UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEPHEN L. SMITH
United States Air Force

ACM S30806

20 July 2006

Sentence adjudged 10 December 2004 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Mary M. Boone (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Jin-Hwa L. Frazier, and Captain Daniel J. Breen.

Before

BROWN, MOODY, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of two specifications of willful dereliction of duty, one specification of wrongful use of cocaine on divers occasions, and one specification of wrongful inhalation of nitrous oxide on divers occasions, in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 934. A military judge sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

The appellant asserts that his guilty plea to wrongfully using nitrous oxide on divers occasions, which was to the prejudice of good order and discipline in the armed forces, was improvident. *See United States v. Erickson*, 61 M.J. 230, 232-33 (C.A.A.F. 2005).

In determining whether a guilty plea is provident, the test is whether there is a "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). In order to establish an adequate factual basis for a guilty plea, the military judge must elicit "factual circumstances as revealed by the accused himself [that] objectively support that plea[.]" *Jordan*, 57 M.J. at 238 (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, 375 (C.A.A.F. 1996).

The appellant stipulated and stated during the guilty plea inquiry that he and three other Airmen purchased cans of whipped cream from a local grocery store in order to inhale the nitrous oxide from the cans. Thereafter, they inhaled or "huffed" the nitrous oxide from the cans. Later that evening, the appellant and three Airmen went to an adult entertainment store and purchased 24 nitrous oxide cartridges. They divided the cartridges equally and then went to a local store and purchased balloons. They then returned to a party at another Airman's home off base. Once there, the appellant cracked open a nitrous oxide cartridge, inflated a balloon, and inhaled the nitrous oxide from the balloon. In addition, he offered another Airman some of the nitrous oxide from an inflated balloon. The appellant testified that inhaling the nitrous oxide made him feel light-headed and dizzy. He did not say how long this feeling lasted. During the guilty plea inquiry the appellant explained that he thought his conduct was prejudicial to good order and discipline because, "it undermines the need for discipline in the squadron." Later the following exchange occurred between the military judge and the appellant:

> MJ: Okay so, do you think that that could be not good for good order and discipline, that other Airmen are also using it -- you're offering to them and they're using it as well?
>
> ACC: Yes, Ma'am.

We conclude that appellant's assertions set forth in the guilty plea inquiry and the stipulation of fact entered into between the parties, do not objectively support his pleas of guilty to an offense under clause 1 of Article 134, UCMJ. First, we note the appellant was off base and off duty at the time of his divers uses of nitrous oxide. Second, unlike the appellant in *Erickson*, the appellant in the case sub judice did not indicate that by inhaling nitrous oxide it impaired and altered his thinking, damaged his brain cells and undermined his capability and readiness to perform military duties, a direct and palpable

effect on good order and discipline. *See Erickson*, 61 M.J. at 232, 233. Under the circumstances, we hold that the military judge abused her discretion by accepting the pleas as to this Charge and its Specification. The findings of guilty as to Charge III and its Specification, alleging wrongful inhalation of nitrous oxide, are dismissed.[*]

Having set aside findings of guilty, we must determine whether we can reassess the sentence or should order a sentence rehearing.

In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the analysis required in sentence reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

After carefully reviewing the record of trial, we are convinced that, absent the error, the sentence would have been at least of a certain magnitude. We are convinced beyond a reasonable doubt that by disapproving confinement in excess of four months we will have assessed a punishment clearly no greater than the sentence the military judge would have imposed absent the error. *See Doss*, 57 M.J. at 185.

Accordingly, under the criteria set out in *Sales*, we reassess the sentence as follows: bad-conduct discharge, confinement for four months, and reduction to E-1. We further find this reassessed sentence to be appropriate.

Conclusion

Charge III and its Specification are dismissed. The remaining findings and sentence, as reassessed, are correct in law and fact, and no error prejudicial to the

[*] There was no mention at trial of Texas Health and Safety Code § 485.031. We take judicial notice of this statute. This law makes it unlawful in Texas to inhale nitrous oxide in the manner in which the appellant used it. If the government had charged the appellant under clause 2 of Article 134, UCMJ, for use of nitrous oxide, the military judge had covered this statute with the appellant during the guilty plea inquiry, and obtained the appellant's agreement his conduct was of a nature to bring discredit upon the armed forces, his plea of guilty would be provident.

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). We affirm only so much of the sentence as includes a bad-conduct discharge, confinement for 4 months, and reduction to E-1. Accordingly, the remaining findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator