UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MICHAEL L. ENNIS
United States Air Force

ACM S31415

29 January 2009

Sentence adjudged 19 October 2007 by SPCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of: two specifications of selling or otherwise disposing of military property; one specification of wrongfully using Adderall, a Schedule II controlled substance; one specification of wrongfully distributing Adderall, a Schedule II controlled substance; and one specification of larceny of military property, in violation of Articles 108, 112a, and 121, UCMJ, 10 U.S.C. §§ 908, 912a, 921. The adjudged and approved sentence consists of a bad-conduct discharge and eight months confinement.

On appeal the appellant asks this Court to set aside the finding of guilty on the wrongful use of Adderall specification and to either order a sentencing rehearing or

reassess the sentence. The basis for his request is that he asserts his plea on the wrongful use of Adderall specification was improvident because there is no evidence that his use was wrongful. We agree. Finding the appellant's plea to the wrongful use of Adderall specification improvident, we: (1) affirm the findings on Charge I and its specifications, Charge II and Specification 2 of Charge II, and Charge III and its specification; (2) set aside findings on Specification 1 of Charge II; and (3) reassess the sentence.

Background

During his *Care*[*] inquiry, the appellant testified that: (1) he was prescribed Adderall and rather than using it orally as prescribed, he crushed and snorted it; (2) he crushed and snorted the Adderall not in an effort to get high, but rather as part of his medical treatment, to shorten the time it would take for the Adderall to take effect; and (3) his use of Adderall was wrongful because he crushed and snorted it rather than ingesting it orally as it was prescribed to be used. The military judge found the manner in which the appellant used the Adderall made the appellant's use wrongful and accordingly found the appellant guilty of the specification.

Discussion

Providency of the Appellant's Plea to Specification 1 of Charge II

"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). An accused may not simply assert his guilt; the military judge must elicit facts "*as revealed by the accused himself*" to support the plea of guilty. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)) (emphasis added). 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); *Jordan*, 57 M.J. at 238).

In the case at hand, the evidence is insufficient to support the military judge's findings that the appellant's use of Adderall was wrongful. In fact, the evidence supports an opposite finding - that the appellant's use of Adderall, a drug which he had been prescribed, was with legal justification and authorization. It is well settled that a valid doctor's prescription for a controlled substance provides the legal justification and authorization to use the prescribed controlled substance for its intended purpose to treat a

[*] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

valid medical condition. *United States v. Pariso*, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007), *review denied*, 66 M.J. 94 (C.A.A.F. 2008).

When asked by the military judge whether he crushed and snorted the Adderall to get high, the appellant specifically told the military judge that his "intention wasn't to get high." Rather, he crushed and snorted the Adderall to get it into his system quicker. In short, the evidence supports a finding that the appellant's use of Adderall was for a legitimate medical reason and such is the case even if the appellant used the drug in a method contrary to the method prescribed. The military judge erred in finding that the appellant's use of Adderall was wrongful and, as a result, abused his discretion in accepting the appellant's guilty plea to the wrongful use of Adderall specification. Accordingly, we set aside the finding of guilty on Specification 1 of Charge II.

Sentence Reassessment and Appropriateness

Because we modified the findings, we must next consider whether we can reassess the sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error," and we may reassess the sentence accordingly. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). "If the error at trial was of constitutional magnitude, then [we] must be satisfied beyond a reasonable doubt that [the] reassessment cured the error." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

We need not speculate whether the wrongful use of Adderall specification had an impact on the sentence the military judge imposed because the military judge specifically stated he "viewed the use of the Adderall as insignificant . . . . [and] did not factor in the accused's use of Adderall into determining . . . an appropriate sentence." Moreover, we are confident that we can reassess the sentence in accordance with the above authority. Setting aside Specification 1 of Charge II does not change the maximum punishment the appellant faced, that which is within the jurisdictional limit of the special court-martial. Hardly can it be said that the sentencing landscape changed.

After careful consideration of the entire record, we are satisfied beyond a reasonable doubt that, in the absence of Specification 1 of Charge II, the military judge would have rendered a sentence of no less than that adjudged at trial. We are further satisfied that, in the absence of Specification 1 of Charge II, the convening authority would have approved a sentence no less than that approved.

Opportunity to Question and Challenge the Military Judge

Rule for Courts-Martial 902(d)(2) provides, "Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification . . . ." Though not raised as an issue on appeal, we note that the military judge failed to ask counsel whether they desired to question or challenge him. Moreover, counsel failed to advise the military judge whether they desired to question or challenge him. However, a failure to exercise a right is not synonymous with being denied a right. Under the circumstances of this case, we find the military judge's failure to ask counsel whether they desired to question or challenge him harmless. Counsel and the appellant had the opportunity to question and challenge the military judge regardless of whether the military judge questioned them about this right.

Conclusion

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

AFFIRMED.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, YA-02, DAF
Clerk of the Court