UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ROBERT L. MOUTON
United States Air Force

ACM 35735

16 November 2005

Sentence adjudged 29 July 2003 by GCM convened at Kadena Air Base, Japan. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and $1000.00 fine.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrew S. Williams, and Major Bryan A. Bonner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Major John C. Johnson, and Captain Stacey J. Vetter.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's answer. The appellant contends the military judge should not have accepted his guilty plea to Specification 1 of Charge II, housebreaking, in violation of Article 130, UCMJ, 10 U.S.C. § 930. He asks us to affirm only the lesser-included offense of unlawful entry. We agree.

The evidence shows the appellant unlawfully entered the dormitory room of his friend so he could obtain his checking account and bank routing numbers. He wanted to use these numbers to steal money. According to the record that is exactly what he did.

The narrow question for our review is whether unlawfully entering the dormitory room and copying down the account numbers constitutes the offense of housebreaking. In this case, housebreaking requires unlawful entry with the intent to commit larceny therein. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 56(b)(2) (2002 ed.). "Therein" lies the problem. The appellant contends he could not properly plead guilty to housebreaking because he did not intend to commit larceny in the dorm room. He just wanted the account numbers. He planned to steal the money later.

We review a military judge's acceptance of a guilty plea under an abuse of discretion standard. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We will not disturb a guilty plea unless there is a substantial basis for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). In the appellant's case, we find his actions do not support a conviction for housebreaking in Specification 1 of Charge II. While he entered the dormitory room unlawfully, he did not do so with the intent to commit larceny "therein." His act of copying the account numbers did not constitute a larceny offense. *See United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997). Although his plea to this housebreaking specification was improvident, we nevertheless find the military judge's inquiry sufficient to support a plea of guilty to the lesser-included offense of unlawful entry in violation of Article 134, UCMJ, 10 U.S.C. § 934.

Having concluded this housebreaking specification cannot stand, we must now either return the case for a rehearing or reassess the sentence. *See United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). Given the circumstances of this case, we are confident that we can determine the appropriate sentence without conducting a rehearing. Even though the appellant's actions did not meet the technical requirements for a housebreaking conviction, this in no way mitigates the seriousness of his misdeeds. This is the appellant's third court-martial for similar offenses and his second punitive discharge. Reassessing the sentence on the basis of the error noted, the entire record, and applying the principles set forth in *Sales*, we are convinced beyond a reasonable doubt that the military judge would have imposed no less than a bad-conduct discharge, confinement for 15 months, forfeiture of all pay and allowances, and a $1,000 fine. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). The approved sentence is wholly appropriate. *See United States v. Healy,* 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Because we are not sending the case back for a rehearing, we except the words "with intent to commit a criminal offense, to wit: larceny, therein" from Specification 1 of Charge II. Consistent with the discussion above, we find the appellant's guilty plea to Specification 1 of Charge II improvident and affirm his conviction of the lesser-included offense of unlawful entry under Article 134, UCMJ. The approved 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; *United States v. Reed*,

54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court