UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman KEVIN M. SHERWIN
United States Air Force

ACM S31477

10 February 2009

Sentence adjudged 21 March 2008 by SPCM convened at Hanscom Air Force Base, Massachusetts. Military Judge: Le Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Frank R. Levi, Major Shannon A. Bennett, Captain Timothy M. Cox, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's conditional guilty plea, a military judge sitting as a special court-martial convicted the appellant of one specification of indecent assault in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence consists of a bad-conduct discharge, ten months confinement, and a reduction to E-1. On appeal the appellant asks this Court to set aside the findings and the sentence. The basis for his request is that he asserts: (1) the military judge erred by denying his motion to suppress evidence from an unlawful search and (2) that, given his extreme alcohol consumption and level of intoxication at the time of the offense, he was unable to

form the specific intent to gratify his sexual desires, and the military judge thus abused her discretion in accepting his guilty plea.* We disagree; finding no error, we affirm.

Background

On 23 September 2007, the appellant and Senior Airman (SrA) CM, the victim, returned to the appellant's residence after a night of drinking. They continued to drink after arriving at the appellant's residence and eventually "passed out." The next morning, the appellant was downloading photographs he took the night before onto his laptop computer and discovered that he had taken photographs of: (1) his exposed penis next to or touching SrA CM's lips as she slept; (2) SrA CM's exposed left breast; (3) SrA CM's clothed buttocks; and (4) himself touching SrA CM's genital region.

On 8 October 2007, Staff Sergeant (SSgt) MC, a fellow security forces member and friend of the appellant, was visiting the appellant at his residence. While at the appellant's residence, the appellant asked SSgt MC if he could repair the appellant's personal computer. During the process of attempting to repair the appellant's computer, SSgt MC discovered copies of the aforementioned photographs in the computer's recycle bin. The next day, troubled by what he had discovered, SSgt MC reported the appellant first to noncommissioned officers in his squadron and then to the Air Force Office of Special Investigations (AFOSI).

On 9 October 2007, AFOSI agents summoned the appellant to their offices for an interview. After a proper rights advisement, the appellant waived his rights, confessed to taking the aforementioned photographs, and consented to the search of his computer. The next day, AFOSI agents seized the appellant's computer. An analysis of the appellant's computer revealed that the photographs were downloaded onto the appellant's computer on 23 September 2007.

At trial, the appellant, asserting that SSgt MC had conducted an illegal search of the appellant's computer, moved to suppress the photographs, the appellant's confession, and derivative evidence there from. After receiving evidence and argument, the military judge denied the appellant's motion. The appellant subsequently conditionally pled and was found guilty of the charge and specification.

Discussion

Motion to Suppress Ruling

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005). An abuse of

* The issues are filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

discretion occurs when the "military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006) (citing *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)). The abuse of discretion standard is a strict one, involving more than a difference of opinion. To be invalidated on appeal, the challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (citations omitted).

In the case at hand, the military judge made thorough and detailed findings of fact, and her findings were amply supported by the evidence. Moreover, with respect to her application of the law, we concur with her conclusions that SSgt MC's actions were that of a private individual, that his actions did not amount to a search, and that, assuming arguendo his actions constituted a search, the "search" was legal because the appellant consented. In short, the military judge did not abuse her discretion in denying the appellant's motion to suppress.

Providency Inquiry

"A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion." *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia,* 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Logan,* 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts "*as revealed by the accused himself*" to support the plea of guilty. *United States v. Jordan,* 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport,* 9 M.J. 364, 367 (C.M.A. 1980)) (emphasis added). Where there is "a substantial basis in law and fact for questioning the appellant's plea," the plea cannot be accepted. *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); *Jorda*n, 57 M.J. at 238).

In the case *sub judice*, sufficient evidence exists to support the military judge's findings that the appellant was not so intoxicated as to prevent him from forming the specific intent to gratify his sexual desires. The military judge specifically discussed the defense of voluntary intoxication with the appellant and trial defense counsel, and both affirmatively waived voluntary intoxication as a defense. Moreover, both agreed that the elements of the offense, including the specific intent element, were met despite the appellant's intoxication. Lastly, the appellant testified that although he does not remember the incident, the photographs, including the photograph of his erect penis, convinces him that at the time of the incident he had the intent to gratify his sexual desires. Put simply, in light of the evidence, the military judge did not err in accepting the appellant's conditional guilty plea.

Conclusion

The approved 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court