**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman JONATHAN T.J. HONG**
**United States Air Force**

**ACM 37508**

**04 October 2010**

Sentence adjudged 18 June 2009 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Reggie D. Yager, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges



PER CURIAM:

Pursuant to his pleas, the appellant was found guilty of divers wrongful use, divers distribution, divers introduction, and divers possession of Ecstasy with intent to distribute in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also convicted of divers possession of 1-benzylpiperazine (BZP) with intent to distribute in violation of Article 112a, UCMJ. The approved sentence consists of a bad-conduct discharge, confinement for nine months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant asserts one assignment of error before this Court: whether the appellant's plea to divers occasions of wrongful possession of BZP in Specification 5 of the Charge was improvident.

*Background*

The appellant was assigned to Naval Base Port Hueneme, California. In January 2009, the appellant purchased 50 pills that he thought were Ecstasy. The pills were both green and purple in color. A subsequent laboratory analysis revealed the purple pills to be Ecstasy and the green pills to be BZP, both Schedule I controlled substances. The appellant sold some of the Ecstasy and BZP pills to other Airmen but continued to possess the remainder.

*Providency of Plea*

"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). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *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)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). When there is "a substantial basis in law and fact for questioning the plea," the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004).

The appellant asserts that his plea to divers possession of BZP with intent to distribute was improvident because he possessed the drug on only one occasion. After a careful review of the record of trial, we agree. During his guilty plea inquiry, the appellant admitted to buying a bag containing pills that he thought were Ecstasy. In fact, some of these pills were BZP. Although he sold some of the BZP tablets, he retained the rest and did not acquire any more of the drug. Consequently, there was but one continuing possession of BZP during the charged time frame. The appellant's plea to possession on divers occasions was therefore improvident.

We affirm the findings of guilty of Specifications 1-5 of the Charge, excepting the words "on divers occasions" in Specification 5. Because we modified the findings, we must reassess the sentence or remand the case for a sentence rehearing. *United States v. Boone*, 49 M.J. 187, 194 (C.A.A.F. 1998). Before reassessing a sentence, this Court must be confident that, absent the error, "the sentence adjudged would have been of at least a certain severity." *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). Ultimately, a

sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). "If [we] cannot determine that the sentence would have been at least of a certain magnitude absent the error, [we] must order a rehearing." *United States v. Harris*, 53 M.J. 86, 88 (C.A.A.F. 2000).

We note that excepting the words "on divers occasions" from the specification did not change the maximum punishment that the appellant faced or alter the substantive evidence which formed the basis of the findings and sentence. Thus, the penalty landscape remains the same. Applying the criteria set forth in *United States v. Sales*, we conclude that we are able to determine with confidence what sentence the military judge would have imposed based on the modified findings. As the evidence concerning the possession of BZP was only a minor part of the appellant's overall misconduct, we are certain that even if the military judge had found the appellant guilty of only the single possession of BZP with intent to distribute, she would have imposed the same sentence adjudged at trial—a bad-conduct discharge, nine months of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. We reassess the sentence accordingly. Furthermore, we find that the sentence, as reassessed, is appropriate. *See United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990).

*Conclusion*

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

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court