UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman DARRELL D. BURTON
United States Air Force

ACM 35802

6 February 2006

Sentence adjudged 22 October 2003 by GCM convened at Vandenberg Air Force Base, California. Military Judge: R. Scott Howard (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Steven R. Kaufman.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of attempted wrongful disposition of military property, in violation of Article 80, UCMJ, 10 U.S.C. § 880; one specification each of conspiracy to commit larceny and conspiracy to wrongfully sell military property, in violation of Article 81, UCMJ, 10 U.S.C. § 881; one specification of wrongful sale of military property, in violation of Article 108, UCMJ, 10 U.S.C. § 908; and one specification of larceny of military property, in violation of Article 121, UCMJ, 10 U.S.C. § 921. He was sentenced by a military judge to a bad-conduct

discharge, confinement for 6 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant contends that his guilty pleas were improvident as to the wrongful sale and larceny specifications, because the values as alleged were improperly aggregated and inconsistent with the values alleged in the conspiracy specifications. Finding merit in this assignment of error, we modify the findings, reassess the sentence, and return the record for a new staff judge advocate's recommendation (SJAR) and action.

Background

The appellant was a firefighter stationed at Vandenberg Air Force Base (AFB), California. In the fall of 2001, he established an account with the Internet-based auction service eBay. A few months later, he and another military member at Vandenberg AFB hit upon a scheme to enrich themselves by stealing firefighting gear, including protective helmets, clothing, and shelters, from their unit. They planned to take the items and put them up for auction on eBay. Over the course of the next 14 months, the two stole several dozen items, apparently in small enough increments to avoid arousing suspicion, and then sold them a few at a time.

As luck would have it, however, word of their scheme made its way to base law enforcement authorities in the form of an anonymous tip. The investigators assigned to the case were quickly able to verify many of the details provided by the tipster and began monitoring the sale of firefighter equipment on eBay. The investigators placed winning bids on a number of items offered by the appellant, and were thereby able to obtain sufficient information to verify his identity. Armed with that information, they obtained a search authorization for the appellant's on-base residence. The search turned up substantial quantities of stolen merchandise and records documenting the appellant's illegal activities.

The government elected to bring parallel sets of charges alleging conspiracy to steal and to wrongfully sell military property, and specifications alleging the actual theft and wrongful sale of military property.[1] Each item alleged to have been stolen is reflected in the specification alleging a conspiracy to steal military property; each item alleged to have been wrongfully sold is reflected in the specification alleging a conspiracy to wrongfully sell military property.

As originally drafted, the larceny and wrongful sale specifications alleged that the military property in question was of a value over $500. The conspiracy specifications

[1] The appellant was also charged with attempted wrongful sale of military property for the items won at the eBay auction by the investigators.

were silent as to value. At some point prior to trial, however, pen-and-ink additions were made to the conspiracy specifications, adding an alleged value. For reasons that are not readily apparent, these pen-and-ink changes alleged that the value of the items were *under* $500. Thus, they were inconsistent with the specifications that alleged that the property was worth *over* $500.

At trial, the appellant pled guilty to all of the charges and specifications. During his providency inquiry, he twice told the military judge that the value of the items he conspired to steal and wrongfully sell was less than $500, and thrice told him the value was "at least" less than $500. When discussing the actual larceny and sale of military property, he told the military judge at least twice that the same property was worth more than $500.

Providency of the Appellant's Pleas

The pleadings in this case are, on their face, inconsistent: they allege that the same property is worth both more and less than $500. Although it may be possible to envision some confluence of facts in which this inconsistency might be reconciled, the record does not reveal them. The appellant's providency inquiry, in which he admits that the property is worth both more and less than $500, suffers the same defect.

Where an accused raises a matter inconsistent with his plea, the military judge has a duty to inquire further. *United States v. Thompson*, 45 C.M.R. 300, 301 (C.M.A. 1972). The inquiry should attempt to resolve the inconsistency by calling it to the accused's attention and offering the accused an opportunity to explain or withdraw the inconsistent matter. *United States v. Adams*, 33 M.J. 300, 302-03 (C.M.A. 1991); *United States v. Garcia*, 43 M.J. 686, 689 (A.F. Ct. Crim. App. 1995), *aff'd*, 48 M.J. 5 (C.A.A.F. 1997). It is not necessary that the inconsistent matter be plausible or credible. *United States v. Lee*, 16 M.J. 278, 281 (C.M.A. 1983). Where there is "a 'substantial basis' in law and fact for questioning the guilty plea," the plea cannot be accepted. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The military judge must instead enter a plea of not guilty to the offense on the accused's behalf, and the trial must proceed as though he had pled not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a).

Here, the appellant's assertion that the property was worth less than $500 and at the same time worth more that $500 set up an inconsistency requiring further inquiry.[2] Fortunately, the inconsistency exists only as to the value of the property stolen and sold, and not to the other elements of the offenses. There is no dispute that the property stolen and wrongfully sold was military property of some value; we therefore affirm the findings of guilt as to the Specification of Charge III and the Specification of Charge IV

[2] The appellant's alternate valuation -- "at least under $500" is not helpful. Nor does the stipulation of fact, which lists some of the property sold by the appellant along with their sale prices, resolve the matter: the sales took place on 19 different dates, and in no case did a single sale exceed $100, let alone the $500 alleged.

by excepting in each the words "of a value over $500" and substituting the words "of some value." The remaining findings are also approved.

Sentence Reassessment

Because we modified the findings, we must consider whether we can reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). The purpose of reassessing a sentence is to purge the error that occurred at trial. Accordingly, we reassess the sentence awarded by the military judge, and not the sentence approved by the convening authority. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

Our modification of the specifications noted above changes the maximum possible sentence in this case. At trial, the parties and the military judge concluded that the maximum sentence included a dishonorable discharge and confinement for 23 years – 10 years each for the larceny and wrongful sale specifications, and one year for each remaining offense. On appeal, the government invites us to consider each of the over 35 larcenies and sales separately, adding the maximum punishment for each in order to arrive at an overall maximum in accordance with our decision in *United States v. Oliver*, 43 M.J. 668 (A.F. Ct. Crim. App. 1995). Unfortunately, this was not the method used to calculate the maximum sentence at trial, and we decline to change standards at this point in the process. We therefore conclude that the maximum sentence for the findings as modified includes a bad-conduct discharge rather than a dishonorable discharge, and confinement for 5 rather than 23 years.

This does not, however, change the facts that were presented to the military judge when he sentenced the appellant. The items stolen and sold remain the same; their individual values have not changed. The fact that the appellant and his co-conspirator abused their positions of trust to engage in a prolonged and premeditated exercise in larceny of critical life-saving equipment, for their own personal gain, remains unchanged. The appellant's prior punishments under Article 15, UCMJ, 10 U.S.C. § 815, and civilian arrest and conviction records likewise remain the same. Taking into account the entire record, including the matters in extenuation and mitigation presented at trial, we are confident that the military judge would have adjudged the same sentence even absent the improvident pleas: no less than a bad-conduct discharge, confinement for six months, and reduction to E-1. *See Doss*, 57 M.J. at 185.

Having reassessed the sentence, we next turn to the question of whether the appellant's sentence, as approved by the convening authority, was appropriate. The appellant argues that before this analysis can be undertaken, he is entitled to a new SJAR that correctly reflects the maximum sentence that could have been adjudged at trial, and a

new action by the convening authority. We agree. The convening authority has "virtually unfettered power" to grant clemency for any reason, or no reason at all. *United States v. Catalani*, 46 M.J. 325, 329 (C.A.A.F. 1997). We conclude that the convening authority should have the benefit of an informed and accurate recommendation from the staff judge advocate in making that decision, and return the record for a new SJAR and action. The appellant's remaining assignment of error, comparing his approved sentence to that of his criminal compatriot, is therefore not ripe for our consideration.[3]

Conclusion

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for new post-trial processing and a new action consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[3] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).