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Nurit Anderson.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A military judge sitting alone, convicted the appellant in accordance with his pleas, of one specification of unlawful entry and one specification of indecent acts, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, 30 months confinement, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant alleges that his pleas to the two specifications are improvident and that his sentence is inappropriately severe. With respect to the indecent acts, the facts which were adduced during the *Care*[1] inquiry and in the stipulation of fact were: that the appellant, knowing two of his fellow Airmen (one a male [Amn G] and the other female [Amn J]) were together in a third Airman's (Amn M) room, entered the room without permission of the lawful occupant. He did so, he said, to watch the two Airmen engage in sexual intercourse. The two were drunk and did not know the appellant was present. The appellant's colloquy with the military judge included the following:

> MJ: You earlier told me that [Amn M] didn't know you were in his room at the time, correct?
>
> ACC: Yes, sir.
>
> MJ: So, you would agree that had he known that you walked into his room to watch [Amn G] and [Amn J] having sex, that he probably wouldn't have been too happy about that? Would you agree?
>
> ACC: No, sir. He wouldn't have been.
>
> . . .
>
> MJ: Let me ask you this, did [Amn G] or [Amn J] even know you were in the room at the time, to your knowledge?
>
> ACC: No, sir.
>
> MJ: So, they didn't know you were there?
>
> ACC: No, sir. Not to my knowledge, your Honor.
>
> MJ: Then I would assume that neither one of them gave you permission to view them having sex. Would that be correct?
>
> ACC: Yes, your Honor, that's correct.
>
> MJ: Do you agree that your conduct was to the prejudice of good order and discipline?
>
> ACC: Yes, sir.

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

MJ: And why do you say that?

ACC: Your Honor, because it's not proper discipline to watch people having sex without their permission and that's contrary to good order.

MJ: Let me ask this, do you think that [Amn J] could have been upset if she had known that you were watching her having sex?

ACC: Yes, your Honor.

MJ: Do you think that [Amn G] may have been upset if he had known that you were watching him have sex?

ACC: Yes, your Honor.

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If "the factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

The appellant contends that the plea to indecent acts is improvident because, among other reasons, the appellant never described any interaction with the victims, which is an essential aspect of the offense. In *United States v. Proctor*, 58 M.J. 792, 799 (A.F. Ct. Crim. App. 2003), *pet. denied*, 60 M.J. 122 (C.A.A.F. 2004), this Court elaborated on this requirement, distinguishing it from the offense of indecent exposure:

> The offense of committing indecent acts with another requires that the acts be done in conjunction or participating with another person . . . However, there is no requirement that an indecent act involve a physical touching . . . It is the affirmative interaction of an accused with another person, voluntarily or involuntarily, that makes what would otherwise be an indecent exposure an indecent act.

(Citations omitted).

We agree with the appellant that the providence inquiry contains no facts from which the required affirmative interaction may be inferred and that the military judge abused his discretion by accepting the plea. However, we conclude that the providence inquiry, read in conjunction with the stipulation of fact, is sufficient to establish the

offense of disorderly conduct to the prejudice of good order and discipline. The appellant's actions are similar to "window peeping," which our sister Court has characterized as conduct that is "offensive, would outrage the sense of decency of others, tends to disturb the peace and quiet, and provoke a breach of peace." *United States v. Foster*, 13 M.J. 789, 796 (A.C.M.R. 1982).

We find no substantial basis in law or fact to question the plea of guilty to Specification 1 of Charge II. We affirm that specification. With respect to Specification 2 of Charge II, we affirm a conviction only as to the lesser-included offense of disorderly conduct to the prejudice of good order and discipline.[2] The sentence is set aside. Consequently, we need not address the third assignment of error.

We return the case to the convening authority, who may order a rehearing on the greater offense of indecent acts. Alternatively, the convening authority may either reassess the sentence or order a rehearing on the sentence. Thereafter Article 66(c), UCMJ, 10 U.S.C. § 866(c) will apply.

Judge FINCHER did not participate in this decision.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[2] The Convening Authority dismissed Charge I, which alleged a violation of Article 120, UCMJ, 10 U.S.C. § 920, following the military judge's acceptance of the guilty plea.