UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman BRIAN W. SCHUMANN
United States Air Force

ACM 35119

29 July 2004

Sentence adjudged 1 February 2002 by GCM convened at Hurlburt Field, Florida. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 1 year and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Andrew S. Williams, Major Maria A. Fried, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Jennifer R. Rider.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

ORR, Judge:

On 1 February 2002, at Hulburt Field, Florida, the appellant was tried by a general court-martial composed of officer members. Consistent with his pleas, the appellant was convicted of one specification of wrongful use of 3,4 methylenedioxymethamphetamine (ecstasy), desertion, breaking restriction, and three specifications of making and uttering checks that were dishonored, in violation of Articles 112a, 85, and 134, UCMJ, 10 U.S.C §§ 912a, 885, 934. He was sentenced to a bad-conduct discharge, confinement for 1 year and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant avers that his guilty pleas to the three bad check specifications of Charge III were improvident. He also asserts that the military judge improperly instructed the members concerning the number of times he pled guilty to using ecstasy. The appellant asks this Court to set aside the findings of guilt concerning the bad checks in Specifications 2, 3, and 4 of Charge III, and to set aside the sentence. For the following reasons, we affirm the findings and sentence.

I. Providence of Plea to Charge III, Specifications 2, 3, and 4

A. Background

The appellant pled guilty to three specifications of making and uttering six checks to three businesses and dishonorably failing to maintain sufficient funds in his account for the payment of the checks in violation of Article 134, UCMJ. The appellant claims on appeal that his guilty plea was improvident because he did not explain or discuss why he believed that his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.

During the appellant's providence inquiry on Specification 2 of Charge III, the military judge informed the appellant that the five elements of the offense of dishonorably failing to maintain funds were:

> MJ: First, that between on or about 26 June 2001, and 27 June 2001, within the continental United States, you made and uttered to Food World certain checks, to wit: the two checks listed in Specification 2 of Charge III, dated 26 June 2001 and 27 June 2001; second, that the checks were made and uttered for the procurement of groceries; third, that you subsequently failed to maintain sufficient funds in the Eglin Federal Credit Union for payment of the checks in full upon their presentment for payment; fourth, that the failure was dishonorable; and fifth, that under the circumstances, the conduct by you 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 then gave the following definition:

> MJ: Now those are the five elements for this particular offense. As far as some definitions that go along with those, "conduct prejudicial to good order and discipline" is conduct which causes a reasonably direct and obvious injury to good order and discipline. "Service discrediting conduct" is conduct which tends to harm the reputation of the service, or lower it in public esteem.

The military judge also read the definitions concerning the other four elements. In response, the appellant admitted he understood the elements and had no questions about any of the elements. While the appellant gave a narrative response to the first four elements, he gave the following responses concerning the fifth element:

> MJ: Okay. Another element is that this was of a nature to bring discredit upon the armed forces, or was conduct that was prejudicial to good order and discipline. Would you agree with me that in a case like this, that it would be service discrediting for you not to pay checks or not to honor checks that are presented to stores or manufacturers in the area?
>
> ACC: Yes, Your Honor.
>
> MJ: And would you agree with me that that would tend to bring down the way that they view the military?
>
> ACC: Yes, Your Honor.
>
> MJ: It would lessen the view and the esteem that they hold the military in?
>
> ACC: Yes, Your Honor.

The military judge read the elements for Specifications 3 and 4 of Charge III and the appellant waived the reading of the definitions. After hearing the military judge read the elements for each specification, the appellant stated that he understood them and acknowledged that his failure to maintain the funds to pay the checks was of a nature to bring discredit on the armed forces and tended to lower the esteem of the armed forces in the view of the public.

B. Discussion

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." *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); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). 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)). 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 (C.A.A.F. 1996).

The appellant claims that the providence inquiry did not establish a factual basis for concluding that his conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces because the appellant did not explain or discuss why his actions were prejudicial to good order and discipline or service discrediting. The appellant cites *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002), as authority for his position. In the *Jordan* case, the Court of Appeals for the Armed Forces (CAAF) held that, "It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty." *United States v. Jordan*, 57 M.J. at 238 (quoting *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)).

In the *Jordan* case, the appellant pled guilty in a "bare bones providence inquiry" without a stipulation of fact. The CAAF reversed the appellant's conviction because the statements elicited from the accused during the providence inquiry were mere "conclusions of law" and were not subject to the adversarial process. *Jordan*, 57 M.J. at 238-39. In *United States v. Sweet*, 42 M.J. 183 (C.A.A.F. 1995), the providence inquiry was a recitation by the military judge of the elements followed by the appellant's response of "Yes, sir." However, the accused in the *Sweet* case signed a stipulation of fact. The military judge "cross-referenced" the stipulation of fact while conducting the providence inquiry. The Court held that the stipulation of fact provided a sufficient factual basis to support the legal conclusions provided by the appellant in response to the military judge's questions.

In the instant case, the providence inquiry was more than a recitation by the military judge of the elements of the offense followed by the appellant's responses of "Yes, Your Honor." The military judge's questions included a factual discussion and the elements of the offense. Specifically, the military judge questioned the appellant while referring to the stipulation of fact. It stated six times that, "The Accused's failure to place or maintain funds in his account was dishonorable, and under the circumstances, the Accused's conduct was to the prejudice of good order and discipline in the armed forces, and was of a nature to bring discredit upon the armed forces." The military judge then asked the appellant whether he agreed "that in a case like this, that it would be service discrediting for you not to pay checks or not to honor checks that are presented to stores or manufacturers in the area." Next, the military judge asked whether the appellant agreed that writing bad checks would tend to "bring down" the way that stores and manufacturers viewed the military. Additionally, the military judge asked whether writing the bad checks would "lessen the view and esteem" that stores and manufactures held the military in. The appellant answered "Yes, Your Honor" to all three questions. At the conclusion of the questioning concerning each of the three bad check specifications, the appellant stated that he understood the elements and had no questions.

While the appellant argues that the military judge's questions were legal conclusions with no factual support, we disagree. Even though the appellant's responses to the military judge's questions were similar, the types of questions in this case were

different than those in *Jordan*. In the instant case the questions included a factual component that afforded the appellant the opportunity to discuss and explain why his conduct was prejudicial to good order and discipline and service discrediting. Additionally, unlike in the *Jordan* case, this appellant signed a stipulation of fact that was subject to the adversarial process. The nature of the military judge's questions coupled with the signed stipulation of fact are more than sufficient to form a factual basis to support a provident plea of guilty to the fifth element of the specifications. *Sweet*, 42 M.J. at 185. Therefore, we hold that the appellant's pleas to Specifications 2, 3, and 4 of Charge III were provident.

II. Factual Misstatement in Military Judge's Instruction

A. Background

The appellant pled guilty to divers use of ecstasy. During the providence inquiry the appellant stated that he used ecstasy about "six or seven times." However, when the military judge gave his instructions to the members he said:

> MJ: Also, I would note for the record that during the accused's *Care* inquiry there was in fact a statement that the court has accepted as a fact in accepting his *Care* inquiry for his pleas of guilty in which he stated that he had used ecstasy for six to eight times. Therefore, you can use that as a fact in determining the amount of time-or correction, the numbers [sic] of times that he did in fact use ecstasy for the divers occasions aspect of the Specification of Charge I.

Counsel for both sides heard this instruction but did not object or correct the military judge's misstatement of the number of times the appellant admitted using ecstasy.

B. Disussion

Because the appellant failed to object to this instruction at trial, we review the military judge's instruction for plain error. *United States v. Boyd*, 52 M.J. 758 (A.F. Ct. Crim. App. 2000), *aff'd*, 55 M.J. 217 (C.A.A.F. 2001). To establish plain error, the appellant must demonstrate that there was error, that it was plain or obvious, and that it materially prejudiced a substantial right. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998).

The facts of this case are clear. During the providence inquiry, the appellant admitted using ecstasy six to seven times. But, the military judge told the members that the appellant admitted using ecstasy six to eight times. We find that the military judge's instruction concerning the number of times the appellant used ecstasy was error. While

the instruction did not affect the language in the specification or the maximum punishment, the instruction increased the appellant's criminal culpability.

Having found error, we recognize our responsibility to reassess the sentence. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). In so doing, we find that the appellant's criminal culpability for the Specification of Charge I is limited to the use of ecstasy six or seven times. This minor modification of the facts more accurately reflects his criminal conduct. The appellant pled and was found guilty of desertion, breaking restriction, three specifications of making and uttering bad checks as well as divers use of ecstasy. The military judge instructed the members to determine a collective sentence to address all of the offenses of which the appellant had been found guilty. Given the nature and the number of charges and specifications for which the appellant was found guilty, we are convinced that this error had no impact on the original sentence. After reassessing the sentence, we are assured "that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 308.

The findings, and the 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, 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, as approved, are

AFFIRMED.

BRESLIN, Senior Judge, concurring in the result:

I concur in the ultimate determination that the findings and sentence should be affirmed. I write separately because "[i]t matters how we decide cases." *United States v. Key*, 57 M.J. 246, 250 (C.A.A.F. 2002) (Crawford, C.J., concurring in part and in the result).

The appellant contends the military judge erred in instructing the members in sentencing that they may consider that the appellant used ecstasy "six to eight times," because in his guilty plea the appellant only admitted using ecstasy "six to seven times." The majority concludes that, even absent objection at trial, this was plain error, but was nonetheless harmless.

The appellant and the majority overlook many facts crucial to the proper disposition of this issue. First, during the providence inquiry, the appellant gave only an approximate number for the times he wrongfully used ecstasy.

> MJ: Okay. As far as the use itself, it says that it was on divers occasions. Approximately how [sic] times did you wind up using ecstasy?

(Accused and counsel conferred.)

. . .

ACC: Between six or seven pills.

MJ: About six or seven?

ACC: Yes, Your Honor.

MJ: I'm sorry?

ACC: About six or seven times, Your Honor.

. . .

ACC: I bought all the ecstasy pills, six or seven, all at the same time from the same person, Your Honor.

MJ: Okay, so you bought them all at the same time from the same person?

ACC: Yes, Your Honor.

MJ: And then you just used them on six or seven different occasions?

ACC: Yes, sir.

During his unsworn statement to the members, the appellant offered a somewhat more detailed description of his use of ecstasy.

> Some friends of mine, Rebecca Rooney and Kris Kitamura, offered me some ecstasy in September 2000. I tried it and threw away any chance I had of being sober. I bought six or seven ecstasy pills from Kitamura and took them all that month. After I finished those pills, I stopped the ecstasy and went back to drinking heavily every day.

Immediately after the appellant's unsworn statement, the military judge held a session with counsel on proposed sentencing instructions. The military judge picked up on the fact that the appellant admitted to more uses in his unsworn statement than he had mentioned earlier in the providence inquiry. It is clear the military judge believed the appellant meant one use with his friends, followed by the purchase and use of six or seven ecstasy pills, for a total of about eight uses. The military judge specifically raised the issue to counsel about taking "judicial notice of *six to eight times as testified to . . . .*"

(Emphasis added.) The trial counsel asked that the military judge instruct the members accordingly. Significantly, trial defense counsel said, "Your honor, I'm a little concerned about that *given that it was in his unsworn statement*." (Emphasis added.) The military judge ruled that he would so instruct and did so, without objection by the defense counsel.

Because there was no objection to the military judge's instruction on the grounds now asserted, we must review this case for plain error. *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986). The appellant has the burden of showing that: (1) there was error, (2) the error was "plain" or "obvious," and (3) the error materially prejudiced the appellant's substantial rights. *Powell*, 49 M.J. at 463-65.

A fair reading of the record does not demonstrate the military judge's instruction about "six to eight uses" was error. In his unsworn statement, the appellant seemed to admit to using ecstasy with his friends, and then buying and using six or seven more pills. When the military judge noted the difference (in open court, in the presence of the appellant), the defense counsel agreed that was what the appellant said in his unsworn statement. Thus, the appellant has not shown that the military judge's instruction was erroneous.[*]

Admittedly, it is possible that the first use the appellant mentioned was part of the six or seven pills he purchased. However, when the military judge specifically raised this matter, the defense counsel concurred with the military judge's interpretation, adding a lot of weight to the military judge's view of the statement. Even if it was "error," it was certainly not "obvious" as required for a finding of plain error. Indeed, the number of times the appellant wanted to admit to unlawfully using ecstasy was a purely factual matter, solely within the control of the defense in the setting of this guilty plea. Where the appellant makes an ambiguous factual statement and then fails to correct or even object to the military judge's interpretation, it cannot rise to the level of "obvious" error.

Finally, there is no material prejudice to the appellant's substantial rights. The appellant discussed the number of times he used ecstasy in terms of a range, i.e. an approximation. During the providence inquiry he told the military judge he used ecstasy "about six to seven times." The difference between "about six to seven times" and "six to eight times" is de minimis in this context. It did not increase the maximum possible punishment, or substantially alter the nature of the offenses for which the appellant was sentenced. The conclusion that this instruction "materially prejudiced the appellant's substantial rights" is untenable.

[*] It is also noted that the military judge instructed the members that the appellant admitted using ecstasy six to eight times in his "*Care* inquiry." While technically inaccurate, this is harmless; there is no reason to believe the members knew what a "*Care*" inquiry was, or that they would place any significance to that information in light of the appellant's unsworn statement.

There is no plain error here. Finding plain error in this situation encourages abuse of the military justice system.

> This approach permits counsel for the accused to remain silent, make no objections, and then raise an instructional error for the first time on appeal. This undermines "our need to encourage all trial participants to seek a fair and accurate trial the first time around."

Fisher, 21 M.J. at 328 (citing *United States v. Frady*, 456 U.S. 152, 163 (1982)). The findings and sentence should be affirmed.

OFFICIAL

ANGELA M. BRICE
Clerk of Court