UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant EVERETT A. SMITH
United States Air Force

ACM 35691

17 October 2006

Sentence adjudged 2 July 2003 by GCM convened at Lackland Air Force Base, Texas. Military Judge: James L. Flanary (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major James M. Winner, Major Sandra K. Whittington, and Major Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Major Kimani R. Eason.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

JACOBSON, Judge:

The appellant was convicted, in accordance with his pleas, of attempted rape of a three-year-old girl, attempted conspiracy to rape a three-year-old girl, attempted sodomy with a child under the age of twelve, attempted conspiracy to commit sodomy with a child under the age of twelve, attempted carnal knowledge, attempted conspiracy to commit carnal

knowledge, failing to obey a lawful general order, knowingly transporting images of minors engaging in sexually explicit conduct in interstate commerce, communicating indecent language in writing, communicating indecent language orally, and wrongfully and knowingly receiving and possessing visual depictions of minors engaged in sexually explicit conduct, in violation of Articles 80, 92 and 134, UCMJ, 10 U.S.C. §§ 880, 892, 934. A military judge sitting alone as a general court-martial sentenced the appellant to a dishonorable discharge, confinement for 25 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, but waived $860.00 per month of the mandatory forfeitures and directed that amount be paid to the appellant's spouse.

On appeal, the appellant asserts: (1) his pleas of guilty were improvident in light of post-trial evidence that he suffers from a severe mental disease or defect; (2) this Court should take appropriate action to ensure the intent of the convening authority is satisfied in regard to the waiver of forfeitures; and, (3) the appellant's pleas of guilty to receiving and possessing child pornography are improvident because inadequate facts were elicited during the providence inquiry to support the "service discrediting" element of the offense.[1] For the reasons set out below, we find no merit in the appellant's first and third assignments of error. However, we find merit in the appellant's second assignment of error and therefore disapprove the adjudged forfeitures.

Background

The accused was apprehended on 12 February 2003 as he attempted to enter a hotel room in San Antonio, Texas, where he planned to meet a woman named "Debbie." The appellant was anticipating a sexual liaison with "Amber" and "Brandi," two minor females in "Debbie's" charge. The appellant believed "Amber" to be approximately three years old, and "Brandi" to be thirteen. Planning for this meeting had taken place over the previous seven months via e-mail and telephone conversations, in which the appellant described to "Debbie" his sexual exploits with, and desires relating to, very young children. He also discussed the sexual abuse that he was going to perform upon the two young girls she would bring to the meeting. Unbeknownst to the appellant, "Debbie" was actually an undercover police officer from Mississippi, and "Amber" and "Brandi" were fictional characters created by the same undercover officer. When the appellant knocked on the door of the agreed-upon hotel room, the undercover officer, accompanied by San Antonio police officers and Air Force Office of Special Investigation (AFOSI) agents, were there to greet him. He was immediately apprehended.

AFOSI agents later searched his personal laptop and home computer and found 95 suspected images of child pornography, including 30 images that were identified as actual children. Seized computer disks revealed additional child pornography. Investigation also revealed that the appellant used his government work computer and his official government-

[1] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

provided e-mail account to send a total of 105 e-mail messages to "Debbie," many of which were intended to arrange the sexual liaison with the children.

Providency of the Pleas in Regard to Mental Disease or Defect

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 to support the plea of guilty. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). 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)).

In claiming that his guilty pleas were improvident, the appellant relies on *United States v. Harris*, 61 M.J. 391 (C.A.A.F. 2005). In that case, our superior court found there was a substantial basis in law and fact for questioning Harris' guilty pleas and therefore set aside the findings and sentence. Harris' mental state had been evaluated several times, with conflicting results. After a one-member, pretrial sanity board found he did not suffer from any mental defect and was "mentally responsible for his behavior," Harris entered mixed pleas and was found guilty of writing several bad checks, larceny, and unauthorized absence. Upon incarceration, he was evaluated at the confinement facility and diagnosed with Bipolar Type I disorder. When the convening authority was informed of this diagnosis via the appellant's clemency submissions, he ordered a post-trial session pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a). The military judge found that Harris, at the time of the offenses, suffered from a severe mental disease or defect but appreciated the wrongfulness of his actions and was subsequently competent to stand trial. The convening authority then ordered a second sanity board, which found that Harris suffered from a severe mental disease or defect but "was able to appreciate the nature and quality or wrongfulness of his conduct." The convening authority then approved the sentence as adjudged. *Harris*, 61 M.J. at 393-94.

The central focus of the Court's discussion in *Harris* was Harris' request for a new trial pursuant to Articles 67 and 73, UCMJ.[2] In the case *sub judice*, the appellant makes no such request. Instead, this appellant attacks the providency of his guilty pleas in light of his claims that post-trial evidence indicates he suffers from a severe mental disease or defect. The *Harris* Court touched briefly on this situation, finding Harris' pleas improvident. *Id.* at 398. In *Harris*, the Court emphasized the military judge's post-trial conclusion that Harris suffered from a severe mental disease or defect at the time of the offenses. *Id.* It therefore questioned how an accused could make an informed plea without knowledge that he suffered from a severe mental disease or defect at the time of the offense, and stated that it was not "possible for a military judge to conduct the necessary *Care* inquiry into an accused's pleas

[2] 10 U.S.C. §§ 867, 873

without exploring the impact of any potential mental health issues on those pleas."[3] *Harris*, 61 M.J. at 398. This is where the case at bar today differs from *Harris.* No factfinder or sanity board ever reached the conclusion that this appellant suffered, either at the time of offense or trial, from a severe mental disease or defect, or was unable to appreciate the wrongfulness of his actions. The appellant simply asks that we leap to the conclusion that his pleas were defective based on the post-trial treatment record assembled at the confinement facility and appended to his assignment of errors. The Court in *Harris* made no such leap and we decline to do so in this case.

The record before us indicates that the military judge ordered a sanity board for the appellant on 27 May 2003. A three-member board conducted its inquiry and released its results on 19 June 2003. It concluded that the appellant did not suffer from a mental disease or defect at the time of the alleged criminal conduct and the appellant was able to understand the nature of the proceedings against him and cooperate in his own defense. The appellant did not object to this result at trial. The record also includes a great deal of evidence that illustrates the appellant's long-term record of functioning in society as a highly competent, intelligent individual. His enlisted performance reports document a nearly 20-year history of exemplary service. His defense exhibits included 22 documents that record his achievements, excellent performance, and training accomplishments during the course of his career. The appellant also submitted 11 character letters from family members, friends, co-workers, and supervisors that portray him as a great worker, outstanding noncommissioned officer, and good person. Although a few letters indicate that his mother's death left him depressed, none of the authors – many of whom indicated that they had known him for many years – gave any impression that the appellant suffers from a "deep-rooted, complex" mental problem. The appellant called a supervisor, his father, and his wife as witnesses during the sentencing phase of his trial. None made any mention of the mental problems that the appellant now claims rendered him unable to make informed pleas. The appellant's written and oral unsworn statements were detailed, eloquent, and highly organized. Beyond mentioning that his mother's death made him feel depressed, the appellant made no mention of, or gave any impression that he was suffering from, the severe mental condition that he now claims. Moreover, we note that the military judge observed the appellant's demeanor during the entire trial and was not moved to question the appellant's mental state. The appellant's undated clemency letter to the convening authority, which appears to have been prepared in early September 2003, is well organized and on-point. In the letter, prepared months after he learned of his mental disorders and began his treatment at the United States Disciplinary Barracks, the appellant again touts his competence, excellent rehabilitative potential, and his ability to do "amazing things" when he puts his mind to it. Finally, we note that a post-trial sanity board ordered by this Court found the appellant competent to participate in his defense on appeal.

We realize that several of the above-cited examples could also be viewed as evidence that the appellant was unaware of his illness prior to trial, or is able to control his problems with medication now that he has been properly diagnosed. However, we decline to read this

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

interpretation into a trial record in which it does not appear. The record, on its face, indicates a highly competent and intelligent individual who made the informed decision to plead guilty to the charges against him and then providently entered those pleas before a military judge. The record further reflects that the military judge satisfied himself that the appellant was competent to enter pleas by ordering a sanity board prior to trial. Finally, this Court satisfied itself that the appellant was competent to participate in his appeal by ordering a second sanity board. This record distinguishes itself from the record in *Harris*, where conflicting sanity boards and judicial findings *in the record*, created a substantial basis in law and fact to question Harris' pleas of guilty. In this case, there are no conflicting sanity boards and no conflicting rulings. The appellant's assertion of incompetence comes solely from his treating psychiatrists and is based on a record compiled after he was convicted and sentenced to 25 years of confinement.[4] The appellant's sudden discovery of his "deeply rooted," "longstanding disorders," which apparently went unnoticed by his spouse, family, friends, supervisors, coworkers, the Air Force, and himself, for many years, conveniently occurred within weeks of receiving a lengthy sentence to confinement. The appellant's claim regarding this newly found condition seems to us at best unlikely, and at worst, disingenuous.

Therefore, we find no basis to question this appellant's guilty pleas and hold that his pleas were provident.

Convening Authority's Waiver of Forfeitures

The convening authority approved the adjudged sentence of forfeiture of all pay and allowances, but waived $860.00 pay per month of the mandatory forfeitures for a period not to exceed six months, for the benefit of the appellant's wife. The post-trial action did not disapprove, modify, or suspend the adjudged forfeitures, but it clearly reflects the convening authority's intention to waive the mandatory forfeiture of pay and allowances under Article 58b, UCMJ, 10 U.S.C. § 858b, for the benefit of the appellant's wife. *See United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Furthermore, the record provides no basis to believe that the appellant's wife was not paid consistent with the convening authority's action or that finance officials have disputed her entitlement to this money. To the contrary, in his brief the appellant expresses his concern that once final action is taken on his case the government may discover the "erroneous payment" and attempt to recoup the money from either the appellant or his spouse. We agree with the appellant that, because the convening authority failed to waive adjudged forfeitures, the government could at some point attempt to recoup the money paid to the appellant's spouse, thereby thwarting the convening authority's intent. We do not agree with the appellant that the only solution to this potential dilemma is to order a new post-trial processing and action. Instead, having satisfied ourselves that the

[4] We believe this also distinguishes this case from *Harris*. In evaluating that case, our superior court emphasized the "lack of forum shopping" on the part of Harris in seeking out a more favorable opinion than he received from the initial sanity board. We believe that "forum shopping" is exactly what the appellant is attempting to do here. In fact, the appellant protests in one appellate submission to this Court, because his treating psychiatrists were not appointed to his post-trial sanity board.

convening authority's intent regarding waiver of forfeitures has been fulfilled, we opt to disapprove the adjudged forfeitures. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Johnson*, 62 M.J. 31, 38 (C.A.A.F. 2005).

Providency of the Child Pornography Pleas

The appellant alleges that his pleas of guilty to receipt and possession of child pornography are improvident because the military judge did not elicit information sufficient to satisfy the "service discrediting" elements of the two specifications. After a thorough review of the providence inquiry, we disagree with the appellant's contention that he merely agreed with the military judge's legal conclusion that the appellant's receipt and possession of child pornography was service discrediting. To the contrary, we find that the appellant's explanations on the record were sufficient to support his pleas of guilty. *See United States v. Roderick*, 62 M.J. 425, 428-29, (C.A.A.F. 2006); *United States v. Bickley*, 50 M.J. 93, 94 (C.A.A.F. 1999). We thus find no substantial basis in law or fact to question the providence of the appellant's pleas to receipt and possession of child pornography.

Conclusion

Accordingly, we conclude the 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). However, to ensure the convening authority's intent is satisfied in regard to financial support for the appellant's spouse, we affirm only so much of the sentence as includes a dishonorable discharge, confinement for 25 years, and reduction to E-1. Accordingly, the findings and the sentence, as modified, are

AFFIRMED.

Judge JOHNSON participated in this opinion prior to her reassignment.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court