UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSHUA A. BROWN
United States Air Force

ACM 35837

30 August 2004

Sentence adjudged 18 December 2003 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, Major Sandra K. Whittington, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Lieutenant Colonel Gary F. Spencer.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

In accordance with his plea, the appellant was convicted of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also charged with controlling a vehicle while drunk and impaired by cocaine in violation of Article 111, UCMJ, 10 U.S.C. § 911, however, that charge was withdrawn after his plea to Article 112a, UCMJ, was accepted. A military judge, sitting alone as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 5 months,

and reduction to E-1. The convening authority approved the sentence. Although the appellant submitted the case on its merits, we find error and set aside the findings and sentence.

Issue

WHETHER THE APPELLANT'S PLEA OF GUILTY TO THE CHARGE AND ITS SPECIFICATION WAS PROVIDENT.

Background

The appellant and his then-girlfriend (currently his wife) took a trip to his hometown, Augusta, Georgia, on or about 4 July 2003. In the evening, they attended a house party. An unidentified male removed cocaine from his pocket, poured some of it on the table, and offered some to the appellant. The appellant placed some of it on his tongue with his finger three to five times, and then snorted some through his nose.

During the *Care*[1] inquiry, the appellant did not mention alcohol consumption on the night he ingested cocaine. However, during the sentencing phase of the trial, the prosecutor introduced substantial evidence concerning the appellant's abundant consumption of alcohol. Without objection, the verbatim testimony of the two Air Force Office of Special Investigations (AFOSI) agents from the Article 32 hearing[2] was offered into evidence. The testimony established that when the AFOSI agents interviewed the appellant about his cocaine use that night, he told them he drank 11 Bud Light beers between the hours of 1930 and 0000, before he ingested cocaine, and that he was "really drunk." When they asked him what effects the cocaine had on his body, he responded it made his tongue "numb" but that he was "too drunk" to feel any other effects of the cocaine.

The prosecutor also introduced the appellant's girlfriend's written sworn statement and her verbatim Article 32 hearing testimony. She stated the appellant had "a lot to drink" and was "getting pretty drunk" at the party. At one point, she suggested he slow down or stop his consumption of alcohol.

Furthermore, the appellant himself made unsworn statements about his alcohol consumption during sentencing. He stated he had consumed Bud Light beers; specifically, he drank "Seven, eight, nine. Maybe a few more. Maybe less." When asked by his counsel if he felt "pretty buzzed," he responded, "Yes, sir." Despite the plethora of evidence and unsworn statements offered during sentencing about the appellant's level of alcohol intoxication, the trial judge did not reopen the *Care* inquiry to

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).
[2] Article 32, UCMJ, 10 U.S.C. § 832.

ensure the appellant's alcohol consumption did not affect his plea to "knowing" use of cocaine.

Discussion

In *Care*, our superior court "imposed an affirmative duty on military judges, during providence inquiries, to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty." *United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003). "A guilty plea will be rejected only where the record of trial shows a substantial basis in law and fact for questioning the plea." *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In accordance with Article 45(a), UCMJ, 10 U.S.C. § 845(a), "If 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." *See Hardeman*, 59 M.J. at 391; *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989). Furthermore, an accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge. *Clark*, 28 M.J. at 405. Rather, in such a situation, Article 45, UCMJ, requires military judges to "resolve inconsistencies and defenses during the providence inquiry" or the guilty plea must be rejected. *Perron*, 58 M.J. at 82 (citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). *See also United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976); *United States v. Dunbar*, 43 C.M.R. 318 (C.M.A. 1971).

The appellant's statements about his level of intoxication that were introduced after the *Care* inquiry are inconsistent with the knowing use of cocaine. Clearly, if the appellant says he was "drunk" at the time he ingested the cocaine, it behooves a trial judge to inquire into how drunk the appellant was in order to ascertain whether there is reasonable doubt as to the existence of actual knowledge. Was the appellant "too drunk" to know that he was tasting cocaine with his finger? Is that why he kept sticking his finger in the white powder and placing it on his tongue? Was he "too drunk" to know he was snorting cocaine? Although he could feel the numbness of his tongue, the appellant stated he was too drunk to feel any other effects. The trial judge had an affirmative duty to reopen the *Care* inquiry and address voluntary intoxication as it related to the element of actual knowledge. As this Court has declared before, we cannot turn a blind eye to a substantial inconsistency that has been left unresolved. *United States v. Ellerbee*, 30 M.J. 517, 519 (A.F.C.M.R. 1990). The trial judge's failure to reopen the *Care* inquiry leaves unresolved a substantial basis in law and fact to question the plea.

Conclusion

Accordingly, we hold the appellant's guilty plea to the offense was improvident. The findings and sentence are set aside. A rehearing is authorized.

OFFICIAL

ANGELA M. BRICE
Clerk of Court