UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DANIEL W. NORTHERN JR.
United States Air Force

ACM 37984

13 February 2013

Sentence adjudged 24 June 2011 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Michael J. Coco.

Approved sentence: Dishonorable discharge, confinement for 3 years and 6 months, forfeiture of all pay and allowances, and a reprimand.

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

Appellate Counsel for the United States: Colonel Don M. Christensen, Major Lauren N. Didomenico, and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and SANTORO
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant pursuant to his pleas of conspiring to distribute ecstasy, disobeying a no-contact order, wrongfully using marijuana, wrongfully using ecstasy, wrongfully using psilocybin, wrongfully distributing ecstasy, wrongfully distributing marijuana, assaulting a witness with force likely to cause grievous bodily harm, obstructing justice by assaulting a witness and telling him to stop lying, and obstructing justice by posting the name of a "snitch" on his Facebook page and allowing his Facebook page to be used to facilitate threats against that witness, in violation of Articles 81, 90, 112a, 128, and 134, UCMJ, 10 U.S.C. §§ 881, 890, 912a, 928, and 934. The adjudged and approved sentence was a dishonorable discharge, confinement for 3 years and 6 months, forfeiture of all pay and

allowances, and a reprimand.[1] The appellant now challenges the sufficiency of his guilty plea to one of the obstruction of justice specifications. Finding no error, we affirm.

Providence of Plea to Obstruction of Justice

The specification at issue alleged the appellant obstructed justice by:

> calling Airman First Class [(A1C) N], a material witness in the said investigation, a snitch and facilitating threats against him because of the statements [A1C N] made concerning the wrongful distribution and use of ecstasy by [the appellant], to wit: by specifically calling a material witness, [A1C N] a snitch on [the appellant's] Facebook page and facilitating threats against [A1C N].

The military judge advised the appellant of the elements of the offense and, after reviewing a stipulation of fact and questioning the appellant, accepted his plea of guilty. We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Nance*, 67 M.J. 362, 365 (C.A.A.F. 2009). The appellant argues that the plea is improvident because (1) The plea inquiry did not comport with *United States v. Hartman*, 69 M.J. 467 (C.A.A.F. 2011), as required when an offense implicates protected liberty interests; (2) The military judge failed to elicit facts sufficient to establish that the appellant facilitated the threats made against A1C N; and (3) The military judge failed to elicit facts sufficient to establish the appellant's conduct was prejudicial to good order and discipline or service discrediting, otherwise known as the terminal element.

The appellant's reliance on *Hartman* is misplaced, as *Hartman* requires the military judge discuss the distinction between protected and non-protected behavior when a charge may implicate both criminal and constitutionally protected conduct. 69 M.J. at 468. There is no constitutionally protected liberty interest in speech made with the specific intent to obstruct justice, as the appellant admitted was his intent. *See generally United States v. Williams*, 553 U.S. 285, 286 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment."); *Virginia v. Black*, 538 U.S. 343, 344 (2003) ("First Amendment permits a State to ban "true threats."); *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) ("[S]peech integral to criminal conduct, such as fighting words, threats, and solicitations remain categorically outside First Amendment protection.").

The stipulation of fact and plea colloquy establish that the appellant identified A1C N as a "snitch" on his Facebook page and, rather than being a passive observer of others' comments, actively and repeatedly encouraged additional dialog. The appellant's cousin later posted what the appellant agreed were threats against A1C N. The appellant

[1] A pretrial agreement that limited confinement to no more than 42 months had no effect on the sentence.

acknowledged he was in control of the contents of his Facebook page and their visibility to the public and he decided not to delete or hide them. Further, the appellant told the military judge, "I realize that by posting that [A1C N] was a snitch, I instigated and facilitated the verbal and physical threats against him. Finally, we note the appellant admitted he publicly identified A1C N as a snitch for the purpose of influencing A1C N's later testimony. This admission alone establishes the commission of the offense and the threatening postings on the appellant's Facebook page that the appellant now challenges would have been properly considered by the court-martial when determining sentence. On this record, we cannot say there is a "substantial basis" for questioning the sufficiency of the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Contrary to the appellant's assertion that there were no facts to support the so-called terminal element – that is, that the appellant's conduct was prejudicial to good order and discipline or service discrediting – the appellant admitted under oath in both the stipulation of fact and during his plea colloquy that his conduct was, in fact, both prejudicial to good order and discipline and service discrediting. The appellant told the military judge:

> I realize that my conduct was of a nature to bring discredit upon the Armed Forces because other civilians read and commented on my posting about A1C [N]. My actions were not representative of an Airman in the United States Air Force and my posting along with the later postings by my cousin could have harmed the reputation of the Air Force or lowered it in public esteem.

The appellant affirmed that his conduct satisfied that element under further direct questioning by the military judge. We therefore hold the appellant's admissions were sufficient to establish this element of the offense. *See Nance*, 67 M.J. at 365.

Conclusion

The approved findings and sentence are correct in law[2] 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).

[2] The effect of the Article 134, UCMJ, 10 U.S.C. § 934, specification's failure to allege the terminal element has not been raised on appeal. We note the military judge advised the appellant of the terminal element and the appellant admitted his conduct satisfied that element. Therefore, in the context of this guilty plea, we find that any error was harmless. *See United States v. Ballan*, 71 M.J. 28, 34 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).

Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist