UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PAUL J. BELLESEN
United States Air Force

ACM S30045

11 April 2003

Sentence adjudged 19 September 2001 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 119 days, reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of failure to go to his appointed place of duty on three occasions, and one specification of absence without leave (AWOL) terminated by apprehension, in violation of Article 86, UCMJ, 10 U.S.C. § 886, one specification of disrespect to a superior commissioned officer, in violation of Article 89, UCMJ, 10 U.S.C. § 889, four specifications of disrespect to noncommissioned officers, in violation of Article 91, UCMJ, 10 U.S.C. § 891, one specification of soliciting another to commit the UCMJ offense of hindering apprehension, and one specification of escape from correctional custody, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge, sitting alone as a special court-

martial, sentenced the appellant to a bad-conduct discharge, confinement for 119 days, and reduction to E-1. The convening authority approved the sentence.

The appellant now complains that he should not be found guilty of three of the offenses to which he pled guilty. Specifically, he alleges that his pleas of guilt to AWOL terminated by apprehension and escaping from correctional custody were not provident, because the appellant later made statements inconsistent with guilt in his unsworn statement during the sentencing proceedings. The appellant also asserts that he cannot be convicted of both AWOL from correctional custody and escape from correctional custody arising from the same act, because the later offense is necessarily included in the former offense. We find no merit to these arguments, but will take minor corrective action.

The appellant was assigned to MacDill Air Force Base (AFB), Florida, as a student in the Maintenance Qualification Training Program. His military duty was to attend daily classes on aircraft maintenance. The appellant was late for class repeatedly. On each occasion, his supervisor formally counseled him on his responsibilities.

On 19 May 2001, the appellant's squadron commander, Major Martin Lovato, directed him to go to the dormitory day room to assemble for a detail to clean up the grounds. The appellant refused and was disrespectful in language toward his squadron commander. Major Lovato then offered the appellant nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for being disrespectful to his superior commissioned officer, and for failing to go to class on time on two previous occasions. The appellant accepted the nonjudicial punishment. The commander's punishment was reduction in grade to E-1, suspended for 6 months, and 30 days' correctional custody, beginning on 7 June 2001.

MacDill AFB did not have a correctional custody facility, so the appellant was taken to Keesler AFB, Mississippi, to serve his 30-day punishment at the regional correctional custody facility there. The appellant's in-processing at the correctional custody facility did not go well. The appellant refused to comply with the instructions of four different noncommissioned officers at the correctional custody facility and was disrespectful to each of them. At about 0400 on 8 June 2001, the appellant left the correctional custody facility without permission.

Later that day, the appellant visited an Internet café, and sent an electronic message to a friend at MacDill AFB. He advised his friend he was AWOL, and asked him to move the appellant's car off the installation to facilitate the appellant's flight. He also told his friend to deny hearing from the appellant.

During the next week, the appellant made his way from Keesler AFB to his father's home near Seattle, Washington. During this time, the appellant called his work

center and left a message indicating he wanted to turn himself in. The appellant's squadron commander, Major Lovato, telephoned the appellant's father, advised him the appellant was AWOL, and asked him to call the squadron if he heard from the appellant.

On 15 June 2001, the appellant arrived at his father's home. His father called Major Lovato and advised him the appellant was at his house. Major Lovato called the Washington State Police, who apprehended the appellant that day.

Providence of the Plea–AWOL Terminated by Apprehension

The appellant contends that his plea of guilty to AWOL terminated by apprehension was improvident. Specifically, he contends that his statements to the military judge about how he was apprehended were in conflict with his plea. The appellant avers the military judge erred in accepting his guilty plea to that element of the offense. We disagree.

"The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." Rule for Courts-Martial (R.C.M.) 910(e). If, after a plea of guilty, the accused "sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . a plea of not guilty shall be entered . . . ." Article 45(a), UCMJ, 10 U.S.C. § 845(a).

In determining whether a guilty plea is provident, the standard of review 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 (1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. Bickley*, 50 M.J. 93, 94 (1999). 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 (1996) (quoting *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 (1996). In view of the well-known tendency of human beings to rationalize their behavior, in a borderline case the military judge can give weight to the defense evaluation of the evidence. *United States v. Clark*, 28 M.J. 401, 407 (C.M.A. 1989); *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987).

As noted above, the appellant pled guilty, inter alia, to AWOL terminated by apprehension. The military judge advised the appellant of the elements of the charged offense. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 10b(3) (2000 ed.). She also explained that, "'Apprehension' means that your return to military control was involuntary. It must be shown that neither you nor persons acting at your request initiated your return." The appellant indicated that he understood the elements of the offense, and that the elements accurately described what he did.

The military judge carefully questioned the appellant about the facts leading up to his apprehension. She noted that, according to the stipulation of fact, the appellant placed a telephone call to his organization and left a message to discuss the possibility of turning himself in. The military judge questioned the appellant in detail about this.

MJ: Okay. During that time, did you decide to turn yourself in?

ACC: Yes, Ma'am.

MJ: You did?

ACC: I was considering turning myself in.

MJ: Okay, but did you in fact voluntarily return--

ACC: No, Ma'am.

MJ: --to correctional custody?

ACC: No, Ma'am.

As the military judge discussed the facts with the appellant, she learned that the appellant's father had called the appellant's commander, who in turn notified the Washington State police, resulting in the appellant's apprehension. She explored this thoroughly to determine whether the appellant's plea was provident.

> MJ: Okay. What I'm getting at there is, a return to authority or a return to one's place of duty may not be deemed involuntary–remember I talked to you about the term where it's terminated by apprehension? Remember that? And one of the terms I talked to you about was that this apprehension means that your return to military authority must have been involuntary. Do you understand that?
>
> ACC: Yes, Ma'am.
>
> MJ: Okay. And one of the situations where it may not be deemed involuntary would be a situation where if after you were apprehended, the civilian authorities learned of your military status from--or that you returned to military authority at your own request or that you had directed someone else to call the police to bring you back in. Do you understand that?

ACC: I understand.

MJ: Okay. And so, on this occasion then, did you direct your dad to call the police so that you could be taken back to authority?

ACC: No, Ma'am.

MJ: Okay. Or did you in fact tell your dad, "Hey, call my boss, Major Lovato, because I want to come back to military authority"?

ACC: No, Ma'am.

The military judge asked the appellant to confer with his defense counsel, and then questioned him further about whether his apprehension was involuntary. She continued to question him at length on that issue. Finally, the military judge asked:

MJ: Okay. You look a little puzzled, and the reason why I'm asking you this continuously is because I want to make sure that you don't believe in your mind that your return from this AWOL status was voluntary. You just told me a minute ago that you had been talking or that your father was talking to Major Lovato about the possibility of turning yourself in and voluntarily returning. Do you believe in any way that on that occasion that you had voluntarily returned to correctional custody?

ACC: No, Ma'am.

After continued questioning, the military judge inquired of counsel for both sides whether further inquiry was required. Both assured the military judge they thought the inquiry was sufficient to assure a provident plea.

During the sentencing portion of the trial, the appellant called his father as a witness. The appellant's father described his telephone call to the appellant's commander very differently than had the appellant in his responses to the military judge. According to the appellant's father, "I told Major Lovato that about three o'clock, when I got off, you know, we'd get in the car and I'd drive him down to McChord Air Force Base, and then he'd turn himself in that day." On cross-examination, the appellant's father admitted that the appellant had also expressed a desire to turn himself in a week earlier and had not done so.

The appellant now contends his plea was improvident. He alleges that the apprehension only occurred after the appellant's father informed Major Lovato that the appellant would be surrendering to military authorities later that day.

We are not persuaded by this argument. The military judge conducted an exhaustive inquiry on this precise point, and the appellant repeatedly indicated that he did not voluntarily return to military control. The appellant's trial defense counsel also agreed that the plea was provident. The extensive discussion of the issue revealed that the appellant considered turning himself in, but that he had not decided to do so at the time he was apprehended by the state police. While the testimony of the appellant's father during the sentencing proceedings seems different, we find it insufficient to create a substantial conflict rendering the appellant's plea improvident. Whether the appellant intended to return to military control is a question of intent. The appellant's own words are the best measure of the appellant's intent. It is not clear whether the testimony of the appellant's father reflected his personal desire about what the appellant should do, a misunderstanding, or simply wishful thinking. In any event, in light of the military judge's exhaustive inquiry on this point, we do not find a conflict within the meaning of Article 45, UCMJ.

Providence of the Plea–Escape from Correctional Custody

The appellant also pled guilty to escaping from correctional custody. He now contends that his guilty plea was improvident. We disagree.

The military judge advised the appellant of the elements of the offense of escape from correctional custody, and the appellant agreed that the elements accurately described what he did. During the inquiry, the military judge specifically questioned the appellant about whether he believed he had been set free by proper authority.

> MJ: Okay. Did anyone, any of these confinement [sic] NCOs or anyone else give you permission or authority to actually leave or escape from correctional custody?
>
> ACC: No, Ma'am.
>
> MJ: Did you believe that you were authorized to leave correctional custody or escape from correctional custody?
>
> ACC: No, Ma'am.
>
> MJ: Did anything at all force you to escape from correctional custody on that occasion?
>
> ACC: No, Ma'am
> . . .

MJ: And do you believe in any way that you had already been set free by any proper authority on that day such that you could have freely left?

ACC: No, Ma'am.

Once again, the defense counsel indicated that he thought no further inquiry was required for a provident plea. The military judge accepted the guilty plea.

During the sentencing proceedings, the appellant made an unsworn statement. In it, he complained that he was treated badly by the staff at the correctional custody facility. The appellant said:

> My escort and I left MacDill [AFB] in the middle of the night, and I arrived at correctional custody at about 1400. From the beginning, it was a nightmare. I was told to stand at attention, holding my bags until my legs were shaking. I thought I was going to pass out several times. I was yelled at constantly. My bags were dumped out all over the ground several times. I was shown pictures of my family and asked, "Do you think they'd be proud of you?" And people would call me "Stupid." I was called an idiot, stupid, dummy, and sissy girl by the staff. I hadn't slept, and I was tired. They made me do push-ups, flutter kicks, and low crawl through mud. It was raining outside, and they made me stand out in the rain for several hours. They threw water on me, and intimidated me with an M-16.
>
> I know all of this is no excuse for leaving correctional custody. I was sent there for a reason, and I am sure Major Lovato thought that it would help me. I just had no idea the staff was allowed to treat us like that. There is no way I could convey to you how scared and tired I was. The staff kept telling me to run away, "Why don't you just go and run off?" They left me standing outside all night, and finally at about 0430, I did run.

At the conclusion of the unsworn statement, the military judge inquired about the appellant's treatment at the correctional custody facility. The military judge framed her inquiry in terms of a violation of Article 13, UCMJ, 10 U.S.C. § 813, which prohibits unlawful pretrial punishment. The military judge commented,

> [Y]ou told me some things in your unsworn statement that are disturbing to me and that have prompted me to now want to question you a little bit further to find out if you believe in any way, based on what you told me in your unsworn statement, that you were in fact subject to this type of treatment such that you might be deserving of relief under Article 13.

The military judge ordered a recess so that the appellant could confer with his counsel. Thereafter, the trial defense counsel and the appellant affirmatively waived any claim of unlawful pretrial punishment.

The appellant now contends that the factual circumstances related in his unsworn statement are inconsistent with his guilty plea. Specifically, he asserts that the statement that the correctional custody staff encouraged him to run away was an indication that he was free to leave. The appellant contends that this is in substantial conflict with his plea.

We do not agree. The appellant's description of the alleged comments, including the name-calling, the references to his family, and the suggestions that he "run away," show that the comments were intended as insults and taunts, and not as serious indications that he was free to leave. The appellant's unsworn statement admits as much, when he noted that, "I know all of this is no excuse for leaving correctional custody." We conclude the appellant's unsworn statement was not inconsistent with his plea.

Providence of the Plea–Failure to Go

Although not raised by either party, there is one aspect of the providence inquiry that concerns us with regard to the appellant's guilty plea to Specification 1, Charge I, alleging his failure to go to duty on time on three occasions, in violation of Article 86, UCMJ. We find that corrective action is required.

The military judge carefully explained the elements of the offense and asked the appellant about the facts and circumstances surrounding each incident. The military judge inquired whether there was anything that forced the appellant to be late for duty on the charged days. The appellant's reply included a comment that, "On one occasion I was late because of problems with my vehicle." This raised the defense of impossibility. *See United States v. Lee*, 16 M.J. 278, 280 (C.M.A. 1983); *MCM*, Part IV, ¶ 10c(6). The subsequent inquiry did not determine whether the defense of impossibility was available.

Under the circumstances, we must find the appellant's plea improvident to one of the three charged failures to go. To that end, we affirm the findings of guilt to Specification 1, of Charge I, excepting the words, "on or about 16 May 2001, 21 May 2001, and 29 May 2001," and substituting the words, "on two occasions between 16 May 2001 and 29 May 2001." We disapprove the findings of guilt to the excepted words, and affirm the findings of guilt to the substituted words.

Having modified the findings, we must reassess the sentence. We may approve a sentence no greater than the sentencing authority would have adjudged absent the error. The offense in question was very minor, especially compared to the remaining offenses. The change would not affect the maximum punishment in the case. The military judge was advised of the reason for the appellant's late arrival on the date in question and

would have considered that in imposing the original sentence. More significantly, the military judge was aware that the appellant had already received nonjudicial punishment for the failures to go, and specifically considered that prior punishment as requested by the defense at trial. *See United States v. Bracey*, 56 M.J. 387, 388 (2002); *United States v. Pierce*, 27 M.J. 367, 369 (C.M.A. 1989). In the unique circumstances of this case, we find the sentence would have been the same even absent the error.

Multiplicity

The appellant notes that his flight from the correctional custody facility formed the basis for the appellant's conviction for AWOL and his conviction for escaping from correctional custody. The appellant argues that this Court may not affirm both convictions because the escape from correctional custody offense is included in the AWOL. Recognizing that the appellant pled guilty to these two crimes without raising an objection at trial, the appellant urges this Court not to apply the doctrines of waiver or plain error.

"Multiplicity" is a concept derived from the Double Jeopardy Clause of the Constitution, prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997). Of course, the legislature is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court in such cases is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one punishment for the same offense." *Brown*, 432 U.S. at 165. Conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

R.C.M. 907(b)(3) provides, "A specification may be dismissed upon timely motion by the accused if: . . . (B) The specification is multiplicious with another specification . . . ." The non-binding discussion to the rule explains, "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." R.C.M. 905(e) provides that failure to raise motions or objections before trial is adjourned shall constitute waiver.

Multiplicity claims are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error. *United States v. Britton*, 47 M.J. 195, 198 (1997). An appellant may demonstrate plain error in multiplicity issues by showing that the specifications are "facially duplicative." *United States v. Heryford*, 52 M.J. 265, 266 (2000); *United States v. Lloyd*, 46 M.J. 19, 23 (1997). To determine whether the specifications at issue are facially duplicative, we review the language of the

specifications and the facts presented in the record of trial. *United States v. Harwood*, 46 M.J. 26, 28-29 (1997).

Reviewing the language of the specifications, it appears they are similar, but not identical. The specification charging AWOL alleged that the appellant did "absent himself from his place of duty . . . Building 3101, Correctional Custody Facility" on or about 8 June 2001. The specification charging escape from correctional custody alleged that on the same date the appellant did "escape from Building 3101, Correctional Custody facility." The difference between "absent" and "escape" is important. An "escape" from correctional custody is complete when a person "casts off any physical restraint" imposed as part of the correctional custody. *MCM*, Part IV, ¶ 70c(1). The offense is complete if a person frees himself, without authority, from any physical restraint, regardless of whether the individual leaves the area. By contrast, absence without leave requires that the person actually be absent from the duty section. We conclude that the specifications are not "facially duplicative," therefore the failure to raise the issue at trial constituted waiver.

Even absent a waiver, we do not find that escape from correctional custody is an included offense of AWOL. As noted above, AWOL requires actual absence from the duty area, whereas escape from custody requires only that the member cast off physical restraints. Additionally, the specific charge in this case alleged that the absence was terminated by apprehension, a matter not required for the escape offense. Moreover, the latter offense requires the individual to be placed in correctional custody by a person authorized to do so, which is not required for AWOL.*

We also find that the purposes of the offenses are different. The purpose of the sanction for AWOL is to assure that military members remain present for duty, while the purpose of punishing escape from correctional custody is to preserve the authority of the physical restraints in correctional custody.

In *United States v. DiBello*, 17 M.J. 77 (C.M.A. 1983), our superior court considered similar, although not identical, offenses and found they were not multiplicious. In that case, the Court considered convictions for AWOL and breach of restriction arising from the same absence. The Court held that the two-week AWOL was a separate offense from the breach of restriction. We recognize that the analysis was based, in part, upon the test established in *United States v. Baker*, 14 M.J. 361 (C.M.A. 1983), which was later overruled by *United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). However, the Court also relied upon an analysis of the offenses themselves in concluding they were separate, and the logic is compelling.

* We recognize that comparing elements of the offenses to determine Congressional intent is not especially helpful because the elements of specific offenses under Article 134, UCMJ, are not defined by Congress.

The appellant suggests that this Court approach our multiplicity analysis in a manner similar to that employed by the Supreme Court in *Rutledge v. United States*, 517 U.S. 292 (1996). In *Rutledge*, the Supreme Court found that the defendant could not lawfully be convicted of violating both 21 U.S.C. § 846, conspiracy to distribute controlled substances, and 21 U.S.C. § 848, conducting a continuing criminal enterprise, where the "in concert" element of the latter offense was based upon the same act as the conspiracy charge. The Supreme Court considered the two statutory provisions, and concluded that it was the intent of Congress that an offender be convicted of only one crime. 517 U.S. at 300.

The appellant's reliance on *Rutledge* is unpersuasive. The Supreme Court's determination of Congressional intent with regard to the statutes at issue there simply does not shed light on the offenses before this Court. We find that the charged offenses of AWOL terminated by apprehension and escape from correctional custody were not multiplicious in this case.

Conclusion

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

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner