UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman EDWARD V. JACKSON
United States Air Force

ACM S31116

31 August 2007

Sentence adjudged 6 January 2006 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judges: James L. Flannery and Barbara E. Shestko (sitting alone).

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND

Appellate Military Judges

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

The appellant was convicted, in accordance with his plea, of one specification of divers wrongful sales of military property of a total value more than $500.00 in violation of Article 108, UCMJ, 10 U.S.C. § 908. He was convicted, contrary to his plea of guilty to only a single larceny of military property, to one specification of divers larcenies of military property of a value of over $500.00 in violation of Article 121, UCMJ, 10 U.S.C. § 921. He was sentenced by a military judge to a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The convening authority approved the findings and only

so much of the sentence that provided for a bad-conduct discharge, confinement for 3 months, and reduction to E-1.

On appeal, the appellant contends his guilty plea was improvident as to the wrongful sales of military property specification because the value of no individual sale exceeded $500.00 and only the aggregate amount of the sales exceeded $500.00. Finding merit in this assignment of error, we modify the findings and reassess the sentence.

Background

The appellant was assigned to the 49th Civil Engineering (CE) Squadron at Holloman Air Force Base, New Mexico. He admitted to selling 4 government owned 12-volt car batteries to a business in a nearby town. The batteries were worth $167.39 each. He pled guilty to selling them on divers occasions. He sold two batteries on one occasion and the other two, two weeks later, to the same business.

During his providency inquiry, he told the military judge that the value of the items he wrongfully sold was more than $500.00. However, from the facts elicited during the *Care*[1] inquiry, it is clear that the value of the two items sold during each of the two sales was $334.78. Thus, as the appellant points out, the $500.00 value was exceeded only if you consider the value of the items sold in the aggregate.

The law governing this type of situation is found in *United States v. Oliver*, 43 M.J. 668, (A.F. Ct. Crim. App. 1995). *Oliver* involved charging thefts of property with a value greater than $100.00, but it makes perfect sense to apply its lessons to selling military property as well. Applying the concepts from *Oliver* to this case and adjusting the values to meet these charges, the rules for a specification alleging divers sales of military property are as follows: If any one sale in the specification is valued at over $500.00, then it is permissible to sentence an accused based on sales of a value over $500.00. If no single item sold was worth over $500.00, but the total punishment of all the sales in the specification, if charged separately, meet or exceed the punishment for that of military property valued at over $500.00, then it is permissible to charge it as a sale of military property with a value of more than $500.00. The $500.00 discriminator is important because, among other things, it boosts the maximum punishment from one year of confinement to 10 years of confinement and increases the severity of the discharge from a bad-conduct discharge to a dishonorable discharge. *See also United States v. Harding*, 61 M.J. 526 (Army Ct. Crim. App. 2005).

The facts in appellant's case do not meet either of these rules. No one sale was valued at over $500.00 and if the two sales were charged separately, the maximum punishment would only have carried a punishment of confinement for two years,

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

forfeiture of all pay and allowances, and a bad-conduct discharge. However, as charged and pled at trial, with a value of more than $500.00, the maximum punishment would have been forfeiture of all pay and allowances, confinement for 10 years, and a dishonorable discharge, if this case were tried at a general court-martial. The appellant agues that this knowledge, by the military judge, "affected the deliberation and ultimate sentence as it pertained to the length of confinement and type of discharge adjudged."

Providency of the Appellant's Pleas

Where an accused raises a matter inconsistent with his plea, the military judge has a duty to inquire further. *United States v. Thompson*, 45 C.M.R. 300, 301 (C.M.A. 1972). The inquiry should attempt to resolve the inconsistency by calling it to the accused's attention and offering the accused an opportunity to explain or withdraw the inconsistent matter. *United States v. Adams*, 33 M.J. 300, 302-03 (C.M.A. 1991); *United States v. Garcia*, 48 M.J. 5 (C.A.A.F. 1997). Where there is "a 'substantial basis' in law and fact for questioning the guilty plea," the plea cannot be accepted. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (citing *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973)). The military judge must instead enter a plea of not guilty to the offense on the accused's behalf, and the trial must proceed as though he had pled not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a).

Here, the facts as revealed during the providency inquiry set up an inconsistency requiring further inquiry. However, the inconsistency exists only as to the value of the property sold, and not to the other elements of the offenses. There is no dispute that the property stolen and wrongfully sold was military property of some value; we therefore affirm the findings of guilt as to the Specification of Charge I by excepting the words "of a total value of more $500" and substituting the words "of a value of less than $500." The remaining findings are also affirmed.

Sentence Reassessment

Because we modified the findings, 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)).

Our modification of the finding does not change the maximum possible sentence in this case. As noted, if tried at a general court martial, the maximum sentence for the charge and specification as charged would have included 10 years of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. However, because this case was tried as a special court martial, the jurisdictional limit of the court provided for a maximum sentence of one year confinement, two-thirds forfeitures of pay for one

year, and a bad-conduct discharge for *both* charges and their specifications. This jurisdictional limit is even less than the full punishment that could be given for wrongfully selling property valued at less than $500.00 which is a confinement for one year, forfeiture of *all* pay and allowances, and a bad-conduct discharge.

Our ruling does not change the facts that were presented to the military judge when she sentenced the appellant. The items stolen and sold remain the same; their individual values have not changed. Likewise, the appellant's duty performance and background have not changed. The appellant argues the military judge's erroneous belief that a greater maximum sentence would have been authorized, had this case been tried at a general court-martial, somehow influenced her sentencing decision, and she decided on a greater sentence. We disagree. A military judge is presumed to know and follow the law absent clear evidence to the contrary. *United States v. Erickson*, 65 M.J. 221 (C.A.A.F. 2007); *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). We are confident that the military judge applied the maximum sentence applicable to that of a special court-martial and was not influenced by a mistaken belief as to a higher sentence. Any error was nullified by her knowledge of the jurisdictional limit of the special court-martial. We believe she would have adjudged the same sentence even absent the improvident plea: no less than a bad-conduct discharge, confinement for five months, and reduction to E-1. *Doss*, 57 M.J. at 185.

Conclusion

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

AFFIRMED.

Judge BRAND did not participate.

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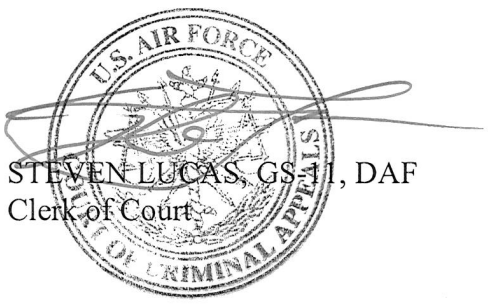

STEVEN LUCAS, GS-11, DAF
Clerk of Court