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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSE L. RAMIREZ JR.
United States Air Force

ACM 35579

25 January 2006

Sentence adjudged 20 February 2003 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Carlos L. McDade, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JOHNSON, Judge:

The appellant was convicted pursuant to his pleas of wrongful distribution and introduction of ecstasy onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A general court-martial consisting of a military judge sitting alone sentenced the appellant to a bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged and waived automatic forfeitures for the benefit of the appellant's spouse.

The appellant has raised two assignments of error for our consideration: (1) Whether the appellant's guilty pleas to wrongful distribution and introduction of ecstasy are improvident because the military judge failed to adequately inquire into and resolve a potential entrapment defense raised by the appellant during the providence inquiry and in his unsworn statement; and (2) Whether this Court should disapprove the adjudged forfeitures in light of *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002), because the convening authority's action fails to properly effectuate his intent to waive mandatory forfeitures for the benefit of the appellant's spouse. We find error and set aside the action.

Background

The appellant and Airman First Class (A1C) A first met in November 2001 at their squadron soccer game. Because both were from Houston, Texas, and shared similar interests they became friends. By February 2002, they became roommates, sharing an off-base apartment together. Over the course of their friendship, the appellant and A1C A took frequent road trips to Houston.[1] According to A1C A, who testified under a grant of immunity, in the spring of 2002, on one of their road trips back to Nebraska, the appellant told A1C A that he had used ecstasy while he was in Houston. A1C A testified that the appellant described the side effects of the drug and encouraged him to try it. A1C A also testified that in late May 2002, while at their apartment, the appellant told him that he was going to sell some ecstasy to a civilian in Omaha, Nebraska.

On 21 May 2002, A1C A contacted an agent assigned to the Air Force Office of Special Investigations (AFOSI) because he disagreed with the appellant bringing drugs on base and selling them to civilians in Nebraska. AFOSI decided to use A1C A as an informant and gave him instructions on how to orchestrate and participate in a controlled buy. In late May 2002, before the appellant left for Houston again, A1C A asked the appellant to purchase ecstasy for him.[2] A1C A told the appellant that the drugs were for a woman whom he liked and who wanted to get high. A1C A did not know how much to ask for so the appellant helped him decide how much ecstasy and marijuana he needed. On this occasion, when the appellant returned to Nebraska, he did not bring back any drugs for A1C A.

In mid-June 2002, when A1C A learned the appellant was driving back to Houston, he again asked the appellant to purchase ten pills of ecstasy for him. He used the same story, that a female friend wanted it. This time, the appellant brought back ecstasy for A1C A. The appellant asked A1C A to either pick up the drugs at his off-base apartment or they could meet at A1C A's house.[3] A1C A instead suggested that the appellant bring the ecstasy to him on base because he was having car problems. As an

[1] The appellant had just gotten married and was visiting his new wife and his family.
[2] During the providence inquiry, the appellant stated that A1C A asked him to bring back ecstasy three or four times.
[3] By this time, A1C A had moved out of the apartment.

incentive for the appellant to bring the drugs on base, A1C A offered to buy the appellant lunch. However, the appellant apparently did not consider this lunch offer an incentive. During the providence inquiry the appellant said "When we talked he said that if I could bring them on base that he would take me to lunch, he was going to buy me lunch *for some reason, I'm not sure why*." (Emphasis added.)

The appellant and A1C A made numerous attempts to exchange the drugs for money; the first couple of times the appellant cancelled (scheduling conflicts) and then A1C A cancelled a couple of times (difficulty coordinating with the AFOSI). The appellant indicated during his providence inquiry that, but for the scheduling conflicts, he would have met A1C A on base the first time they agreed to meet. More than a week had passed since the appellant's return to the local area before he and A1C A met.

On 25 June 2002, A1C A met the appellant on base at his duty site. When the appellant attempted to give the ecstasy to A1C A, A1C A told him that he had some of the appellant's things in his car and that they should just go outside. As they were walking to his car, the appellant again attempted to give A1C A the ecstasy, but A1C A refused to take the drugs. A1C A reminded the appellant that A1C A would buy the appellant lunch. Once at the car, as the appellant was putting the drugs in A1C A's car, AFOSI agents who were watching the transaction immediately apprehended the appellant and A1C A.

Entrapment Defense

During the providence inquiry, the military judge discussed the defense of entrapment at length. She specifically asked the appellant why it took more than one suggestion from A1C A before the appellant actually brought ecstasy back to him. The appellant indicated it was a lack of follow through on his part and also because he was not interested in doing it because he did not want to get into trouble. The appellant admitted he changed his mind and decided to bring the ecstasy back because he thought he could trust A1C A. When asked whether he would have done it for any other friend whom he trusted, the appellant ultimately responded, "probably."

Discussion

If an accused elects to plead guilty, our superior court has imposed an affirmative duty on military judges to conduct a detailed inquiry into the offenses charged, the accused's understanding of the elements of each offense, the accused's conduct, and the accused's willingness to plead guilty. *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). "A guilty plea will be rejected only where the record of trial shows a substantial basis in law and fact for questioning the plea." *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). If an accused, after a plea of guilty, sets up matter inconsistent with the plea, a plea of not guilty shall be entered into the record, and the court shall proceed as though he had

pleaded not guilty. *Hardeman*, 59 M.J. at 391; *United States v. Clark*, 28 M.J. 401, 405 (C.M.A. 1989). Furthermore, "an accused servicemember cannot plead guilty and yet present testimony that reveals a defense to the charge." *Clark*, 28 M.J. at 405. Article 45, UCMJ, 10 U.S.C. § 845, requires military judges to resolve inconsistencies and defenses during the providence inquiry or the guilty plea must be rejected. *See also United States v. Perron*, 58 M.J. 78, 82 (C.A.A.F. 2003); *United States v. Outhier*, 45 M.J. 326 (C.A.A.F. 1996).

Entrapment is an affirmative defense. Rule for Courts-Martial (R.C.M.) 916(g). It is a "defense if the criminal design or suggestion to commit the offense originated [with] the [g]overnment and the accused had no predisposition to commit the offense." *Id*.; *see also United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002). The defense has the initial burden of proving there was an inducement by the government agent to commit the crime. Once the defense has met their burden, the government must prove beyond a reasonable doubt that the criminal design did not originate with the government or that the accused had a predisposition to commit the offense prior to being approached by the government agent. *Hall*, 56 M.J. at 436. In *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992), the court defined "inducement" as:

> government conduct that 'creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense.' Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship.' Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.

Id. (internal citations omitted).

Furthermore, predisposition relates to a law-abiding citizen. *United States v. Lubitz*, 40 M.J. 165, 167 (C.M.A. 1994). "A law-abiding person is one who resists the temptations, which abound in our society today, to commit crimes." *Id*. (quoting *United States v. Evans*, 924 F.2d 714, 717 (7th Cir. 1991)). "When a person accepts a criminal offer without being offered extraordinary inducements, he demonstrates his predisposition to commit the type of crime involved." *Lubitz*, 40 M.J. at 167.

Although A1C A, working as an AFOSI informant, repeatedly asked the appellant to purchase drugs for him and suggested that the appellant bring the ecstasy on base, we do not find government inducement. Our superior court has held "[a] government agent's repeated requests for assistance in acquiring drugs do not in and of themselves constitute the required inducement." *United States v. Howell*, 36 M.J. 354, 360 (C.M.A. 1993). What is lacking in the case sub judice is persuasive evidence that shows the appellant was an "undisposed person or law-abiding citizen." The ultimate question is whether the

appellant was predisposed to distribute ecstasy to A1C A and to introduce it on a military installation, a question which we answer in the affirmative.

There was testimony that the appellant was very familiar with ecstasy. According to A1C A, the appellant had used the drug, explained the side effects to him, and even encouraged him to try some. The appellant's statement that he was "nervous about even having the Ecstasy off base" indicates that he may have been more comfortable with transferring the drugs on base. A1C A also testified that the appellant told him about a civilian in Omaha to whom the appellant was going to sell ecstasy.

Additional corroborating evidence of the appellant's predisposition to distribute ecstasy and introduce it on a military installation is the appellant's own testimony during the providence inquiry. When the military judge asked him about the price he paid for the ecstasy he responded he had to pay a higher price for the drugs because he "didn't buy it from the same person." He stopped short of saying he didn't buy it from the same person he bought it from before. Furthermore, A1C A testified that the appellant helped him arrive at a number of ecstasy pills when he first asked the appellant to bring back some drugs from Houston. We did not ignore the appellant's statement that he did not bring drugs back the first time A1C A asked him because he did not want to get into trouble. However, we find that the appellant's fear of getting into trouble is not equivalent to a lack of predisposition. *See Clark*, 28 M.J. at 406. Accordingly, we hold the appellant's guilty pleas to the offenses were provident and that the military judge adequately resolved the entrapment defense that was raised by the appellant's testimony.

We next decide whether the military judge should have reopened the providence inquiry based on some statements the appellant made during his unsworn presentation. During his unsworn statement, the appellant told the judge that he wanted to tell her about the offenses he committed. He said,

> about a week went by without us being able to work out a time and place for me to give him the pills. At a point, I was so nervous about even having the Ecstasy off base I told A1C [A] that I didn't want them and that I was going to just take the money loss and flush them down the toilet. He [A1C A] said, "No, I want them."
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> . . . .
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> Ma'am, what I did that day I will regret for the rest of my life. Even though I brought the pills to base because Airman [A] asked me to, I can't blame him and I don't blame him. Ma'am, I know I have no one to blame for this but myself. *I could have said no to him more than once*. I could have put an end to the whole thing and cut it off before it even started but I didn't.

(Emphasis added.)

At issue is the appellant's comment about wanting to get rid of the ecstasy before the actual transfer to A1C A took place and A1C A's insistence that he still wanted the drugs. However, moments after the appellant made the statement about flushing the drugs, he took full responsibility for his criminal behavior, admitting that he could have refused to distribute the ecstasy to A1C A. The appellant resolved the potential entrapment defense with his own statements that he could have put an end to the entire transaction. Accordingly, we hold the military judge was not required to reopen the providence inquiry.

Emminizer

After the trial, the convening authority deferred the adjudged and required forfeitures until the date of the action, 16 May 2003. On that date, he directed that forfeiture[4] of all pay and allowances be waived for a period of six months and directed that the money be paid to the appellant's dependent. However, the convening authority did not first modify or suspend the adjudged forfeitures, as required by *Emminizer*, 56 M.J. at 441. In light of our superior court's holding in *United States v. Lajaunie*, 60 M.J. 280 (C.A.A.F. 2004), we conclude that it is necessary to return this case to the convening authority for a new action that expressly complies with *Emminizer*.

Conclusion

The record of trial is returned to The Judge Advocate General for remand to the convening authority for a new action consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[4] Although the word "forfeiture" was inadvertently missing from that sentence in the action, we are certain that the convening authority intended to waive the forfeiture of pay and allowances and did not intend to waive the appellant's pay and allowances.