UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain BRYAN S. POLLOCK
United States Air Force

ACM 35360

24 November 2004

Sentence adjudged 9 August 2002 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: Kurt D. Schuman.

Approved sentence: Dismissal, confinement for 45 days, and a fine of $969.00.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Maria A. Fried, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher and Major Steven R. Kaufman.

Before

STONE, GENT, and MOODY
Appellate Military Judges

PER CURIAM:

We have carefully examined the record of trial and the briefs from the defense and government. The appellant raises three issues for our consideration. We find no error and affirm.

The appellant first challenges his plea of guilty to larceny of medications valued at $969.00. At the onset, we note that consolidating numerous individual acts into a single specification may benefit an appellant by reducing the maximum punishment or, at least, eliminating a possible exaggeration of charges. *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988); *United States v. Oliver*, 43 M.J. 668 (A.F. Ct. Crim. App. 1995). The appellant did not object to the joinder of what he now claims are multiple larcenies into one duplicitous specification, and thus he waived any complaint that he may now have

about the pleadings, barring plain error. Rules for Courts-Martial 905(b)(2) and 910(j); *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998). Appellate consideration of a duplicity claim, like those claims based on multiplicity, is effectively waived by an unconditional guilty plea, except where the record shows that the challenged offense is facially duplicative. *United States v. Lloyd*, 46 M.J. 19, 20 (C.A.A.F. 1997). We find no plain error and conclude the appellant's pleas are otherwise provident. The military judge properly advised the appellant of the elements of the offense, and nothing in the record reasonably raised a defense or a matter inconsistent with his pleas. Moreover, even if we assume there was a misunderstanding as to the maximum punishment, we conclude it was not a substantial factor in the appellant's decision to plead guilty. *See United States v. Mincey*, 42 M.J. 376 (C.A.A.F. 1995). We find no substantial basis in law or fact for questioning the plea. *See United States v. Pinero*, 60 M.J. 31, 33-34 (C.A.A.F. 2004). Therefore, we hold the military judge did not abuse his discretion in accepting the appellant's guilty plea to larceny. *See United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

The appellant next argues he was unfairly prejudiced when trial counsel, contrary to the evidence, argued that the appellant was "absolutely dangerous" for stealing prescription medications with the intent to give them to financially needy members of his family. Because the appellant failed to object to trial counsel's argument, we review this matter for plain error. *Powell*, 49 M.J. at 462-63. Sentencing arguments "must be based on the evidence and must not unduly inflame the passions or prejudices of the court-members." *United States v. Rodriquez*, 28 M.J. 1016, 1022 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 150 (C.M.A. 1990). Looking at the trial counsel's argument as a whole, and in view of trial defense counsel's very strong rebuttal to the lack of evidence supporting this argument, we conclude there was no plain error in this case.

As to the appellant's final assignment of error concerning the appropriateness of his sentence, we have carefully considered the "nature and seriousness of the offense[s] and the character of the offender," and conclude his sentence is appropriate. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 181 (C.M.A. 1959)).

Conclusion

The findings and the sentence are correct in law and fact and no error prejudicial to the appellant's substantial rights 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 findings and the sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court