IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S Appellee v.	) FINAL BRIEF ON BEHALF OF) APPELLANT)) Crim. App. Dkt. No. 20090083)) USCA Dkt. No. 11-0389/AR
Specialist (E-4) **KENNETH L. GOODMAN** United States Army Appellant	)

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

Granted Issues[1]

I. WHETHER APPELLANT'S PLEA OF GUILTY TO FAILURE TO OBEY A GENERAL REGULATION (CHARGE I) WAS IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO SECURE A DISCLAIMER OF THE MISTAKE OF FACT DEFENSE WHEN IT WAS RAISED DURING THE PROVIDENCE INQUIRY.

II. WHETHER AN ARTICLE 134 CLAUSE 1 OR 2 SPECIFICATION THAT FAILS TO EXPRESSLY ALLEGE EITHER POTENTIAL TERMINAL ELEMENT STATES AN OFFENSE UNDER THE SUPREME COURT'S HOLDINGS IN UNITED STATES V. RESENDIZ-PONCE AND RUSSELL V. UNITED STATES, AND THIS COURT'S RECENT OPINIONS IN MEDINA, MILLER, AND JONES.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ); 10 U.S.C. § 866 (2008). This

[1] In accordance with this Court's May 11, 2011 order, Issue II will not be briefed.

Honorable Court has jurisdiction over this matter pursuant to Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On November 13, 2008 and January 21, 2009, Specialist Kenneth L. Goodman (Appellant) was tried by a military judge sitting as a general court-martial at Fort Bliss, Texas. Pursuant to his pleas, Appellant was convicted of Failure to Obey a General Regulation (one specification), Maltreatment (two specifications), Making a False Official Statement (one specification), Indecent Exposure (one specification), and Bigamy (one specification) in violation of Articles 92, 93, 107, and 134, UCMJ; 10 USC §§ 892, 893, 907, and 934, respectively. Contrary to his plea, Appellant was also convicted of Wrongful Sexual Contact (one specification) in violation of Article 120, UCMJ; 10 USC § 920. The convening authority approved 11 months confinement, and all other adjudged punishment.

On January 21, 2011, the Army Court affirmed the findings and the sentence. (Joint Appendix (JA) 1.)

On May 11, 2011, this Court granted Appellant's Petition for Grant of Review, and ordered Briefs filed under Rule 25 on Issue I only. Appellant is filing his Brief and Joint Appendix on Issue I pursuant to this Court's Order.

Statement of Facts

Appellant pled guilty to Violating a General Regulation by sexually harassing PFC N.L. During the providence inquiry, Appellant admitted he made sexually charged comments to PFC N.L. for about a month when she first arrived in the unit. (JA 14, 16.) However, Appellant stated it was normal for he and PFC N.L. to engage in mutual sexual banter. (JA 15.) When he made sexual comments to her, she bantered comments right back at him. (JA 15-16.)

Private First Class N.L. was very "touchy-feely" (JA 25.), and he knew of her reputation for promiscuity (JA 23.) To Appellant, it did not seem as if PFC N.L. took any offense with his comments. (JA 17.) She never told him to stop, and never said or did anything to indicate discomfort with him. (JA 17.)

Based on all this, Appellant thought PFC N.L. was interested in him. (JA 25.) He expressly stated during the providence inquiry he thought she was receptive to his sexual comments. (JA 26.) He only learned otherwise after the fact, when his chain of command gave him a "no contact" order. (JA 19, 27.) Once he knew, he made no further comments to PFC N.L. (JA 19.)

During the providence inquiry, the military judge did not secure a disclaimer of the mistake of fact defense from Appellant. (JA 11-28.)

Summary of Argument

If the providence inquiry reveals a defense to the crime charged, the military judge should secure a disclaimer of the defense from the accused. If the accused does not negate the defense, the military judge must withdraw the guilty plea, enter a plea of not guilty for the accused, and proceed to trial on the merits.

In this case, Appellant's providence inquiry raised a potential mistake of fact defense. Appellant pled guilty to Violating a General Regulation by sexually harassing PFC N.L. Appellant expressly stated he thought PFC N.L. was willingly consenting to his sexual comments, and he enunciated numerous specific reasons in support of his belief.

