UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CASEY K. FLETCHER
United States Air Force

ACM S32077

14 November 2013

Sentence adjudged 14 May 2012 by SPCM convened at Peterson Air Force Base, Colorado. Military Judge: Martin T. Mitchell (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PELOQUIN, Judge:

Consistent with his pleas, the appellant was convicted by a military judge sitting alone as a special court-martial of two specifications of wrongful distribution of 3, 4-Methylenedioxymethamphetamine (Ecstasy), and one specification of assault, in violation of in violation of Articles 112a and 128, UCMJ, 10 U.S.C. §§ 912a, 928. The adjudged sentence consisted of a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, while waiving mandatory forfeitures for the benefit of the appellant's dependent spouse and daughter. On appeal, the appellant asserts two errors: (1) His

guilty pleas to distribution of Ecstasy were improvident; and (2) He was denied the effective assistance of counsel. Finding no error that materially prejudices the appellant, we affirm.

Background

The appellant and Senior Airman (SrA) LH were acquaintances who both lived in base housing with their spouses. On information from SrA LH, the Air Force Office of Special Investigations (AFOSI), using SrA LH as their informant and agent, set up two controlled buys of Ecstasy from the appellant. On 1 July 2011, and again on 14 July 2011, the appellant, in response to requests from SrA LH, sold Ecstasy to SrA LH under the watchful eye of AFOSI.

In mid-August 2011, the appellant learned that his spouse and SrA LH were having an affair and that it had been ongoing during the course of the AFOSI operation. The appellant subsequently assaulted SrA LH, and when questioned by AFOSI about the assault, informed AFOSI of the affair.

The appellant pled guilty pursuant to a pretrial agreement and agreed to a Stipulation of Fact which laid out the facts and circumstances relevant to his actions.

Providency of Guilty Pleas

The appellant now contends his pleas were improvident because the military judge failed to sufficiently develop the facts to obviate a potential entrapment defense.

"[We] review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Ferguson*, 68 M.J. 431, 433-34 (C.A.A.F. 2010) (alteration in original) (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2010)). "Where the possibility of a defense exists, [our superior court] has indeed suggested that a military judge secure satisfactory disclaimers by the accused of this defense." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (citing *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983); *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976)). "The bottom line, however, is that rejection of the plea requires that the record of trial show a "substantial basis" in law and fact for questioning the guilty plea." *Id.* at 436.

The military judge fully realized, given that an AFOSI undercover operation was the avenue for discovering the appellant's misdeeds, that the appellant may have asserted an entrapment defense to exonerate himself. During a Rule for Courts-Martial 802 conference, trial defense counsel informed the military judge that he had determined, and the appellant concurred, that an entrapment defense was not applicable in this case. The

military judge read and reviewed the definition of entrapment with the appellant twice during the trial. The military judge questioned the appellant exhaustively regarding the defense. The appellant acknowledged he understood what an entrapment defense was and that it did not apply in his case. He admitted he was predisposed to distributing Ecstasy and that he did so of his own volition without coercion, as exemplified by the following colloquy:

> MJ: Sergeant Fletcher, do you agree that the defense of entrapment does not apply to your case?
>
> ACC: Yes, sir.
>
> . . . . .
>
> MJ: Once the suggestion was made by [SrA LH], were you inclined to commit the offense [of distribution of Ecstasy]?
>
> ACC: Yes, sir.
>
> . . . .
>
> MJ: Do you admit that you were predisposed to committing this offense?
>
> ACC: . . . So yes, Your Honor, I was predisposed to commit this offense.
>
> MJ: Do you admit that you were readily inclined to accept the opportunity furnished by [SrA LH] to commit this offense?
>
> ACC: Yes, Your Honor.
>
> . . . .
>
> MJ: Did anything or anyone force you to distribute Ecstasy?
>
> ACC: No, sir.
>
> MJ: Could you have avoided distributing Ecstasy if you had wanted to?
>
> ACC: Yes, sir.

