UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman EDDIE D. BYRD JR.
United States Air Force

ACM 35973

27 July 2005

Sentence adjudged 9 April 2004 by GCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Captain Christopher S. Morgan.

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

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial of one specification each of absence without leave, willful destruction of military property, wrongful use of cocaine on divers occasions, assault consummated by a battery, and obstruction of justice in violation of Articles 86, 108, 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 886, 908, 912a, 928, 934. He was sentenced by a military judge sitting alone to a bad-conduct discharge, confinement for 15 months, and reduction to E-1. The convening authority reduced the period of confinement to 12 months and directed that mandatory forfeitures under Article 58b, UCMJ, 10 U.S.C. § 858b, be waived for six

months and paid to the appellant's spouse, but otherwise approved the sentence as adjudged.

During our review of this case submitted on its merits, we noted an inconsistency between the appellant's plea to the Article 108, UCMJ, offense and the facts he recited during his providence inquiry. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Accordingly, we modify that specification to reflect the lesser-included offense of negligently destroying military property, affirm the findings as modified, and reassess the sentence.

Background

At trial, the appellant entered pleas of guilty to all charges and specifications. The Specification of Charge II, alleging willful destruction of government property, described the property as "a window in the residence" at an address on Eglin Air Force Base, Florida. During his *Care* inquiry, the appellant described the residence as his "base housing unit," and explained the incident as follows:

> ACC: On 17 August 2003, I was at my house on Eglin Air Force Base, Florida. My wife and I got into a terrible argument and I lost my temper. After the argument my wife left the house. I started throwing pots and pans and breaking dishes. Then I struck my elbow against the back door of the house. *I meant to hit the solid part of the door but I struck the window instead* and broke it.

(Emphasis added.)

Alertly perceiving an inconsistency between the appellant's plea and his account of the events, the military judge then engaged the appellant in the following discussion:

> MJ: [I]t sounds to me like what you're saying is that you went to slam your elbow into the door but you didn't mean to slam it into the glass and break it, is that right?
>
> ACC: Yes, sir. But if I hadn't hit it, it wouldn't have broke, but I didn't do it intentionally with that in mind. I thought I would do less damage by hitting the door to relieve some of my anger which I shouldn't have been doing anyway.
>
> MJ: Airman Byrd . . . I described "willfully" for you as meaning intentionally or on purpose, and it sounds like what you're telling me is that you intentionally hit the door but you didn't intentionally break the window, and I'm not sure how to reconcile those two.

The appellant's trial defense counsel offered this effort at reconciliation, which was subsequently adopted by the military judge:

> ADC: Your Honor, Airman Byrd struck the door on purpose, and when reading the definition of "willfully," it's either intentionally or on purpose, so he willfully and on purpose took his elbow and struck it against the door, the consequence of which was to break the window. That was something in showing how he pled that he could plead to willfully destroying this government property because he certainly was striking the door with a sense of purpose.
>
> MJ: Let me ask you this, Airman Byrd. There's no question that you slammed your elbow into the door on purpose, is that fair?
>
> ACC: Yes.
>
> MJ: Do you believe that one of the natural and probable consequences of slamming your elbow into a door with a glass window in it is that you could break the glass window?
>
> ACC: Yes, Your Honor.

Discussion

A military judge's decision to accept a guilty plea is reviewed 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)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973); *United States v. Chancelor*, 36 C.M.R. 453, 455-56 (C.M.A. 1966). An accused may not simply assert his guilt; the military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *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)).

As the military judge noted, the appellant's version of events was initially inconsistent with his plea to the Article 108, UCMJ, offense. The appellant specifically denied any intent to break the window, and in his colloquy with the military judge, further explained that he did not intend to strike the window in the first place. In a litigated case, a trier of fact might be permitted to reject the appellant's story and infer that because the appellant broke the window, he must perforce have intended to do so. In

a providence inquiry, however, this option is not available: the accused must admit to the factual basis for the plea. Rule for Courts-Martial 910(e).

The military judge and the appellant's trial defense counsel at trial attempted to remedy the inconsistency by establishing that breaking the window was "one of the natural and probable consequences" of the appellant's intentional striking of the door. Intent can sometimes be proven this way. *United States v. Johnson*, 24 M.J. 101, 105 (C.M.A. 1987). However, to satisfy the intent prong under *Johnson*, an accused must know that the prohibited result is "practically certain" to follow from his actions, regardless of his desire. *Id.* "[T]he necessary intent is lacking unless the factfinder determines not only that the prohibited results were highly foreseeable, but also that the accused, in fact, knew they were almost certain and nonetheless went ahead." *Id.* at 105-06.

Here, the appellant specifically disclaimed any intent to damage the window,[1] admitting only that "one of" the consequences of hitting the door was that he "could" break the glass. This falls short of the "practical certainty" required under *Johnson*. Nonetheless, it is sufficient to establish that the appellant's conduct was negligent, in that it was reasonably foreseeable that the force he applied to the door would be enough to damage its window. Accordingly, we modify the finding of guilty of the Specification of Charge II, excepting the word "willfully" and substituting therefore the word "negligently," and affirm the finding as modified. The remaining findings are also affirmed.

Sentence Reassessment

Because we have modified the finding as to the Specification of Charge II, 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 adjudged 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).

Here, the military judge was fully aware of the facts and circumstances surrounding the breaking of the window. Those facts, whether characterized as willful or negligent, pale in comparison to the remaining offenses for which no corrective action is

[1] The appellant insisted that he believed hitting the door would cause "less damage" than hitting the glass. We do not view this as an admission that he intended to damage the door -- since the term "less damage" can fairly encompass no damage at all -- but rather merely as an acknowledgement that he understood forcefully hitting the glass would damage it.

needed. The appellant was properly convicted of divers uses of cocaine, efforts to obstruct the investigation of his cocaine use, and assault consummated by battery on his pregnant wife, as well as the other offenses. Placed in that context, and set against the appellant's dismal disciplinary record – the prosecution admitted records relating to over a dozen disciplinary actions, including two Article 15s[2] and six letters of reprimand – the breaking of government-owned glass can only have had a de minimus impact on his sentence. We are confident that the military judge would have adjudged the same sentence even absent the improvident plea: no less than a bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances.

Conclusion

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[2] Article 15, UCMJ, 10 U.S.C. § 815.