UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALDRIAN O. NIVERBA
United States Air Force

ACM 36798

21 November 2007

Sentence adjudged 22 June 2006 by GCM convened at RAF Lakenheath, United Kingdom and RAF Mildenhall, United Kingdom. Military Judge: Gordon R. Hammock (Arraignment) and Adam Oler (Trial).

Approved sentence: Bad-conduct discharge, confinement for 21 months, forfeiture of all pay and allowances for 21 months, reprimand, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Chadwick A. Conn, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with his pleas, the appellant was convicted by general court-martial of two specifications of larceny of non-military property of a value of more than $500 and two specifications of larceny of non-military property of a value of $500 or less, in violation of Article 121, UCMJ, 10 U.S.C. § 921. Contrary to his plea, he was also convicted on one specification of larceny of military property of a value of more than $500, in violation of Article 121, UCMJ. A panel of officers sentenced him to a bad-

conduct discharge, confinement for 2 years, forfeiture of all pay and allowances for 24 months, reduction to E-1, and a reprimand. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge, confinement for 21 months, forfeiture of all pay and allowances for 21 months, reduction to E-1, and a reprimand.

The appellant asserts his pleas to the two specifications alleging larceny of non-military property of a value of more than $500 were improvident because the property's value was calculated by mistakenly aggregating items taken during separate larcenies. We find the challenged pleas provident and affirm the findings. However, we find error in the judge's determination of the maximum allowable sentence and reassess the adjudged sentence.

Background

The specifications at issue stem from the appellant's illicit use of two other individuals' credit cards to buy merchandise for himself. He used each card more than once and charged a combined total of slightly more than $1,200 on one and £ 461 (British pounds) on the other. The appellant indicated during the *Care*[1] inquiry that at the exchange rate in effect at the time of his offenses, £ 461 was worth more than $500.

Instead of charging a separate specification for every purchase the appellant made, the government charged a single specification per credit card. Each specification alleged the appellant stole money "on divers occasions . . . with a combined value of more than $500." $500 is the break point for determining the maximum potential punishment for larceny under Article 121, UCMJ. The maximum punishment for larceny of property valued at $500 or less is limited to a bad-conduct discharge and confinement for 6 months. Larceny of property valued at more than $500 carries the potential for a dishonorable discharge and confinement for 5 years.[2] *Manual for Courts-Martial* (*MCM*), Part IV, ¶ 46.e.(1)(b), (d).

When multiple larcenies are combined into a single specification, Rule for Courts-Martial (R.C.M.) 307(c)(3) and the accompanying Discussion at ¶ (H)(iv) require that the specification state the value of each included larceny. *MCM*, Part II at 29. The specifications at issue did not follow that format and no information on the value of the stolen property or the number of individual thefts concerned, or whether the individual thefts occurred substantially at the same time and place, was elicited at trial. Despite that lack of information, the military judge, with the express agreement of the government and the defense, applied the greater punishment factor applicable to larcenies of property

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).
[2] Because one of the appellant's other offenses included the possibility of a dishonorable discharge, that element of the potential maximum punishment is not in issue on appeal, only the length of confinement.

valued at over $500 when informing the appellant and the court-martial panel members of the maximum permissible punishment.

Maximum Permissible Punishment

The appellant contends, and the government concedes, that the maximum period of confinement for each of the challenged offenses was 6 months, not the 5 years applied by the judge. We agree.

When multiple thefts are combined under one specification, an accused is not automatically subject to the greater punishment factor solely because the combined value of the items stolen exceeds $500. Rather, for the greater punishment factor to apply, the government must establish at least one of the following circumstances: 1) The thefts to be aggregated occurred substantially at the same time and place; 2) At least one of the individual thefts exceeded $500; or 3) The total individual number of thefts aggregated, if charged separately, would expose the accused to a maximum punishment equal to or greater than the maximum for the aggregated offense charged. *United States v. Christensen*, 45 M.J. 617, 619 (Army Ct. Crim. App. 1997); *United States v. Oliver*, 43 M.J. 668, 670 (A.F. Ct. Crim. App. 1995). In the case sub judice, there is no evidence in the record to indicate the existence of any of these circumstances. The appellant, upon questioning by the military judge, confirmed he used each credit card more than once and that the combined value of the resulting thefts exceeded $500. However, no further information on the individual thefts aggregated in each specification was sought or provided. In the absence of such information, the increased punishment factor cannot be applied and the maximum confinement for each specification is limited to 6 months. The military judge erred by concluding otherwise and by improperly advising the appellant and the court-martial panel members that the maximum potential period of confinement was 9 years longer than that legally authorized.

Providency of the Appellant's Pleas

The appellant also asserts that because the military judge misinformed him as to the maximum potential period of confinement for the challenged specifications, his pleas of guilty to those specifications were not provident. We find to the contrary.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and will not overturn that decision unless the record reveals "a substantial basis in law and fact" to question it. *United States v. Simmons*, 63 M.J. 89, 92 (C.A.A.F. 2006) (internal citations omitted). "A military judge may not accept a guilty plea unless he makes 'such inquiry of the accused' that satisfies him [that there is] a 'factual basis for the plea.'" *Id.* (quoting R.C.M. 910(e)). "[The required] factual predicate is sufficiently established if 'the factual circumstances as revealed by the accused himself objectively

support [the] plea.'" *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)).

The appellant's pleas meet the required standard. The challenged specifications allege the appellant stole money on divers occasions and that the combined value of the thefts exceeded $500 per victim. During the *Care* colloquy, the appellant detailed for the military judge how, when, and where he committed the charged offenses, admitted that he illicitly used each credit card more than once, and detailed to the judge the total amounts stolen, which exceeded $500 per victim. In short, the appellant's responses during the *Care* inquiry clearly established every element alleged in each challenged specification.[3]

Given the above, the only real issue is whether the erroneous determination of the maximum possible punishment for these two offenses itself made the appellant's plea improvident. A "substantial misunderstanding" by an accused of the maximum punishment to which he is subject as a result of his plea can render a guilty plea improvident. *United States v. Mincey*, 42 MJ 376, 378 (C.A.A.F. 1995) (citations omitted). However, not every misunderstanding as to the maximum punishment is "substantial." To determine whether a misunderstanding qualifies as a "substantial misunderstanding" we must consider "'all the circumstances of the case . . . to determine whether the misapprehension of the maximum sentence affected the guilty plea, or whether that factor was insubstantial in [the appellant's] decision to plead' guilty." *Id.* (citations omitted). *See also United States v. Ontiveros*, 59 M.J. 639, 640 (C.G. Ct. Crim. App. 2003).

In this case, the mistake by the military judge erroneously elevated the maximum permissible confinement time for all offenses to which the appellant pled guilty from 2 years, 6 months to 11 years, 6 months, and the overall permissible confinement from 12 years to 21 years.[4] Although this nine-year difference is certainly considerable, we conclude it was not a substantial factor in the appellant's decision to plead guilty. The appellant's testimony during the *Care* inquiry overwhelmingly established the case against him and there is nothing in the record to suggest that his pleas were otherwise improvident. Further, the appellant pled guilty to the challenged specifications without the benefit of a pretrial agreement. After evaluating all the circumstances of this case, we conclude there is no reasonable likelihood the appellant would have demanded trial on the offenses at issue if he knew the actual maximum period of confinement was far

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[3] *Cf. United States v. Harding*, 61 M.J. 526 (Army Ct. Crim. App. 2005), in which the court, under similar circumstances, found the appellant's pleas improvident solely because no evidence was adduced during the *Care* inquiry as to the individual thefts that made up the aggregated amount charged.

[4] On one of the other charges, the appellant pled guilty to the lesser included offense of wrongful appropriation of military property valued at more than $500, which carries a maximum confinement of 6 months. He was convicted of the greater larceny offense, with a maximum confinement of 10 years. The total maximum confinement for all offense of which the appellant was convicted was 12 years. Because of the error here at issue, the judge mistakenly advised the members the maximum confinement was 21 years.

shorter than he was advised at trial. We accordingly find that his pleas to the challenged specifications were provident.

Reassessment of Sentence

Having found error in the military judge's misstatement of the maximum permissible punishment to the court-martial panel, we must determine whether a sentence rehearing is required or whether we can ourselves reassess the sentence. If we can determine to our satisfaction that "absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error" and we may reassess the sentence accordingly. *United States v. Moffeit*, 63 M.J. 40, 41 (C.A.A.F. 2006) (quoting *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). "If the error at trial was of constitutional magnitude, then [we] must be satisfied beyond a reasonable doubt that [the reassessment will cure] the error." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002).

Applying this analysis, and after careful consideration of the entire record, we are satisfied under either of the above standards that, in the absence of the error, the members still would have rendered the same sentence, and we reassess the sentence accordingly. By far, the most serious offense of which the appellant was convicted was theft of $43,000 worth of military equipment, which by itself carries a maximum potential sentence of confinement for 10 years. The offenses covered by the challenged specifications, while not inconsequential, are relatively minor by comparison. Further, the facts and circumstances of the appellant's offenses remain the same, and were fully presented to the panel prior to sentencing. Similarly, the information presented to the sentencing authority on the appellant's duty performance and background remains the same and is not affected by the error. Based on these same factors, we are also convinced the convening authority's action would have remained the same.

Conclusion

The approved 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, 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, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court