UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic HUBERT C. BROCK II
United States Air Force

ACM S30461

8 August 2005

Sentence adjudged 11 September 2003 by SPCM convened at Beale Air Force Base, California. Military Judge: Anne L. Burman.

Approved sentence: Bad-conduct discharge, confinement for 5 months, and forfeiture of $575.00 pay per month for 5 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

STONE, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

The appellant was convicted, in accordance with his pleas, of one specification of failure to go and three specifications of willful disobedience of a superior commissioned officer, in violation of Articles 86 and 90, UCMJ, 10 U.S.C. §§ 886, 890. The special court-martial, consisting of members, sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and forfeiture of $575.00 pay per month for 5 months. The convening authority approved the sentence adjudged.

The appellant has submitted two assignments of error: (1) Whether the pleas to Specifications 2 and 3 of the Article 90, UCMJ, Charge were improvident; and (2) Whether the ultimate offenses underlying the Article 90, UCMJ, Charge were merely instances of failure to go. Finding error, we order corrective action.

Background

The facts adduced during the providence inquiry and contained in the stipulation of fact establish that the appellant was assigned to the 9th Maintenance Squadron at Beale Air Force Base (AFB), California. On 11 August 2003, the appellant's commander, Lieutenant Colonel (Lt Col) Walter Haussner, personally directed him to report to Technical Sergeant (TSgt) Clarence Estes every morning at 0700 hours. The purpose of the order was for the appellant to be assigned extra duties pursuant to nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815. The appellant acknowledged he understood the order. TSgt Estes informed the appellant to meet him at Building 1069, located on Beale AFB.

The following day, 12 August 2003, the appellant called Staff Sergeant LeRoy Trask, Jr. and stated that he would be late for work because he needed to retrieve some clothes to send to his child. The appellant did not receive permission from his commander to report late, nor was there any emergency requiring him to act as he did. The appellant finally reported to TSgt Estes at 0830 hours. Later that day, the appellant was more than an hour late returning from lunch.

On the following day, 13 August 2003, the appellant called TSgt Estes and stated that he would be late for work. He informed TSgt Estes that the reason for his lateness was "lack of motivation." Again, the appellant did not have permission from his commander to be late. He eventually arrived to work at 1030 hours, though at a different location from Building 1069.

Later that day, Lt Col Haussner revoked the appellant's base driving privileges, ordering him to report each day at 0700 at the base revocation parking lot. From there, someone would transport the appellant to his place of duty. On the following morning, 14 August 2003, the appellant was late. He stated that he had requested a friend to drive him from his home to the revocation lot. During the providence inquiry, he admitted, "My friend was driving my car, and we had to make arrangements, but I remember being a bit, well, disoriented. So I may have been--I just had a hard time collecting it that morning, and so I subsequently made myself late."

Providency of the Guilty Pleas

The standard of review for the providency 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) (quoting *United States v. Prater*, 32 M.J. 433 (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) (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 (C.A.A.F. 1996).

The elements of willful disobedience of a superior commissioned officer are as follows:

> (a) That the accused received a lawful command from a certain commissioned officer;
>
> (b) That this officer was the superior commissioned officer of the accused;
>
> (c) That the accused then knew that this officer was the accused's superior commissioned officer; and
>
> (d) That the accused willfully disobeyed the lawful command.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 14(c)(2)(f) (2000 ed.).

"'Willful disobedience' is an intentional defiance of authority. Failure to comply with an order through heedlessness, remissness, or forgetfulness is not a violation of this Article, but may violate Article 92." *MCM*, Part IV, ¶ 14(c)(2)(f). The appellant contends that his pleas to Specifications 2 and 3 of Charge II are improvident because the military judge did not elicit facts sufficient to establish a willful disobedience of Lt Col Haussen's command.

The facts underlying Specification 2 are the events of the morning of 13 August 2003, when the appellant advised TSgt Estes that he was not reporting to work due to a "lack of motivation." The military judge properly advised the appellant of the elements of Article 90, UCMJ, and also properly defined willful disobedience for him. The appellant admitted all the elements. The colloquy with the military judge included the following:

MJ: Do you agree that this was a lawful order?

ACC: I do, Your Honor.

MJ: Did you understand the order?

ACC: Yes, I did, Your Honor.

MJ: When were you supposed to obey the order?

ACC: Effective immediately, mainly on the date of the 13th, at 0700.

MJ: Did you obey it?

ACC: I did not.

MJ: Why not?

ACC: At this point in time, I couldn't begin to tell you. [Pause.] Further, I would like to add that it was due to personal reasons, but not being a dire situation, and it wouldn't have prevented me from carrying out those orders that I was charged with.

….

MJ: Where were you when you called Sergeant Estes?

ACC: At my residence in Yuba City.

MJ: And what was going on that morning?

ACC: [Pause.] This all was affected by an ongoing bout with depression, and that morning I just felt overwhelmed, and I was having a real hard time getting started.

MJ: Do you believe that any struggles that you might've had with depression gave you a legal excuse or justification to disobey Lieutenant Colonel Haussner's order?

ACC: No, Your Honor.

The facts underlying Specification 3 are the events of the morning of 14 August 2003, when the appellant arrived late at the revocation lot. As stated above, he claimed to have been disoriented, that he "had a hard time collecting it that morning," and that he had made himself late.

MJ: Tell me what happened that morning.

ACC: [Pause.] That morning, ma'am, I requested a ride from a friend. I don't rightfully--I don't recall what time I got onto the base, but it wasn't--at the specification, that's fairly accurate.

MJ: So a friend was--in other words, you didn't drive yourself from your home to base?

ACC: No, Your Honor.

MJ: So you asked your friend to pick you up?

ACC: To come over and take me to the base.

MJ: To the revocation lot?

ACC: Yes, ma'am.

MJ: Do you remember what time your friend showed up?

ACC: The exact time I cannot recall.

MJ: Why was it that you were late?

ACC: There was no dire or extreme emergency that was present--present at the time.

MJ: And was your friend late? [No response.] And--I'll back up for a moment: Did you tell your friend----

ACC: I can't----

MJ: --what time you had to be at the lot?

ACC: My friend was driving my car, and we had to make arrangements, but I remember being a bit, well, disoriented. So I

may have been--I just had a hard time collecting it that morning, and so I subsequently made myself late.

MJ: Okay, so you're not claiming in some way that there was some dire emergency or accident that prevented you from showing up on time?

ACC: There was none, ma'am.

MJ: And it's not simply showing up on time, but simply obeying the order of your commander to be at a particular place at a particular time, right?

ACC: Yes, Your Honor.

As to both specifications, the appellant admitted that he violated the elements of Article 90, UCMJ. However, the military judge did not ask him to explain why the facts underlying these two specifications evidence willful disobedience rather than simply a failure to obey an order. We conclude that, standing alone, and without further elaboration, these facts do not objectively support the plea to Article 90, UCMJ. The appellant's conclusory statements admitting the elements of the offense are not sufficient. *See United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002). However, we conclude that the facts underlying Specifications 2 and 3 of Charge II are sufficient to support a plea of guilty to the lesser-included offense of failure to obey a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892.

Ultimate Offense

We resolve the remaining issue adversely to the appellant. The appellant argues that the ultimate offenses in the Specifications of Charge III are that of failure to go. In the first place, we conclude that the appellant has waived this issue by virtue of his plea of guilty. "[A] plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt." Rule for Courts-Martial (R.C.M.) 910(j). *See United States v. Lopez*, 42 C.M.R. 268 (C.M.A. 1970); *United States v. Hamil*, 35 C.M.R. 82 (C.M.A. 1964).

Even if not waived, however, in considering the "environment in which the order was given," we find no basis to conclude that the orders in question were given merely to "improperly escalate punishment." *United States v. Landwehr*, 18 M.J. 355, 357 (C.M.A. 1984). Nor did the orders require the appellant merely to report for "regular work duties." *United States v. Peaches*, 25 M.J. 364, 366

(C.M.A. 1987). From the facts contained in the record, we conclude that Lt Col Haussen brought "the full authority of his office" to bear through the issuance of these orders in an effort to enforce good order and discipline in his organization. *Landwehr*, 18 M.J. at 357. By his personal and direct involvement, Lt Col Haussen lifted them "above the common ruck" of routine orders and directives. *Id*. *See also Untied States v. Byers*, 40 M.J. 321, 323 (C.M.A. 1994). We hold that the ultimate offenses in Charge II are not merely those of failure to go but, rather, willful disobedience of an order, as set forth in Specification 1, and failure to obey an order, as we have affirmed in Specifications 2 and 3.

Sentence Reassessment

Because we have modified a finding of guilty, we must perform sentence reassessment. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id*. at 308.

We are convinced we are able to do so. Because this was a special court-martial, our modified findings of guilty have not affected the maximum punishment. Even viewed as violations of Article 92, UCMJ, Specifications 2 and 3 of Charge II evidence a serious lack of military discipline. We are aware of the provision in the *Manual* which states that, in Article 92, UCMJ, cases, "if in the absence of the order . . . which was violated or not obeyed the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed . . . the maximum punishment is that prescribed elsewhere for the particular offense." *MCM*, Part IV, ¶ 16(e)(2). While it is probable in this case that the appellant could have been convicted of failure to go, we conclude that such convictions would have been based on different facts from those that underlie Charge II. We conclude that even for purposes of punishment, Charge II should not be viewed as equating simply to a failure to go.

Based upon all the circumstances, we find the appellant is entitled to some sentencing relief. We conclude that, absent the improvident pleas, the panel would have sentenced the appellant to no less than a bad-conduct discharge, three months of confinement, and forfeiture of $575.00 pay per month for three months.

The approved findings, as modified, and sentence, as reassessed, 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 approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court