UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANIEL J. SWANSON
United States Air Force

ACM 36259

20 October 2006

Sentence adjudged 29 January 2005 by GCM convened at Ramstein Air Base, Germany. Military Judge: Adam Oler.

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Major Jin-Hwa L. Frazier, and Captain Daniel J. Breen.

Before

BROWN, JACOBSON and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of wrongfully displaying obscene material on his official government computer and wrongfully and knowingly possessing child pornography on divers occasions, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. Officer and enlisted members sitting as a general court-martial, sentenced appellant to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The convening authority approved the findings and sentence as adjudged.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant claims the military judge abused his discretion by refusing to accept the appellant's conditional guilty plea to wrongful possession of child pornography.[1]

Background

At trial the appellant moved to suppress admission of a computer disk found during a search of his gym bag and derivative evidence obtained therefrom. The military judge denied the defense motion and entered findings of fact and conclusions of law. The motion to suppress affected only the Charge and Specification of wrongful possession of child pornography. It did not affect the Charge and Specification alleging a violation of Article 92 of the UCMJ. After the military judge made his ruling, the trial defense counsel informed the court the appellant was willing to enter an unconditional guilty plea to the Article 92 offense and a conditional guilty plea to wrongful possession of child pornography. The prosecution agreed to the entering of a conditional guilty plea to wrongful possession of child pornography. The parties could not agree on whether the motion to suppress was charge dispositive. The military judge did not approve the conditional guilty plea. The appellant then moved to abate the proceedings in order to pursue a writ of mandamus to order the military judge to approve the conditional guilty plea. The military judge denied this motion. Thereafter, the appellant entered unconditional guilty pleas to all charges and specifications. Pursuant to the appellant's pleas of guilty, the military judge found him guilty of all charges and specifications.

Conditional Guilty Plea

Rule for Courts-Martial (R.C.M.) 910(a)(2) provides in relevant part as follows:

> *With the approval of the military judge* and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. (Emphasis added).

Air Force Instruction (AFI) 51-201, *Administration of Military Justice*,

[1] In the appellant's second assignment of error, also raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), he argues that if this Court finds in his favor on the issue raised above, then the military judge abused his discretion in not suppressing the evidence from the search of his gym bag and derivative evidence obtained therefrom.

¶ 8.2 (26 Nov 2003) in relevant part provides the following guidance for implementing R.C.M. 910(a)(2): "Accept a conditional guilty plea *only when the issue preserved for appeal is case dispositive*." (Emphasis added).

Case dispositve "normally denotes that nothing remains to be resolved after resolution of the issue in controversy." *United States v. Monroe*, 50 M.J. 550, 553 (A.F. Ct. Crim. App. 1999). "Conditional pleas should be reserved for those cases in which an adverse ruling on appeal ends the case -- i.e., the government is unable to retry the accused on any of the specifications because of the appellate court's decision on the preserved issue." *United States v. Hare*, ACM 30083, unpub. op. at 17 (A.F.C.M.R. 3 Dec 1993).

R.C.M. 910(a)(2), does not give an accused an absolute right to enter a conditional guilty plea. *Monroe*, 50 M.J. at 553; *United States v. Forbes*, 19 M.J. 953, 954 (A.F.C.M.R. 1985). In fact, this Court stated in *Forbes* that "[s]ince the purpose of a conditional guilty plea is the conservation of judicial and governmental resources, the discretion allowed the trial judge and the government is not subject to challenge by an accused." *Id*.

We have criticized staff judge advocates and military judges for entering into and approving conditional guilty pleas that were not case dispositive and contrary to the guidance of AFI 51-201, ¶ 8.2. *See Monroe*, 50 M.J. at 553; *United States v. Phillips*, 32 M.J. 955, 956-57 (A.F.C.M.R. 1991); *United States v. Collison*, ACM S28736, unpub. op. at 8-10 (A.F.C.M.R. 24 Feb 1994); *Hare*, unpub. op. at 16-18. Approval of a conditional guilty plea by the military judge under R.C.M. 910(a)(2), is more than a ministerial act. *Monroe*, 50 M.J. at 553. One of the findings the military judge should make on the record in approving a conditional guilty plea is that the motion is case dispositive. *Id.*

In this case, the parties agree the defense motion was *not* case dispositive. The remaining charge and specification would have survived even if the military judge had granted the motion. Moreover, the prosecution contended the motion was not dispositive of the wrongful possession of the child pornography Charge and Specification. Under these circumstances, we find the military judge did not err. Instead, he followed the *clear* guidance of this Court when he properly declined to approve the conditional guilty plea. *See id; Phillips*, 32 M.J. at 957. This assignment of error is without merit.[2]

[2] Given our resolution of this issue, we find the appellant's unconditional pleas of guilty to all charges and specifications waives appellate review of the military judge's ruling on the defense motion to suppress. *See* R.C.M. 910(j); *United States v. Hinojosa*, 33 M.J. 353, 354 (C.M.A. 1991); *United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995).

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

JEFFREY L. NESTER
Clerk of Court