UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain CHARLES D. MOORE
United States Air Force

ACM 37968

17 January 2013

Sentence adjudged 10 May 2011 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Michael J. Coco (sitting alone).

Approved sentence: Confinement for 4 month, a fine of $17,798.00, and a dismissal.

Appellate Counsel for the Appellant: Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre, Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and CHERRY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of two specifications of larceny of military property and two specifications of making a false claim in violation of Articles 121 and 132, UCMJ, 10 U.S.C. §§ 921, 932. The court adjudged a dismissal, confinement for four months, forfeiture of all pay and allowances, and a fine of $17,798. A pretrial agreement capped confinement at four months. The convening authority approved the sentence as adjudged, except for the forfeitures, and waived automatic forfeitures for the benefit of the appellant's family. The appellant assigns as error that his plea to larceny of claimed

per diem expenses is improvident because he raised a potential defense not resolved by the military judge and that the fine is inappropriately severe.

The appellant was on active duty orders from November 2008 to March 2010. He deployed to Iraq from December 2008 to June 2009, and was assigned to Wright-Patterson Air Force Base, Ohio, from August 2009 to March 2010. For the period of his assignment to Wright-Patterson, the appellant claimed monthly lodging expenses based on a fraudulent lease agreement and fraudulent certifications of lost rental receipts for a total amount of approximately $6,700. Also, during the entire period of active duty, he falsely claimed that his dependent family members resided in New Hampshire and, as result, received over $11,000 more in basic allowance for housing payments than he was entitled to for the actual residence in Kentucky.

Guilty Plea Inquiry

During the plea inquiry, the appellant admitted that he used fraudulent documents "to get paid for lodging expenses that [he] didn't accrue." He told the military judge that he actually lived in a different apartment complex from that claimed, where he paid nothing in exchange for unspecified "security guard" or "courtesy officer" duties. The military judge inquired further into the misrepresentation used to obtain the rental payments:

> MJ: All right. And what did you put in these travel vouchers that you misrepresented?
>
> ACC: I claimed to be living at a residence that I did not live at and was paying rent for somewhere that I wasn't. I did not have to pay rent where I was actually living.

The appellant acknowledged that he would not have received the money if he had told the truth about his living arrangements. The appellant now argues that the military judge erred by accepting his plea because he stated that he "paid" rent by exchanging services which would entitle him to the claimed per diem payments. Of course, the claim he submitted to the Government mentioned nothing about such an exchange because, as already pointed out, the appellant submitted fraudulent rental payment receipts for a non-existent apartment.

A military judge must determine whether an adequate basis in law and fact exists to support a guilty plea by establishing on the record 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). Acceptance of a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the plea are reviewed de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We afford significant deference to the military judge's determination that a factual basis exists to support the

plea. *Id. See also United States v. Barton*, 60 M.J. 62 (C.A.A.F. 2004); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *Jordan*, 57 M.J. at 238. Rejection of a guilty plea requires that the record show a substantial basis in law and fact for questioning the providence of the plea. *Inabinette*, 66 M.J. at 322; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

The appellant's statement about exchanging his services for rent could perhaps raise a defense if viewed in isolation but, in context, the statement does not raise a substantial basis to question the providence of his plea. The appellant told the judge that he submitted fraudulent rental receipts and a fraudulent lease to get reimbursed for rent that he did not pay. He admitted that, if he had told the truth about his rental arrangement, he would not have been paid by the Air Force. Despite his fully informed guilty plea with the assistance of counsel, despite his sworn admissions that his claim for rental expenses was made up out of whole cloth, he now argues that the military judge should have done more. We think not.

The mere possibility of a defense is insufficient to overturn a guilty plea, and "[w]e also will not 'speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas.'" *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995)). In *Faircloth*, the Court set aside a split decision of the lower court which had invalidated a guilty plea to larceny based on the lower court majority becoming "troubled" by statements in the plea inquiry which raised possible issues regarding the right to possession of certain charged negotiable instruments. *Id*. at 173. In reversing the decision, the Court endorsed the comments of Senior Judge Pearson who wrote in partial dissent: "[T]his is a guilty plea, folks. Whether someone is an 'owner' or 'any other person' is a matter of proof which an accused may contest at trial. By pleading guilty, appellant knowingly waived a trial of the facts as to that issue." *Id.* at 174. Such is the case here.

The appellant would have the military judge and this court speculate on the nuances of barter and exchange, the value of services exchanged, and how a reimbursing authority would compute the value of those services in determining what, if any, payment was due – and all of this in a case where the appellant admits that he was not even living where he claimed. The opportunity to develop and litigate such facts was at trial, and the appellant freely and voluntarily waived that opportunity. He told the military judge that he stole the per diem money by submitting fraudulent documents and that, if he had told the truth, he would not have been paid the money. That is sufficient for the military judge to accept the plea of guilty, and we find no substantial basis to question that plea.

Sentence Appropriateness

The appellant argues that his sentence to a $17,798 fine is inappropriately severe in light of a Government lien placed on the appellant's "pay and taxes" in the amount of $8,757.26, and asks that the fine be reassessed and reduced by that amount. We review de novo whether the sentence is appropriate. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Fines are certainly not limited to the amount of unjust enrichment; in fact, fines may be imposed even where there is no unjust enrichment. *United States v. Stebbins*, 61 M.J. 366, 370 (C.A.A.F. 2005) (A fine of $75,000 following a conviction of rape and forcible sodomy was upheld.). Here, the appellant used his active duty service as an opportunity to defraud the Government of over $17,000. Regardless of later recoupment actions, the sentence to a fine is entirely appropriate.

Conclusion

The approved findings and the 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court