We have also looked at the Stipulation of Fact and the appellant's text messages leading up to the Ecstasy distribution. It is apparent, from the agreed-upon facts of the case and the appellant's exchanges with SrA LH, that the appellant was acting of his own

accord and was predisposed to locating a source of the Ecstasy, obtaining Ecstasy from the source, and then distributing Ecstasy to SrA LH.

The record of trial clearly shows the appellant was aware and knowledgeable of the entrapment defense. The record clearly shows he affirmatively rejected the proposition that the defense applied to his actions. There is no "substantial basis" in law or fact to warrant rejection of the appellant's guilty plea. We find the plea was provident and, thus, within the military judge's discretion to accept.

Assistance of Counsel

The appellant contends that his trial defense counsel was ineffective by not fully advising him on the defense of entrapment, or fully investigating the facts which would support such a defense.

We review de novo claims of ineffective assistance of counsel. *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011). Claims of ineffective assistance of counsel are reviewed under the two-pronged test set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Green*, 68 M.J. 360, 361-62 (C.A.A.F. 2010). To prevail on a claim, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 361-62 (citing *Strickland*, 466 U.S. at 687; *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)). "[T]he defense bears the burden of establishing the truth of the factual allegations that would provide the basis for finding deficient performance." *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007) (citation omitted). Where there are opposing affidavits in a guilty plea case, a fact-finding hearing is not required if our review of the pleadings and the record "conclusively show that [the appellant] is entitled to no relief." *United States v. Ginn*, 47 M.J. 236, 244, 248 (C.A.A.F. 1997). We must consider whether the appellant's factual allegations contradict his admissions during the guilty plea inquiry. *Id.* If no reason is provided for rejecting the appellant's earlier assertion, his post-trial allegation can be rejected as inherently incredible and no rehearing should be ordered. *Id.* at 245.

There is no need for a fact-finding hearing in this case. The record of trial and the appellate filings do not support the factual premise raised by the appellant in his affidavit. The appellant asserts trial defense counsel merely mentioned the entrapment defense to him and immediately dismissed its applicability to the case. The appellant's current recollection is at odds with trial defense counsel's attested recollection of his discussions of the defense with his client, as well as his research into, and analysis of, the availability of the defense. Even more significant, the appellant's testimony at trial is at odds with his current recollection. At trial, the appellant twice acknowledged that he fully understood the defense and agreed with his trial defense counsel that it did not apply to

the circumstances of his case. As noted above, the appellant further testified that he was predisposed to distributing Ecstasy and did so of his own accord. Such testimony shows that he was fully aware of the defense and that he understood his actions and intentions negated the applicability of an entrapment defense.

The appellant's submission highlights the fact that his spouse and SrA LH were having an affair while SrA LH was engaged by AFOSI in the undercover operation. The appellant suggests that this affair was a stressor on him which made him vulnerable to the AFOSI operations. He further suggests that the Government continuing to target him, even as their agent was party to introducing this stressor, supported an entrapment defense. The appellant contends trial defense counsel failed to fully investigate these facts and use them to develop an entrapment defense.

We disagree. The facts reveal that the appellant did not become aware of this affair until well after he had distributed the Ecstasy to SrA LH. The appellant did have some knowledge of what he considered inappropriate text messages between SrA LH and his spouse. It also appears these messages bothered him and caused him to question the strength of his marriage. That said, whatever stress his knowledge of the actual affair placed on the appellant, it was not present until after he committed his offenses. More pointedly, the affair was not known to the Government until after the commission of the offenses. It stands that SrA LH's affair with the appellant's spouse was irrelevant to his proclivity to engage in this criminal conduct. Trial defense counsel reviewed the circumstances of the affair and assessed any nexus it may have to the AFOSI operation. Trial defense counsel, in discussion and consultation with the appellant, appropriately reviewed and considered the relevancy of the affair to an entrapment defense theory and reasonably determined the affair did not have a nexus to the Government's actions.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court