UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALAN J. SIA
United States Air Force

ACM S32071

18 October 2013

Sentence adjudged 24 April 2012 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 45 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Travis K. Ausland and Captain Christopher James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

ROAN, HECKER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

The appellant was tried by a special court-martial composed of a military judge sitting alone and, pursuant to his pleas, was convicted of absence without leave and wrongful introduction of Ecstasy (3, 4-Methylenedioxymethamphetamine) onto a

military base, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a.[1] The appellant was also charged with possession of Ecstasy with intent to distribute, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, but pled guilty by exceptions to possession without the intent to distribute. After a litigated trial, the military judge found the appellant guilty of the greater offense. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 45 days, and reduction to E-1.

On appeal the appellant alleges his plea to wrongful introduction of Ecstasy was improvident. For the reasons discussed below, we agree.

Background

On 26 December 2011, while at a Las Vegas casino, the appellant saw a small orange bottle sitting between two slot machines. Looking inside, he found five small green and blue pills, which he believed to be Ecstasy based on stamps on the face of the pills. The appellant decided to keep the pills so he could take them after his upcoming separation from the Air Force in February 2012. He placed the pills in a breath mint container in his backpack. Over the next several weeks, he kept the backpack in his car and house.

After departing on terminal leave, the appellant was called back on 4 January 2012 due to an ongoing Air Force Office of Special Investigations (AFOSI) investigation into drug abuse at Nellis Air Force Base (AFB). He drove onto the base with his backpack and the pills in his car. AFOSI subsequently discovered the pills when investigators searched the car.

The appellant pled guilty to wrongfully possessing the Ecstasy between 26 December 2011 and 4 January 2012, but not guilty to possessing it with the intent to distribute. The Government elected to proceed to trial with proof that his possession was with such intent. After hearing evidence the appellant told AFOSI he was keeping the pills to distribute to a woman he had met several months earlier at a club, the military judge found the appellant guilty of the greater offense.

The appellant also pled guilty to wrongfully introducing the Ecstasy onto Nellis AFB on 4 January 2012. On appeal, he contends his plea to this offense was improvident because he had forgotten the pills were in his car and therefore he did not "knowingly" introduce them onto the base.

[1] The military judge dismissed three specifications that alleged the appellant wrongfully possessed, used, and distributed Ecstasy after granting a defense motion to suppress the appellant's confession due to lack of corroboration under Military Rule of Evidence 304(g).

Providency of Plea

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We will not disturb a guilty plea unless the record of trial shows a substantial basis in law or fact for questioning the guilty plea. *Id.* To prevent the acceptance of improvident pleas, the Court of Appeals for the Armed Forces has long placed a duty on the military judge to establish, on the record, a factual basis establishing that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *see also* Article 45, UCMJ, 10 U.S.C. § 845. In considering the adequacy of guilty pleas, we consider the entire record, including the full range of the appellant's responses during the plea inquiry to determine whether the requirements of Article 45, UCMJ, Rule for Courts-Martial 910, and *Care* have been met. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002); *see also United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009) (examining the "totality of the circumstances of the providence inquiry"); *United States v. Sweet*, 42 M.J. 183, 185 (C.A.A.F. 1995).

The elements of wrongful introduction onto a military installation are (1) that the accused introduced a controlled substance onto an installation used by or under the control of the armed forces, and (2) that the introduction was wrongful. *Manual for Courts-Martial*, Part IV, ¶ 37.b.(4) (2008 ed.). The military judge advised the appellant that in order to be "wrongful," his introduction of the drugs onto the base must be "knowing and conscious" and that he would not be guilty of this offense if he brought a container onto the base "without knowing that it actually contains a controlled substance."

When the military judge asked the appellant why he thought he was guilty of this offense, the appellant gave several responses. Initially, after explaining how he came into possession of the pills, the appellant stated he still had his backpack in the car when he was called back from leave. He continued: "Then I remembered them at the time they were still there and I did not think about it until OSI started to ask me questions about the ecstasy." In response to a question about whether his possession of the pills between 26 December 2011 and 4 January 2012 was knowing and conscious, the appellant responded affirmatively and added:

> I had forgotten that day that I had them on me until the OSI investigator asked me about it. I didn't consciously bring them onto the base knowing that I had them at the time, is what I remember. . . . I had no intention of bringing them onto base.

The military judge asked the appellant to clarify why he believed his introduction of the pills onto the base was not "conscious." The appellant responded:

> [W]hen they did like arrest me and stuff, I was like, go ahead and search the car because I didn't think I had anything there. And then when I thought about it, I was like, well, you know what, better not because I remembered they were there. So that's when I remembered that I had them. Prior to that, I didn't remember that I had brought the backpack that had the pills inside of it. That's why I said that I didn't knowingly bring it with any intent of anything.

In response to further questioning, the appellant admitted he had made a conscious decision to put the pills in his backpack and to leave his backpack inside his car. The military judge asked the appellant if he agreed that making a decision to store something inside his car means he is responsible for "wherever the car goes." The appellant agreed. He also responded affirmatively to the military judge's questions about whether he could have avoided introducing Ecstasy if he had wanted to, and that he had no authorization to bring it onto base.

In *United States v. Thomas*, 65 M.J. 132 (C.A.A.F. 2007), our superior court discussed the concept of "wrongfulness" relative to the mens rea required for the offense of wrongful introduction. The issue in that case was whether an accused could be guilty of the offense when he was unaware that he had entered onto military property. Analogizing to case law regarding drug possession, the court concluded an accused "must have actual knowledge that he was entering the installation" and found the plea improvident on that basis. *Id.* at 135. In reaching this conclusion, the court also noted that the instructions recommended for this offense in the Military Judges' Benchbook correctly stated the law, namely:

> (1) That (at time and place) the accused introduced (amount) of (substance) onto an installation under the control of the armed forces, to wit: (name of installation);
>
> (2) *That the accused actually knew he introduced the substance;*
>
> (3) That the accused actually knew the substance he introduced was (contraband); and
>
> (4) That the introduction by the accused was wrongful.

Id. at n.3 (citing to Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-37-4c (1 April 2001)) (emphasis in original).

We find the logic and holding of the *Thomas* decision equally applicable to an accused's knowledge of whether he was *in possession of a controlled substance* when he knowingly entered a military installation. *See also United States v. Brown*, 50 M.J. 262,

267 (C.A.A.F. 1999) (knowledge of controlled substance cannot be established by mere negligence). Accordingly, we agree with the appellant that his plea cannot be provident unless his admissions demonstrate that he actually knew he was bringing Ecstasy onto Nellis AFB when he drove onto the base on 4 January 2012. The appellant consistently maintained that he did not know or intend to bring the Ecstasy onto the base and did not remember it was in his car until he was already on base and being questioned by AFOSI. His responses to several conclusory questions by the military judge cannot serve as the basis for a provident plea in this case.

Sentence Assessment

Having found error regarding the wrongful introduction specification, we must consider whether we can appropriately reassess the sentence or whether we must return the case for a rehearing on sentence. After dismissing a charge, this Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). *Id.* at 307. "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Id.* at 308. Under this standard, we have determined that we can discern the effect of the errors and will reassess the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

In addition to the drug offenses, the appellant had pled guilty to being absent without leave on one occasion for failing to report to work. For all three offenses, the maximum sentence was capped at the jurisdictional limits of a special court-martial. Prior to announcing his sentence, the military judge granted a defense motion to find the wrongful introduction and wrongful possession with intent to distribute specifications to be an unreasonable multiplication of charges for purposes of sentencing. He therefore "combined" these two specifications in reaching his sentencing decision and then sentenced the appellant to a bad-conduct discharge, confinement for 45 days, and reduction to E-1. Given this, and having considered the entire record of trial and the principles of *Sales* and *Moffeit*, we are satisfied the military judge would have assessed the same sentence even if the appellant had not been improperly convicted of wrongful introduction of Ecstasy. Furthermore, we find such a sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Conclusion

The finding of guilty as to Specification 5 of Charge II is set aside and dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court