UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RYAN E. BUSH
United States Air Force

ACM S31214

13 June 2007

Sentence adjudged 18 September 2006 by SPCM convened at Beale Air Force Base, California. Military Judge: Charles E. Wiedie (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for Appellant: Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

BROWN, BECHTOLD, and WISE
Appellate Military Judges

PER CURIAM:

The appellant was convicted, consistent with his pleas, of one specification of failure to obey a lawful order , one specification of dereliction of duty on divers occasions by willfully failing to remain awake during duty hours, one specification of fleeing apprehension, one specification of divers wrongful use of cocaine, one specification of wrongful use of marijuana, one specification of stealing military property, one specification of attempting to unlawfully enter the dormitory room of Airman First Class T.E.B., and one specification of breaking restriction, in violation of Articles 80, 92, 95, 112a, 121, and 134 UCMJ., 10 U.S.C. §§ 880, 892, 895, 912a, 921, 934. A military judge sitting as a special court-martial, sentenced the appellant to be discharged from the service with a bad-conduct discharge and confinement for 8 months. The convening authority approved the findings and the sentence as adjudged.

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordon*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). "In order to establish an adequate factual basis for a guilty plea, the military judge must elicit 'factual circumstances as revealed by the accused himself [that] objectively support the plea[.]'" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providence inquiry must demonstrate the appellant understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000)

This case was submitted to this Court for review on its merits. 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, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). Our review of the guilty plea inquiry concerning Specification 2 of Additional Charge I, divers occasions of willful dereliction of duty, reveals the following:

> MJ: The term "willfully" means intentionally. It refers to the doing of an act knowingly and purposely specifically intending the natural and probable consequence of the act. Did you knowingly and purposely fail to perform your duties specifically intending the natural and probable consequences?
>
> ACC: Yes, sir.
>
> MJ: And why did you do that?
>
> ACC: I was tired.
> ….
>
> MJ: Now you say you willfully failed to obey this order. Did you plan to go to sleep when you----
>
> ACC: No, sir, I just kind of nodded off, sir.

While the appellant stipulated that on one occasion he intended to go to sleep while on duty, as is revealed above, during his guilty plea inquiry, he said he, "just kind of nodded off" when he fell asleep while on duty. Given this inconsistency in the record, the military judge had a responsibility to resolve it or not accept the appellant's plea of guilty of divers willful derelictions of duty. The military judge abused his discretion by accepting the appellant's plea of guilty to this offense. *Eberle*, 44 M.J. at 375. However, the responses by appellant establish his guilt beyond a reasonable doubt of the lesser included offense of negligent dereliction of duty on divers occasions, in violation of Article 92,

UCMJ. Accordingly, as to Specification 2 of Additional Charge I, we affirm the finding, excepting the word "willfully", substituting the word "negligently."

Because we have found the appellant guilty of the lesser included offense of negligent dereliction of duty, we next analyze the case to determine whether we can reassess the sentence. *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)). We conclude that we can. Reassessing the sentence, we are convinced beyond a reasonable doubt that the military judge would have awarded the same punishment regardless of the error: a bad-conduct discharge and confinement for eight months. *Id.* Furthermore, we find the sentence to be appropriate. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

The findings, as modified, and sentence, as reassessed, are correct in law and fact, and no additional 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, as modified, and sentence, as reassessed are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator