UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant THEODORE D. MIRICH
United States Air Force

ACM 36775

17 July 2007

Sentence adjudged 28 April 2006 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Timothy M. Cox.

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

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of four specifications of prejudicial conduct or conduct of a nature to bring discredit upon the armed forces, in violation of Article 134, UCMJ, 10 U.S.C. § 934. His approved sentence included a bad-conduct discharge, confinement for 60 months, and reduction to the grade of E-1.

We reviewed the record of trial, the assignment of errors, and the government's answer thereto. The appellant asserts his guilty plea to Specification 4 of the Charge was improvident because the specification failed to state an offense, and that his sentence to a bad-conduct discharge and confinement for 60 months is inappropriately severe.

The appellant avers that Specification 4 fails to state an offense because KW, a 13 year old dependent child of another servicemember, was incapable of engaging in the "solicited" criminal conduct, and/or the record is devoid of any factual basis from the appellant that KW was aware she was being asked to join in a criminal venture. The appellant was charged with a violation of the general article and not solicitation. There was discussion on the record that the most analogous crime was a violation of 18 U.S.C. § 2422.

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). The providency inquiry must reflect the fact that the accused understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). A military judge must explain the elements of the offense and ensure that a factual basis for each element exists. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172 (C.A.A.F. 1996)). We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

A specification states an offense if it alleges every element. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). The sufficiency of a specification may be sustained if the necessary facts can be found within the terms of the specification in a specification not challenged prior to the findings or sentence. *Id.* (citing *United States v Mayo*, 12 M.J. 286, 288 (C.M.A. 1982)).

In regard to Specification 4 of the Charge, the appellant was advised of the two elements of the offense. He admitted both elements and described for the military judge his illegal conduct when he tried to entice KW into coming to his home to engage in sexual activity. The specification states an offense and the appellant's plea was provident and supported by evidence in the record of trial. The military judge did not abuse his discretion in accepting that plea.

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Although the military judge sentenced the appellant to a dishonorable discharge and confinement for 8 years, his approved sentence included a bad-conduct discharge and confinement for 60 months. After a careful review of the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence is not inappropriately severe.

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; *United States v Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator