UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic EDWARD A. RAASCH JR.
United States Air Force

ACM 35717

14 October 2005

Sentence adjudged 2 July 2003 by GCM convened at Kadena Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 21 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia Jr., Major Terry L. McElyea, Major Antony B. Kolenc, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Lane A. Thurgood.

Before

MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PETROW, Judge:

The appellant was convicted in accordance with his pleas of dereliction of duty, disobeying a lawful regulation, divers thefts of currency, and the writing of bad checks with intent to defraud, in violation of Articles 92, 121, and 123a, UCMJ, 10 U.S.C. §§ 892, 921, 923a. On appeal, the appellant argues that his guilty plea to larceny of currency of a value of more than $500 on divers occasions was improvident, and that a miscalculation of the maximum punishment for Charge II was substantial enough to

render his plea of guilty improvident. Finding no error, we affirm the findings and sentence.

If an accused, after entering a guilty plea, sets up a matter inconsistent with the plea the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A providence inquiry into a guilty plea must establish not only that the accused himself believes he is guilty, but also that the factual circumstances as revealed by the accused objectively support that plea. *United States v. Higgins*, 40 M.J. 57, 68 (C.M.A. 1994); *United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000). Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

The essence of the first error raised by the appellant is premised on the assertion that, during the *Care*[1] inquiry, the military judge failed to adequately impress upon the appellant that there was a distinction between pleading to the theft of a sum in excess of $500, and pleading to several thefts which, in the aggregate, exceeded the sum of $500. Based on this alleged oversight, the appellant contends that his plea of guilty was improvident.

While the military judge did not specifically define the term "on divers occasions" for the appellant, the record reflects that the appellant clearly understood that the specification for Charge II accused him of perpetrating more than one act. We need hardly proceed past the appellant's first utterances regarding the matter:

> MJ: All right. Tell me about this theft from [Senior Airman (SrA) Paige Hart]. What happened there?
>
> ACC: On diverse occasions, I had Paige Hart's ATM card. . . . On some occasions I've taken money out for her when she asked . . . I sometimes took more money than I should have when she asked and kept it for myself.

This was shortly followed by:

> MJ: So would you agree then you exceeded the authorization she gave you?
>
> ACC: Yes, sir.

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

MJ: You did this on more than one occasion, correct?

ACC: Yes, sir.

MJ: And *collectively*, talking about all the money you took from her beyond her authorization, was that over 500 bucks?

ACC: It was around that, sir.

MJ: Okay. Have you sat down and reviewed some of the--possibly the receipts--and thought back in your mind and talked about this with Captain Thomas? As we sit here today, can you look me in the eye and tell me it was over 500 bucks?

ACC: Yes, sir.

MJ: Sure about that?

ACC: Yes, sir.

MJ: Okay. Now although Airman Hart didn't give you any authorization to take these additional amounts of money, say the $40 to $60 *on those different occasions*, did you think you had authorization to take that?

ACC: Not--no, I really didn't.

(Emphasis added.) These are not mere conclusions of law being recited by an accused, but are clearly a recitation of the facts surrounding the offense which reflects that he understood the essence of the offense, and knew to what he was pleading guilty. Accordingly, we find no merit to the first assigned error. *See Prater*, 32 M.J. at 436.

With regard to the second assigned error, the military judge calculated the maximum period of confinement under Charge II to be five years. The trial defense counsel concurred. The *Manual* specifies the maximum punishment for larceny of property other than military property based upon the total amount stolen. For a value of $500 or less, the maximum punishment is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 46e(1)(b) (2002 ed.). For a value of more than $500, the maximum punishment is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years. *Id.* at ¶ 46e(1)(d).

In *United States v. Oliver*, 43 M.J. 668 (A.F. Ct. Crim. App. 1995), this court explained the methodology used in discerning the maximum punishment in offenses

involving multiple thefts.[2] Where the specification alleges multiple thefts of an aggregate value in excess of $500, the military judge must first analyze the evidence to determine if the government can prove separate thefts. *Id.* at 670. If the government can prove that any one theft was for more than $500, then the higher "more than $ [5]00" punishment level is to be applied. *Id.* In the alternative, if "the government could allege and prove separate specifications with punishments which, when combined, equal or exceed the maximum punishment for the aggregate specification," then the "more than $ [5]00" punishment level would again be appropriate. *Id.* at 668. *See also* Rule for Courts-Martial (R.C.M.) 307(c)(3), Discussion (H)(iv).

A review of the stipulation of fact and of the accused's testimony during the *Care* inquiry has convinced us that neither of the above techniques were satisfied in this case. Regarding the first calculation method, there is simply no evidence that any one theft exceeded $100 much less $500.

With regard to the second method, the appellant testified during the *Care* inquiry, that "on some occasions" SrA Hart would ask him to get money for her through use of her ATM card, and that he "sometimes" took more money out than she had requested and kept it for his own use. He would take $40 to $60 more than authorized by SrA Hart. The appellant testified that on one occasion, he used SrA Hart's debit card absent a request from her to do so, and on that occasion used it to purchase some small items at the shoppette.

From the stipulation of fact, the only fact relevant to this issue is that, in April 2003, SrA Hall discovered there were some transactions on her bank statement that she did not make which totaled over $500.

To apply the second method, it is necessary to cobble together from the available evidence enough specifications to produce an aggregate amount of punishment that equals or exceeds five years confinement. The average theft appears to be in the amount of $50. Although there is testimony that the total amount stolen was over $500, there is no estimate as to how many thefts occurred. Thus, the available evidence is insufficient to determine if the higher punishment is triggered under the second method.

In *Oliver*, the accused was found guilty of stealing telephone services by using his roommate's telephone credit card number to make over $1,300 in long distance phone calls. In the stipulation of fact introduced at trial, the government included the roommate's phone bills which established the dates and amounts of the calls from which could be fashioned specifications sufficient to equal or exceed the equal to or over $100 punishment level. However, no equivalent quality or quantity of evidence is available in the instant case to identify ten separate incidents of theft.

[2] At that time, the enhanced punishment amount was of a value more than $100 rather than the current $500.

The failure of the trial defense counsel to object to the military judge's determination of the maximum sentence at trial constituted waiver. R.C.M. 905(e). Therefore, we review for plain error. *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). To constitute plain error the error must be "obvious and substantial," and is invoked in cases in which the "fairness, integrity or public reputation of judicial proceedings" is seriously affected. *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986); *United States v. Atkinson*, 297 U.S. 157, 160 (1936).

The maximum sentence calculated by the military judge for all offenses was 48 years confinement, including the maximum 5 years confinement for Charge II. Based on the above analysis, however, the correct maximum sentence is 43 years, 6 months confinement. The sentence imposed consisted of a bad-conduct discharge and 21 months confinement.

We find no plain error and conclude that the appellant's pleas of guilty were provident, notwithstanding the erroneous advice regarding the maximum confinement. *See United States v. English*, 25 M.J. 819, 822 (A.F.C.M.R. 1988). While a 4 year, 6 month error in the calculation of the punishment was substantial when considered in isolation, it ceases to be so in view of the maximum punishment of 43 years and 6 months confinement. The circumstances of this case do not lend themselves to the observation that the appellant's pleas of guilty were viewed by him as "the only means of avoiding a crushing sentence." *Id.* (citing *United States v. Hunt*, 10 M.J. 222, 224 (C.M.A. 1981)). Nor is the error of such a magnitude that it materially prejudices a substantial right of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *Powell*, 49 M.J. at 465.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court