

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic RYAN E. MCCLAIN
United States Air Force**

ACM 36429

28 December 2006

Sentence adjudged 17 June 2005 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 13 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jefferson E. McBride.

Before

**BROWN, FRANCIS, and PETROW
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

In a mixed plea case, the appellant was found guilty of three specifications of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. Appellant contends that a stipulation of fact admitted at trial constituted a confessional stipulation and that the military judge failed to adequately advise the appellant prior to admitting it into evidence as required by *United States v. Bertelson*, 3 M.J. 314, 316-17 (C.M.A. 1977).

Background

The controversy swirls around Specification 2 of the Additional Charge, alleging that the appellant stole the sum of \$1485.00 from the Community Bank, one of the offenses to which the accused pled not guilty. During an inquiry conducted pursuant to *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), concerning Specification 1 of the Additional Charge, to which he pled guilty, appellant testified that MG, then stationed at RAF Mildenhall, was separating from the Air Force because his mother was ill. MG provided the appellant with power of attorney to ship his household goods. The appellant found MG's checkbook amongst the household goods, and signed MG's name on seven checks, totaling \$3385.00. The appellant was the payee and endorser on each of the checks. He cashed the checks at the Community Bank at RAF Mildenhall. Of that total, \$1900.00 was taken from MG's bank account.

During the course of this inquiry, the military judge observed that a stipulation of fact offered by the prosecution asserted inculcating facts concerning the allegation contained in Specification 2 of the Additional Charge, to wit: "The remaining \$1,485.00 did not come from [MG's] account [at The Lowell Five Bank in Lowell, Massachusetts] due to [MG] closing his account. The \$1,485.00 came from the possession of Community Bank. [The appellant] did not know [MG's] account was closed when he cashed the checks mentioned in paragraph 6." The following paragraph states: "[The appellant] cashed the checks outlined in Paragraph 6 with the intent to permanently deprive [MG] of the use and benefit of the money (\$3,385.00)."

Having deduced that she was now dealing with a confessional stipulation, the military judge entered into the following discussion with the appellant:

MJ: Since this discussion and you've had your conversation with me, it flows over into some of the facts that affect potentially one of the other charges and that is, Specification 2 of the Additional Charge, and arguably Charge II and its Specification. Let me just go back to the Stipulation of Fact inquiry and make sure; did you consult fully with your counsel about this stipulation?

ACC: Yes, Your Honor.

MJ: After consulting with your counsel, do you understand that in truth you're admitting certain facts that the government could use arguably to help them prove the remaining charges and specifications?

ACC: Yes, ma'am.

MJ: Now, you understand that by admitting in Prosecution Exhibit 1, the facts that talk about the checks that go over that \$1,900.00 amount, that those are facts that do not necessarily have to come in to support my assessment of Specification 1 of the Additional Charge. In other words, in order for your pretrial agreement to stand, all you needed to do was to talk about the facts and circumstances about those two charges and those specifications that you've entered pleas of guilty to, do you understand that?

ACC: Yes, Ma'am.

MJ: Did you understand that you didn't have to admit to writing the checks greater than the amount of \$1,900.00 when you agreed to the stipulation?

ACC: Yes, Your Honor.

MJ: So, you knew in effect by stipulating to these facts, that these could be facts that the government arguably will attempt to use to prove their case for the remaining two specifications and charges that are left in this trial?

ACC: Yes, Your Honor.

MJ: Are you doing that of your own free will?

ACC: Yes, Your Honor.

MJ: Did anyone force or coerce you into doing that?

ACC: No, your honor.

The subject of the discussion then changed to focus on the terms of the pretrial agreement.

MJ: [W]hat this says is that this [pretrial] agreement would be cancelled and has no effect whatsoever . . . if you fail to agree with the trial counsel to a reasonable stipulation concerning the facts and circumstances to which you are pleading guilty. I advise you, that under the law, that particular agreement means that all you needed to agree to or approve of in this Stipulation of Fact, with regard to the checks written off [MG's] account, were those \$1900.00 worth of checks. Do you understand that?

ACC: Yes, Your Honor.

MJ: So, you went above and beyond that of your own free will even though the pretrial agreement didn't require you to do that?

ACC: Yes, Your Honor.

....

MJ: I want to make sure you're clear that the pretrial agreement when it talks about the reasons of the Stipulation of Fact concerning the charges to which you've entered pleas of guilty, technically, all you needed to do under the law, would be to admit to the facts to support these two charges that we're talking about and not any facts that would support the other charges. Do you understand that?

ACC: Yes, ma'am.

MJ: So, do you understand that it's your right, basically, to have that information excised out of the Stipulation of Fact?

ACC: Yes, Your Honor.

MJ: Nonetheless, do you agree to permit the stipulation with its facts, and, however these facts might support Charge II and its Specification and Specification 2 of the Additional Charge? Do you still nonetheless agree to the Stipulation of Fact?

ACC: Yes, Your Honor.

....

MJ: A confessional stipulation is simply where you've pled not guilty, but yet you've entered into a stipulation that, at least from the government's perspective, arguably, seems to prove their case. Do you understand that?

ACC: Yes, ma'am.

MJ: [D]o you understand that you have the right not to enter into a stipulation that, in essence from the government's perspective, might arguably confess to the two crimes that you've pled not guilty to?

ACC: Yes, ma'am.

MJ: And you agreed to do that anyway?

ACC: Yes, ma'am.

The military judge then proceeded to conduct the standard inquiry regarding the pretrial agreement. The military judge went through each element of the agreement and the appellant agreed that he understood its contents, and that the agreement contained all of the agreements and understandings that he had made with the government. Both the prosecution and defense counsel agreed with the military judge's interpretation of the agreement.

Neither the prosecution nor defense introduced evidence on the merits other than the stipulation. In his closing argument, defense counsel argued that the facts in the stipulation failed to establish that the appellant had the necessary intent to deprive the Community Bank of its funds, being unaware that MG had closed his account.

Discussion

A military judge's decision on admission of evidence is reviewed on appeal for a clear abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). The judge's decision must be "arbitrary," "clearly unreasonable," or "clearly erroneous" to warrant reversal. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987).

A confessional stipulation is described as one which "establishes, directly or by reasonable inference, every element of a charged offense" to which "the defense does not present evidence to contest any potential remaining issue on the merits." See Rule for Courts-Martial 811(c), Discussion; *Bertelson*, 3 M.J. at 315 nn.1-2.

To establish larceny, the government must prove that the accused intended to permanently deprive "another person" of the use and benefit of the property. *Manual for Courts-Martial, United States, (MCM)*, Part IV, ¶46(b)(1)(d) (2005 ed.). The term "any other person" means any person who has possession or a greater right to possession than the accused. *MCM*, Part IV, ¶46(c)(1)(c)(iii). Accordingly, the fact that the appellant was unaware that MG had closed his account, and that Community Bank would be the one to suffer the loss, did not serve to defeat a finding that the appellant had the requisite intent to commit larceny. Therefore, the information in the stipulation dealing with those funds in excess of the \$1,900.00 loss to MG, established, directly or by reasonable inference, a prima facie case against the appellant as to Specification 2 of the Additional Charge. As a result, Prosecution Exhibit 1, in fact, constituted a confessional stipulation to an offense to which the appellant had pled not guilty.

In *Bertelson*, the Court addressed the nature of the judicial inquiry to be conducted where the facts asserted in a stipulation of fact amounted to a confession to an offense to which the accused was pleading not guilty. *Bertelson*, 3 M.J. at 317. In *United States v.*

Watruba, 35 M.J. 488, 490 (C.M.A. 1992), our superior court specified the elements of that inquiry necessary to satisfy *Bertelson*. First, the military judge is required to expressly communicate to the accused before accepting his confessional stipulation that it cannot be accepted without his consent. Second, the judge must apprise the accused that the Government has the burden of proving beyond a reasonable doubt every element of the offense and that by stipulating to material elements of the offense, the accused alleviates that burden. Third, the military judge must also ascertain from the accused on the record that a factual basis exists for the stipulation. Finally, the trial judge also shall conduct a plea bargain inquiry in accordance with the guidelines set forth in *United States v. Green*, 1 M.J. 453 (C.M.A. 1976). *Watruba*, 35 M.J. at 490 (quoting *Bertelson*, 3 M.J. at 316-17). In *Green*, the court required that the military judge conduct an inquiry to ensure that the accused understands the meaning and effect of each condition of the pretrial agreement, that both the accused and the prosecution agree that the written agreement encompasses all of the understandings of the parties, and that the judge's interpretation of the agreement comports with their understanding of the meaning and effect of the plea bargain. *Green*, 1 M.J. at 456.

Based upon the military judge's inquiry outlined above and the rest of the record before us, we conclude that the military judge comported with the requirements of both *Bertelson* and *Green*. Accordingly, we find that the admission of the stipulation of fact did not constitute an abuse of discretion by the military judge.

The approved findings and sentence 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 and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator