UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSHUA J. MARTINEAU
United States Air Force

ACM 37987

23 April 2012

Sentence adjudged 27 June 2011 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, forfeiture of $750.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of failure to go, absence without leave, wrongful use of methamphetamines and marijuana, and wrongful possession of Hydrocodone, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 9 months, forfeiture of $750.00 pay per month for 6 months, and reduction to E–1. In accordance with a pretrial agreement, the convening authority reduced the confinement period to 7 months and approved the remainder of the sentence as adjudged. Although the appellant's defense counsel submitted this case on its merits, we find the appellant's plea to wrongful possession of

Hydrocodone to be improvident. We set aside and dismiss this specification and reassess the sentence in our decretal paragraph.

Background

The appellant pled guilty to possessing two tablets of Hydrocodone. During his providence inquiry, the appellant told the military judge that he found the drugs while cleaning out his car. The appellant stated that the drugs did not belong to him and he believed that an acquaintance of his had dropped the drugs while riding in the car the previous day. The appellant testified that he put the drugs into a cigarette pack. He then told the military judge that he intended to throw them into a dumpster when he finished cleaning the car but was apprehended by law enforcement twenty minutes later before he could dispose of the drugs.

Review of Guilty Pleas

"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) (citations omitted). A military judge abuses this discretion if he fails to obtain from the accused an adequate factual basis to support the plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). "[I]n reviewing a military judge's acceptance of a plea for an abuse of discretion appellate courts apply a substantial basis test: Does the record as a whole show 'a substantial basis in law and fact for questioning the guilty plea.'" *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)) (internal quotations omitted).

Innocent Possession

The elements of wrongful possession of a controlled substance are: (1) that the accused possessed a certain amount of a controlled substance, and (2) the possession was wrongful. *Manual for Courts-Martial, United States*, Part IV, ¶ 37.b(1) (2008 ed.). Our superior court has recognized that, under certain circumstances, possession of a controlled substance may be "innocent." *United States v. Kunkle*, 23 M.J. 213, 215 (C.M.A. 1987). If a controlled substance comes into a person's possession inadvertently or unwittingly, the temporary possession will not be considered wrongful if he or she intends to deliver the substance to law enforcement or to immediately destroy it. *Id*. at 217. The Court stated that such possession is innocent because it occurs without criminal intent. *Id*.

Based upon the information discussed during the guilty plea inquiry and the stipulation of fact introduced at his court-martial, it is unclear whether the appellant innocently possessed the Hydrocodone. The appellant testified that he was unaware of the drug's presence until he found it in his car only 20 minutes before he was

apprehended. During his discussion with the military judge, the appellant stated that he intended to dispose of the drug shortly after he discovered it. The military judge did not inquire whether the appellant had sufficient opportunity to destroy the substance before he was apprehended. This colloquy was required in order to determine whether the innocent possession defense could have applied. The military judge's failure to engage the appellant on this issue prevents us from concluding that the "acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969) (citations omitted). *See also* Rule for Courts-Martial 910(e), Discussion ("If any potential defense is raised by the accused's account of the offense or by other matters presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense."). The military judge's decision to accept the appellant's guilty plea on this specification amounts to an abuse of discretion. The appellant's guilty plea with respect to Specification 3 of Charge II is therefore set aside and dismissed.

Sentence Reassessment

Because we have dismissed Specification 3 of Charge II, we must analyze the case to determine whether we can reassess the sentence. *See United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002). "If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *Id*. at 185 (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). We conclude that we can.

Under the facts of this case, we find no prejudicial impact upon the sentence. It was clear from the record of trial that possession of the Hydrocodone was of minimal import in determining the appellant's sentence. The adjudged sentence was far below the maximum permitted for the appellant's remaining convictions. Therefore, we are confident that the military judge would have given the appellant the same sentence had he not considered the offense that was the subject of the improvident plea. Excluding evidence concerning the improvident plea and considering only the other evidence properly before the military judge at trial, we approve the sentence as adjudged. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990). We further find the reassessed sentence to be appropriate. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

Specification 3 of Charge II is set aside and hereby dismissed. The remaining findings 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court