UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JONATHAN A. BABB
United States Air Force

ACM S31221

26 September 2007

Sentence adjudged 31 October 2006 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Steven R. Woody (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of one specification of false official statement, one specification of larceny of non-military property of a value of more than $500.00,[1] and one specification of larceny of non-military property of a value of $309.70, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. He was sentenced by a military judge, sitting alone as a special court-martial, to a bad-conduct discharge and confinement for 8 months. The convening authority approved the findings and sentence as adjudged.

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[1] By exceptions and substitutions.

On appeal, the appellant contends his guilty plea was improvident as to the larceny of non-military property of a value more than $500.00 specification, because his guilty plea inquiry never established that he stole over $500.00 worth of merchandise during any one of the twenty separate larcenies to which he admitted. Finding no merit in this assignment of error, we approve the findings and sentence.

Providency of Plea

We will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). *See generally* 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review*, § 8.03 (2d ed. 1992) ("trial court's finding" that there is "an adequate factual basis" to accept a guilty plea is reviewed "under an abuse of discretion standard").

The law governing this issue is found in *United States v. Oliver*, 43 M.J. 668, (A.F. Ct. Crim. App. 1995). To promote judicial economy, this Court, in the *Oliver* case, set out the following rule: when the government pleads multiple thefts, or bad checks, in one specification alleging an aggregate value in excess of $500.00,[2] military judges should calculate the maximum punishment by analyzing the evidence to determine if the government can prove separate acts. If the government can prove that any one theft, or check, was for more than $500.00, apply the "more than $500.00" punishment factor. If the government could allege and prove separate specifications with punishments which, when combined, equal or exceed the maximum punishment for the aggregate specification, apply the "more than $500.00" punishment factor. Otherwise, apply the lesser "$500.00 or less" punishment factor. *See* Rule for Courts-Martial 307(c)(3) and its Discussion (H)(iv) (alleging value in theft offenses); *Oliver*, 43 M.J. at 670.

The defense avers and the government concedes that in the case sub judice the providency inquiry did not establish that any one of the thefts was more than $500.00. However, the appellant testified with regard to the specification alleging thefts of property over $500.00, that he took all the items listed in the specification from the Base Exchange on approximately 20 occasions during the charged timeframe. The appellant also testified that the total value of all the merchandise was approximately $2,340.00. Thus the evidence did establish that the appellant committed enough separate thefts, that the government could allege and prove separate specifications with punishments which,

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[2] Since *Oliver*, Article 121, UCMJ, was amended to reflect "more than $500.00" (vice the old value of more than $100.00) as the value that triggers the increased maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. The maximum punishment for larceny of non-military property of a value of $500.00 or less is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. Article 121, UCMJ.

when combined, equal or exceed the maximum punishment for the aggregate specification. Thus the military judge did not err in using the "more than $500.00" punishment factor for this specification. Furthermore, the appellant and counsel agreed with the military judge's calculation of the maximum punishment, which was the cap for the special court-martial forum. Therefore we hold the military judge did not abuse his discretion in accepting the appellant's plea of guilty to this specification.

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court