UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RICHARD L. ROEBUCK
United States Air Force

ACM 35203

9 May 2005

Sentence adjudged 2 May 2002 by GCM convened at Hurlburt Field, Florida. Military Judge: Ann D. Shane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 15 months, and forfeiture of all pay and allowances.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

GRANT, Judge:

The appellant was tried by a general court-martial at Hurlburt Field, Florida, composed of a military judge sitting alone. In accordance with his pleas, the appellant was found guilty of failure to go, absence without leave (AWOL), wrongful use of cocaine on two separate occasions, wrongful use of marijuana, and carrying a concealed weapon, in violation of Articles 86, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 912a, 934. Contrary to his pleas, he was found guilty of disrespect towards a superior commissioned officer and a noncommissioned officer, and disorderly conduct, in violation of Articles 89 91, and 134, UCMJ, 10 U.S.C. §§ 889, 891, 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 24 months, and forfeiture of all

pay and allowances. The convening authority disapproved the finding of guilty as to the disorderly conduct offense, and, in accordance with a pretrial agreement, reduced the confinement to 15 months but otherwise approved the sentence.

The appellant has submitted three assignments of error: (1) Whether his guilty plea to carrying a concealed weapon was improvident; (2) Whether he is entitled to confinement credit for two days spent in civilian confinement; and (3) Whether he was illegally punished in violation of Article 13, UCMJ, 10 U.S.C. § 813. We find merit in his first two assignments of error and will discuss below.

Background

The appellant was off base near Fort Walton Beach, Florida, and was stopped by the local police. During a consensual search of his person, the civilian police seized a "butterfly knife" from his pocket.[1] This knife had a 6-inch handle and a 4 ½-inch blade. He was placed in civilian confinement for two days before being turned over to military authorities. As part of a pretrial restriction, he was directed to sign in every three hours on a log maintained by the Charge of Quarters.

Providency of the Guilty Plea

As required by Rule for Courts-Martial (R.C.M.) 910(c), the military judge questioned the appellant about his understanding of the offenses to which he was pleading guilty, and about the factual basis for his pleas. The military judge informed the appellant of the elements of each of the offenses. She specifically advised the appellant that the offenses charged under Article 134, UCMJ, require that "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." The military judge also defined the terms "conduct prejudicial to good order and discipline" and "service discrediting conduct." The appellant agreed that the elements accurately described what he did. Thereafter, the military judge asked the appellant to tell her how he committed each of the offenses, and the appellant described his conduct relating to each crime.

The appellant now argues his plea to carrying a concealed weapon was improvident. Citing *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002), he asserts the military judge did not elicit a factual basis for finding that his conduct was prejudicial to good order and discipline or was of a nature to bring discredit upon the armed forces.

In determining whether a guilty plea is provident, the standard of review is whether there is a "'substantial basis' in law and fact for questioning the guilty plea."

[1] A butterfly knife is one in which the blade folds into the handle.

United States v. Milton, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). *See United States v. James*, 55 M.J. 297, 298 (C.A.A.F. 2001). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). *See United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999).

We review a military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 910(e). Our superior court has held that, contrary to civilian practice, a military accused may only plead guilty if the plea is in accordance with the actual facts. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan*, 47 C.M.R. 1, 2 (C.M.A. 1973); *United States v. Chancelor*, 36 C.M.R. 453, 455-56 (C.M.A. 1966). It is not enough to elicit legal conclusions; the military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

We are not satisfied the military judge made the proper inquiry to establish a factual basis for a provident plea. *Jordan*, 57 M.J. at 238-39. The military judge began the inquiry with a correct statement of the law. She accepted the appellant's admission that he had concealed the weapon, that he knew it was illegal to carry a concealed weapon, that the weapon was dangerous, and that "carrying it can bring the service discredit." The appellant made no further statement providing facts to support why his behavior may have been of a nature to bring discredit to the armed forces, and no further inquiry was conducted by the military judge. Simply stating that "carrying it can bring the service discredit" is a legal conclusion, which is not enough, without further facts, to support the element. *Outhier*, 45 M.J. at 331. Additionally, neither the stipulation of fact nor the remainder of the record provided more facts to support the plea. For these reasons, we conclude the factual circumstances as revealed by the appellant do not objectively support the plea.

Therefore, we conclude that there is a "substantial basis" in law and fact for questioning the plea. *Prater*, 32 M.J. at 436. We hold that the military judge did abuse her discretion by accepting the appellant's guilty plea without further inquiry regarding how his behavior brought discredit to the service. *Eberle*, 44 M.J. at 375. Accordingly, we set aside and dismiss the guilty finding as to Specification 1 of Charge V.

Confinement Credit

The appellant asserts, and the government concedes, that he should receive an additional two days of pretrial confinement credit for the time he was held by civilian authorities. We agree and so order. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984);

United States v. Murray, 43 M.J. 507 (A.F. Ct. Crim. App. 1995); *United States v. Sherman*, 56 M.J. 900 (A.F. Ct. Crim. App. 2002).

Violation of Article 13, UCMJ

The appellant argues his pretrial restriction violated Article 13, UCMJ, and, as a result, he should receive 81 days of confinement credit.[2] An accused is entitled to day-for-day credit against confinement for time spent in pretrial restriction where the conditions are tantamount or equivalent to confinement. *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985). We review de novo the question of whether the pretrial restrictions were tantamount or equivalent to confinement. *United States v. King*, 58 M.J. 110, 113 (C.A.A.F. 2003). In this regard, we consider the nature and scope of any pretrial restraint, the accused's required duties, and other conditions imposed upon the servicemember. *United States v. Smith*, 20 M.J. 528, 531-32 (A.C.M.R. 1985).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon him, we hold that the appellant's pretrial restriction was not tantamount or equivalent to confinement. The appellant was in a training status at the time, and all individuals in that status were required to remain on the installation. The commander suspected the appellant was leaving the installation at night. Furthermore, the appellant had failed his class studies and become so disruptive in the classroom he had to be removed. He was placed in a casual status but was still required to follow the rules for trainees. The conditions of the appellant's pretrial restriction supported the commander's concern for his whereabouts, and they were not so onerous as to be considered tantamount to confinement.

Sentence Reassessment

Because we found the appellant's plea improvident as to Specification 1 of Charge V, we must consider whether we can reassess the sentence. If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude," then we "may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). The purpose of reassessing a sentence is to purge the error that occurred at trial. Accordingly, we reassess the sentence adjudged by the military judge, and not the sentence approved by the convening authority. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990). We are confident that, in the absence of the concealed weapon specification, the military judge would have adjudged a sentence of no less than a bad-conduct discharge, confinement for 15 months, and forfeiture of all pay

[2] The appellant alleges this required sign-in period lasted for 81 days; however, testimony in the record of trial indicates this requirement actually lasted 49 days.

and allowances. We also find that the sentence, as reassessed, is appropriate. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Conclusion

The approved findings, as modified, and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court