The military judge should have advised Appellant that a defense might be available, and should have secured from Appellant a knowing and intelligent disclaimer of the defense. Because the military judge did not address the defense, Appellant's guilty plea was improvident.

Issue Granted[2]

WHETHER APPELLANT'S PLEA OF GUILTY TO FAILURE TO OBEY A GENERAL REGULATION (CHARGE I) WAS IMPROVIDENT BECAUSE THE MILITARY JUDGE FAILED TO SECURE A DISCLAIMER OF THE MISTAKE OF FACT DEFENSE WHEN IT WAS RAISED DURING THE PROVIDENCE INQUIRY.

UCMJ Article 45 provides, in part, that "[i]f an accused . . . after a plea of guilty sets up matter inconsistent with the plea, . . . a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty." Under the express language of UCMJ Article 45, the military judge cannot allow a guilty plea to stand if inconsistent matters arise. *United States v. Clark*, 28 M.J. 401 (C.M.A. 1989). If matters inconsistent with the guilty plea arise, then the military judge must reject the plea. *United States v. Davenport*, 9 M.J. 364 (C.M.A. 1980).

An accused cannot plead guilty and yet present testimony that reveals a defense to the crime charged. *Clark*, 28 M.J. at 405. If the providence inquiry reveals a defense to the crime charged, the military judge should secure a disclaimer of this defense from the accused. *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). If the accused does not negate the defense, the military judge must withdraw the guilty plea, enter a plea of not guilty for the accused, and proceed to trial on the merits.

[2] Although this Court granted Appellant's petition on two issues, it ordered briefing on Issue I only.

United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976).

In this case, the military judge erred by accepting Appellant's guilty plea because his testimony during the providence inquiry raised a potential defense. Specifically, Appellant's statements plainly raised a potential mistake of fact defense. *See, R.C.M.* 916(j).

Appellant expressly stated he thought PFC N.L. was willingly receptive to his sexual comments. As elaborated in the providence inquiry, he based his belief on several specific observations. For example, he and PFC N.L. occasionally engaged in mutual sexual banter. When he made sexual comments to her, she replied with banter of her own. She never seemed offended by his comments, never asked him to stop, and never said or did anything to indicate discomfort with him.

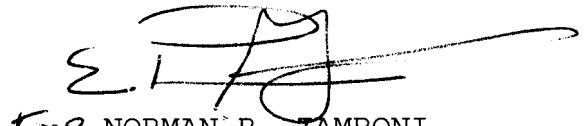
Based on these facts, Appellant's providence inquiry patently raised the possibility of a mistake of fact defense as to PFC N.L.'s consent. Appellant could have legally disclaimed his right to raise that defense on the record, but he did not. The military judge was obligated to address this potential defense during the inquiry, but failed to do so.

The military judge should have advised Appellant that this defense was available, and should have ensured he understood the defense. Most importantly, the military judge should have secured from Appellant a knowing and intelligent disclaimer that

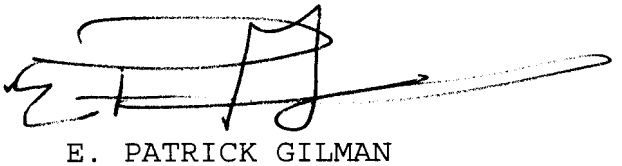
he did not want to assert the defense. Because the military judge did not resolve the issue of the potential defense, Appellant's guilty plea was improvident.

Conclusion

WHEREFORE, Appellant requests this Court set aside the finding of guilty as to Charge I, and dismiss Charge I.



FOR NORMAN R. ZAMBONI
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
901 N. Stuart Street
Arlington, Virginia 22203
(703)588-6023
USCAAF Bar No. 29802



E. PATRICK GILMAN
Captain, Judge Advocate
Defense Appellate Division
USCAAF Bar No. 34813

IMOGENE JAMISON
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF Bar No. 32153

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Goodman*, Crim.App.Dkt.No. 20090083, USCA Dkt. No. _____/AR, was electronically filed with both the Court and Government Appellate Division on June 9, 2011.

MICHELLE L. WASHINGTON
Paralegal Specialist
Defense Appellate Division
(703) 588-6023