UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant SHERIDAN R. FERRELL II
United States Air Force

ACM 35581

23 August 2005

Sentence adjudged 30 January 2003 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 6 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Terry L. McElyea.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

STONE, JOHNSON, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial of two specifications of dereliction of duty and two specifications of larceny of military property of a value over $500 in violation of Articles 92 and 121, UCMJ, 10 U.S.C. §§ 892, 921. On appeal, he claims that the military judge erred in aggregating the value of some of the items he stole; that his pleas were improvident under a variety of theories; and that his sentence was inappropriately severe. The appellant asks for a sentence rehearing or, in the alternative, a new staff judge advocate's recommendation (SJAR) and convening authority's action. Finding merit in his aggregation claim, we

modify the findings, reassess the sentence, and return the record for a new SJAR and action.

Background

The appellant was assigned to the Joint Intelligence Operations Center, Headquarters United States Central Command (USCENTCOM), from 30 September 1999 until 9 August 2002, when he was relieved of duty and placed in pretrial confinement in connection with the offenses that led to his court-martial. The appellant held a Top Secret security clearance and worked in a sensitive compartmented information facility (SCIF) within USCENTCOM.

Contained in the SCIF were a number of portable computers used for the processing of Top Secret data[1] and other sensitive information. The proper control and safeguarding of such materials was a matter of great concern within the command generally and the appellant's work area in particular. The appellant was obliged to attend and satisfactorily complete a number of training briefings on the proper handling of these computers and the classified materials they contained. By virtue of his clearance and training, the appellant was permitted access to the SCIF essentially at will.

In late 2001, the appellant applied through his chain of command to become a warrant officer in the United States Army. Unfortunately, processing of his application was delayed, and the appellant became angry and began to feel resentful. Eventually, he hit upon a scheme to "get back" at the government for what he regarded as its ill-treatment of him: over the course of several weeks in the summer of 2002, he began stealing various pieces of equipment stored in the SCIF. Although he fully realized he was "screwing" his comrades at USCENTCOM and "disrupting" their operations,[2] the appellant engaged in multiple thefts, taking four laptops and two Palm Pilots. He later confessed that he planned to keep the items he stole or to sell them for profit.

When the initial thefts were discovered, military security officials ordered the immediate lock-down of the SCIF and everyone in it. While the parties at trial were commendably careful not to divulge specific details of the information contained on the stolen computers and Palm Pilots, the witnesses who testified described data that can only be described as extraordinarily vital and sensitive information.

In the investigation that followed the thefts, over 45 agents of the Air Force Office of Special Investigations were deployed to MacDill Air Force Base from all over the United States. In time, some 1,400 individuals were questioned, including the appellant.

[1] "Top Secret" information is defined as information whose "unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security." 40 C.F.R. § 11.4(f)(1).

[2] The prosecution offered testimony that USCENTCOM in general, and the appellant's work area in particular, were at the time active in executing Operation Enduring Freedom.

Although he initially lied about his involvement in the thefts, he eventually confessed and surrendered the stolen property, which he had taken to his home. There was no evidence offered that any classified data was ever actually lost.

Providency of the Appellant's Pleas

At trial, the appellant pled guilty to two specifications of dereliction of duty, consisting of removing the computers from the secure environment of the SCIF, and two specifications of larceny: one alleging theft of the computers, and another alleging larceny of the Palm Pilots and accessories. A third larceny specification was withdrawn pursuant to a pretrial agreement.

The appellant now contends that his plea to the second dereliction specification was improvident because the military judge asked a series of leading questions eliciting mostly yes or no responses. In evaluating this claim, we examine the record. *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992). The appellant signed a detailed stipulation of fact covering both dereliction specifications, which was offered and admitted during his providency inquiry. The military judge fully explained the elements and definitions relating to dereliction of duty when inquiring about his plea as to the first specification, and offered to repeat them when discussing the second -- an offer the appellant declined. Considering the record as a whole, we conclude the appellant's plea was provident. *See United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002).

The appellant also argues that his plea to Specification 2 of Charge II, alleging larceny of the two Palm Pilots and related accessories is improvident, because the value was alleged to be over $500. While the aggregate value of the two Palm Pilots does exceed $500, the record shows that they were each taken at different times. Even accounting for the accessories, the appellant did not exceed the $500 level charged in this specification on any one occasion.

Appellate government counsel correctly note that the appellant lodged no objection to aggregating the value of the Palm Pilots at trial or prior to the convening authority's action. The government urges us to apply the doctrine of waiver, arguing that this case does not meet the "plain error" standard of *United States v. Pabon*, 37 M.J. 836, 844 (A.F.C.M.R. 1993), cited by the appellant. Even were we to accept the government's argument, we are obliged to approve only those findings we conclude are correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When the facts recited during the providency inquiry create a substantial basis for questioning an appellant's guilt, his pleas are improvident and cannot be accepted. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The appellant's plea to larceny of military property of a value in excess of $500 was not provident and we will not affirm the finding of guilty as to that offense. However, there is no dispute that the appellant stole military property of a lesser value; we therefore affirm the finding as to Specification 2 of Charge II by excepting the words

"of a value more than $500" and substituting the words "of some value." The remaining findings are also affirmed.

Sentence Reassessment

Because we modified the finding as to Specification 2 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 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 specification noted above rendered no change to the factual basis on which this military judge, sitting alone, sentenced the appellant. We decline to adopt the appellant's cumbersome mathematical analysis of the ratios between the sentence awarded at trial and the various maximum sentences that could have been awarded. Taking into account the entire record, including the matters in extenuation and mitigation presented at trial, the grave nature of the offenses and the appellant's motives for committing them, we are confident that the military judge would have adjudged the same sentence even absent the improvident plea: no less than a dishonorable discharge, confinement for seven years, and reduction to the lowest enlisted grade.

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, however, 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 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.

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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator