UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW D. OLSON
United States Air Force

ACM S31781

30 March 2011

Sentence adjudged 20 January 2010 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Wes Moore.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Major Coretta E. Gray, Major Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

Before a special court-martial, the appellant entered mixed pleas of (1) not guilty to one specification of attempted wrongful distribution of cocaine, (2) guilty to one specification of divers wrongful use of cocaine, and (3) guilty to one specification of wrongful possession of hydrocodone, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. After the military judge accepted the appellant's pleas of guilty, the government withdrew the charge of attempted distribution of cocaine pursuant to a pretrial agreement that capped confinement at three months. A panel of officers sentenced the appellant to a bad-conduct discharge and hard labor without confinement for three months. The appellant waived submission of clemency matters, and the

convening authority approved only the bad-conduct discharge. The appellant now asserts that the military judge erred by accepting his plea of guilty to possession of hydrocodone because, he argues, the military judge failed to adequately inquire into possible lawful possession based on a valid prescription. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

The appellant admitted during the plea inquiry that he used two to three lines of cocaine at an off-base apartment on 3 April 2009, and used several more lines about a month later. On the second occasion, he purchased the cocaine for $50, and on this same occasion the drug dealer also gave the appellant a hydrocodone pill after the appellant complained of a backache. The appellant explained:

> Even though it was given to me for a backache, I knew that hydrocodone is a controlled substance, that I am only legally allowed to possess it with a prescription. I did not have a prescription for it and I did not believe that my backache was a medical justification or defense for my possession.

When the appellant mentioned that he knew it was wrongful to possess hydrocodone because he had previously had a prescription for it, the military judge ensured that this was not a potential defense:

> [MJ:] So based on that [previous] experience, you knew it was something you couldn't have without a prescription?
>
> [ACC:] Yes, sir.
>
> [MJ:] Did you have any reason to believe that that previous prescription was still valid, or was still active?
>
> [ACC:] No, sir.

The military judge then inquired whether the appellant had prescriptions for any painkillers, and the appellant replied that he received a prescription for Vicodin following hemorrhoid surgery. The military judge again ensured that this was not a potential defense:

> [MJ:] So you could have gone to the doctor or whatever and said that your pain was not being taken care of and maybe they would have prescribed you something stronger?
>
> [ACC:] Yes, sir.

[MJ:] So you had no belief, or reason for believing, that you were entitled to possess the hydrocodone on this occasion?

[ACC:] Yes, sir – no, sir I didn't have any reason to believe.

Finally, in a stipulation of fact signed by the appellant and admitted during the plea inquiry, the appellant states that his possession of hydrocodone "was not pursuant to any lawful prescription."

Only after his case had been forwarded for appellate review did the appellant first claim that his prescription for Vicodin excused his possession of hydrocodone. In an affidavit he states that he was "lead to believe" that his possession of hydrocodone was unlawful because it is different from Vicodin, and he attaches an informational brochure from the Drug Enforcement Agency stating that Vicodin is a trade name for hydrocodone. He also attaches his prescription for Vicodin dated 18 February 2009 that apparently prescribes 20 pills at a specified dosage unit.

Providency of Plea to Wrongful Possession of Hydrocodone

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *see also United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts as revealed by the accused himself to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). The rejection of a plea requires more than a mere possibility of a defense; to reject a plea there must be "a 'substantial basis' in law [or] fact for questioning the [appellant's] guilty plea." *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008) (first alteration in original) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

Contrary to the appellant's assertion that the military judge "failed to adequately resolve the issue of wrongfulness," we find that the military judge elicited more than sufficient information on which to base his acceptance of the appellant's plea of guilty to wrongful possession of hydrocodone. During several exchanges between the appellant and the military judge concerning the wrongfulness of his possession of hydrocodone in the context of his prescription for Vicodin, the appellant affirmed that his possession was wrongful. Only now on appeal does he invite us to speculate that the hydrocodone he received from the cocaine dealer was (1) the same chemical composition as that authorized by the prescription, (2) the same dosage unit as authorized by the prescription, (3) not in excess of the number of pills authorized in the prescription, and (4) lawfully

obtained as a result of the prescription. By his sworn statements to the military judge the appellant shows that the answer to each of these questions is no.

Neither the appellant nor his counsel claimed at trial that the February 2009 prescription for Vicodin somehow justified the appellant's receipt of hydrocodone from a drug dealer over two months later. The military judge inquired about the appellant's ability to return to the doctor for more pills if the pain had persisted, and the appellant replied that he could have but did not. This exchange clearly shows that both the appellant and the military judge understood the illegally obtained hydrocodone to be in addition to the amount of Vicodin prescribed in February. Although it is well settled that obtaining a controlled substance with a valid prescription is a defense to criminal prosecution for such possession, controlled substances obtained from an unlawful source, like a drug dealer, are not obtained *pursuant to a valid prescription*. *See generally United States v. Pariso*, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007) (valid prescription provides authorization to possess and use controlled substance, but possession and use must be within ambit of validity specified in the prescription).

We find that the record shows no basis in law or fact for rejecting the appellant's plea of guilty, and we will not now speculate on the existence of facts that might invalidate that plea especially where the matter raised post-trial contradicts the express admissions of the appellant. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). The time to litigate is at trial, but the appellant and his counsel chose to plead guilty; armed with their knowledge of the facts, to include the February 2009 prescription for Vicodin, they negotiated a pretrial agreement that resulted in the dismissal of an attempted distribution charge and capped the appellant's exposure to confinement at three months. The military judge fully explored with the appellant the possibility that his prescription provided a defense, and the appellant affirmed that it did not. The record contains ample evidence to support the military judge's acceptance of the appellant's pleas of guilty, and we find that he did not abuse his discretion in doing so.

Conclusion

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, 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 are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court