

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JUSTIN W. ERICKSON
United States Air Force**

ACM S30244

30 June 2004

Sentence adjudged 30 September 2002 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 95 days, and reduction to E-1.

Appellate Counsel for Appellant: Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, Judge:

On 30 September 2002, at Lackland Air Force Base, Texas, a military judge sitting as special court-martial tried the appellant. Consistent with his pleas, the appellant was convicted of attempted wrongful possession of 3,4 methylenedioxymethamphetamine (ecstasy), wrongful use of cocaine, and wrongfully inhaling nitrous oxide, in violation of Articles 80, 112a, and 134, UCMJ, 10 U.S.C §§ 880, 912a, 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 105 days and reduction to E-1. The convening authority reduced the amount of confinement to 95 days and approved the remainder of the sentence as adjudged.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. On appeal, the appellant avers that his guilty plea to wrongfully inhaling nitrous oxide

was improvident. The appellant asks this Court to set aside the findings of guilty concerning Specification 2 of Charge III and to reassess the sentence. We find no error and affirm.

Background

The appellant and two of his friends went out drinking to celebrate his graduation from security forces training. During the night, the appellant and his friends ended up at an adult video store. While there, the appellant and his friends bought “Whippits” (nitrous oxide canisters) and the appellant inhaled nitrous oxide.

The appellant pled guilty to one specification of wrongfully inhaling nitrous oxide in violation of Article 134, UCMJ. The appellant claims on appeal that his guilty plea was improvident because the military judge failed to elicit sufficient facts during the providence inquiry to establish that the appellant’s actions were prejudicial to good order and discipline.

The military judge stated that there were three elements to the offense. Specifically, he stated:

That at or near San Antonio, on or about 8 March 2002, you inhaled nitrous oxide;

The second element is that your inhalation of that was wrongful; and

The third element is that under the circumstances your conduct was to the prejudice to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

After the appellant acknowledged that his actions had satisfied the requirements of the first two elements, the military judge stated:

MJ: And the final thing that you need to make sure that you understand is that it had to have been prejudicial to the good order and discipline. And that means causing a reasonably direct and obvious injury to good order and discipline or had to be service discrediting. Which means it would have to tend to harm the reputation of the service or lower it in public esteem. Okay?

ACC: Yes, sir.

MJ: And you have to make sure you’re satisfied with this, because this is a little bit different from those other - - the other drug offense that you pled

guilty to is illegal because it's a named illegal drug. It's illegal to use cocaine. The [C]ongress has made that statute. They made a law against it.

Now, there is no statute toward [sic] basis at least being charged here by the government that nitrous oxide is illegal to inhale, just per se. Do you understand what I'm saying?

ACC: Yes, sir.

MJ: What you're telling me though is that your inhaling it under the circumstances, the way it happened in your case, was wrongful. That under the circumstances it was either prejudicial to good order and discipline or was service discrediting. Do you understand that?

ACC: Yes, sir.

MJ: Okay. It's really important that you do understand that, and that you understand that you're telling me that you're pleading guilty. That you really believe in your heart of hearts that your use of that nitrous oxide did satisfy that element. Okay?

ACC: Yes, sir.

Law

In determining whether a guilty plea is provident, the standard of review is whether there is a "substantial basis" in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). See *United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). 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 (C.A.A.F. 1996).

Discussion

The appellant claims that the providence inquiry did not establish a factual basis for concluding that his conduct was prejudicial to good order and discipline or of a nature

to bring discredit upon the armed forces because the appellant did not explain or discuss why his actions caused a direct and palpable injury to good order and discipline or was service discrediting. The appellant cites *United States v. Plesec*, ACM 30441 (A.F. Ct. Crim. App. 25 Oct 1994) (unpub. op.) as authority for his position. In the *Plesec* case, this Court set aside a conviction for wrongfully inhaling an aerosol intoxicant because the military judge did not elicit sufficient facts to show that the appellant's conduct was prejudicial to good order and discipline or service discrediting. The Court held that the appellant's conduct could be upheld as a simple disorder or neglect under Article 134, UCMJ, but:

To do so requires that the specification allege conduct which meets one or the other of the first two clauses of Article 134, UCMJ, "to the prejudice of good order and discipline" or "conduct of a nature to bring discredit upon the armed forces." Taking the second first, appellant's conduct may have brought discredit upon the Air Force, but there is no indication in the specification or in appellant's providence inquiry responses how it did. As for prejudice to good order and discipline, we are mindful of the admonition of the [Manual for Courts-Martial] that such offenses should be limited to "cases in which the prejudice is reasonably direct and palpable."

Plesec, unpub. op. at 3 (internal citations omitted).

In the instant case, the specification alleged that the appellant violated clause 1 of Article 134, UCMJ (conduct prejudicial to good order and discipline), by wrongfully inhaling nitrous oxide. The military judge asked the appellant why he believed he was guilty of a crime. He stated:

MJ: Okay. Now, again, I need to ask you this. Obviously, and that's why they were selling it at the video store, because it's not illegal, you know, for just a civilian can go in there, apparently, and do that and it's not necessarily illegal. But you're telling me what you did was a crime that you want to plead guilty to. So I need to ask you what makes you think under the circumstances that this was a crime? I mean, just doing it on it's own is not a crime. There has to be something that's prejudicial to good order and discipline or discrediting upon the armed forces that makes it a crime.

ACC: Sir, it impaired my - - it altered my thinking.

MJ: Okay.

ACC: For ten seconds I was, I guess what I could say, high for ten seconds.

MJ: All right.

ACC: And that's why I think it was wrong.

MJ: Okay. All right. And don't let me put words in your mouth. Don't let anybody put words in your mouth or in your heart, I mean, this is really important. Because you're telling me that you believe that to do that - - and because you got caught I guess that hurt good order and discipline in the military and military members shouldn't get high?

ACC: Yes, well - - yes, sir.

MJ: Okay. And again, do not let me put words in your mouth, because afterwards, don't - - two months from now I don't want to have your attorney come back and saying, well, he didn't really feel that, the judge put the words in his mouth. So, do you really feel like in your heart of hearts that, yeah, it is prejudicial to good order and discipline for me to have gotten high that afternoon?

ACC: Yes, sir.

We find that the military judge's questions during the providence inquiry elicited sufficient facts to support the appellant's guilty plea. The military judge went into great detail to ensure that the appellant understood the elements of the offense. The appellant explained and discussed the reasons why his conduct was prejudicial to good order and discipline. Additionally, the appellant told the military judge why he believed his conduct was service discrediting. Specifically, he said, "I belong to the Air Force. It [inhaling nitrous oxide] damages brain cells. It's bad for you. That's got to be discrediting to the Air Force." Later the appellant said, "Sir, being a part of the Air Force, I know I'm supposed to be on my toes, just always looking good even in the public eye, not just the military. And just, doing what I did in the car is definitely discrediting." The colloquy between the military judge and the appellant was much more than a "bare bones" providence inquiry where an appellant recited conclusions of law. *See Jordan*, 57 M.J. at 239. Even if it is later determined that the appellant's responses do not show a direct and palpable impact on good order and discipline, his responses show that his conduct was of a nature to bring discredit upon the armed forces. Therefore, we find the appellant's plea to Specification 2 of Charge III provident.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator