UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KYLE L. BREZNAK
United States Air Force

ACM S30396 (f rev)

31 May 2006

Sentence adjudged 1 May 2003 by SPCM at Goodfellow Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major James M. Winner, and Major John N. Page III.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel Michael E. Savage.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

STONE, Senior Judge:

The appellant pled guilty to one specification of failure to obey a lawful order, three specifications of larceny, and one specification of false swearing.[1] A military judge, sitting alone as a special court-martial, accepted his pleas of guilty and sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The convening

[1] Articles 92, 121, and 134, UCMJ, 10 U.S.C. §§ 892, 921, 934.

authority approved this sentence on 9 June 2003, but failed to reflect in his final action that confinement was limited to four months by a pretrial agreement (PTA).

After addressing the four issues raised in the appellant's assignment of errors, we remedied this error in our previous decision in this case by setting aside the 9 June 2003 action. *United States v. Breznak*, ACM S30396 (A.F. Ct. Crim. App. 29 Apr 2005) (unpub. op.). The appellant then filed a brief with the Court of Appeals for the Armed Forces, raising the following issue:

> WHETHER THE COURT OF CRIMINAL APPEALS, AFTER SETTING ASIDE THE CONVENING AUTHORITY'S ACTION, HAD JURISDICTION UNDER ARTICLE 66(c), UCMJ, [10 U.S.C. § 866(c)] TO REVIEW THE FINDINGS AND SENTENCE BEFORE ANY NEW ACTION WAS TAKEN.

Our superior court reversed our previous decision and returned the case to The Judge Advocate General of the Air Force for submission to the convening authority for a new action that conformed with the PTA. The court further directed that the record "be returned to the Court of Criminal Appeals for further review under Article 66, UCMJ, and then Article 67, UCJM [sic], shall apply." *United States v. Breznak*, 62 M.J. 437 (C.A.A.F. 2006) (mem.).

On 15 February 2006, the convening authority took action that conformed with the PTA. On 20 April 2006, the appellant filed a brief with this Court indicating he had "no additional specific assignment of errors to file beyond what was already submitted and [previously] considered by this Court."

In accordance with our superior court's determination that we lacked jurisdiction to decide the issues raised in the appellant's first assignment of errors, we now turn to an analysis of those matters.

The appellant's first assertion is that his guilty pleas to two of the larceny specifications were improvident. The basis of this complaint is that the military judge never defined the phrase "on divers occasions," which was alleged in both specifications. We do not find a "'substantial basis' in law and fact" for questioning the appellant's guilty pleas to these specifications. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). In the context of the entire record, it is clear the appellant understood the meaning and effect of pleading to larceny on "divers occasions." *See generally United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003). When responding to the military judge's request for an explanation as to why he thought he was guilty of these larceny offenses, the appellant noted that "on more than one occasion" he had stolen property by "writing a series of checks" on various dates within the charged timeframes. The military judge did not abuse his discretion in accepting the appellant's pleas. *See United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

The appellant next asks for new post-trial processing because of two errors in the staff judge advocate's recommendation (SJAR). The government concedes it was error for the SJAR to misstate the adjudged sentence of confinement as four months (when it was actually five months) and to omit any reference to the PTA. *See* Rule for Courts-Martial (R.C.M.) 1106(d)(3)(A). Even though the SJAR itself failed to reflect this information, attachments to the SJAR contained the required information. Moreover, the convening authority who first acted on the findings and sentence was well acquainted with the PTA because he signed it. Under these circumstances, the appellant has not established a colorable showing of prejudice. *See United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Next, the appellant contends the military judge erred when he permitted the appellant's commander to testify in presentencing that the appellant was a person of "dubious character." *See generally* R.C.M. 1001(b)(5) ("trial counsel may present, by testimony or oral deposition . . . evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation."). In overruling the trial defense counsel's objection to this testimony, the military judge indicated he could put this comment in the proper perspective. Even if we were to assume admission of this testimony was error, it was harmless. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a). We are confident the military judge did not give inappropriate weight to this testimony.

Finally, the appellant complains that the commander's comment about the appellant's "dubious character," in conjunction with other objectionable portions of the commander's testimony merits application of the cumulative error doctrine. *See United States v. Dollente*, 45 M.J. 234, 236 (C.A.A.F. 1996). We note that the military judge sustained objections to testimony concerning uncharged misconduct and the commander's opinion as to the nature and severity of the offenses, and thus properly limited the commander's testimony to those matters authorized by R.C.M. 1001(b)(4) and (5). Under these circumstances, we conclude the doctrine of cumulative error does not apply.

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

THOMAS T. CRADDOCK, SSgt, USAF
Court Administrator