UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOSEPH B. TAPP
United States Air Force

ACM S32085

18 November 2013

Sentence adjudged 31 July 2012 by SPCM convened at Mountain Home Air Force Base, Idaho. Military Judge: Natalie D. Richardson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 1 month, forfeitures of $994.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Jane E. Boomer.

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

Before

ORR, HELGET, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was convicted by a military judge sitting as a special court-martial of two specifications of larceny, in violation of Article 121, 10 U.S.C. § 921. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 1 month, forfeiture of $994.00 pay per month for 2 months, and reduction to E–1. The convening authority approved the sentence as adjudged. Before this Court, the appellant argues that (1) his plea to Specification 2 of the Charge was improvident; or in the alternative, (2) the evidence is legally and factually insufficient to support his conviction; and (3) his sentence is inappropriately severe. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

On 28 May 2012, the appellant entered the Mountain Home Air Force Base Exchange on three different occasions. Each time he picked up a shopping basket and placed the following merchandise in the basket: a GoPro Battery Backpack, a GoPro Chesty Chest Harness, an Xbox Forza Motor Sport 4 video game, a ScanDisk 64 GB Flash Drive, a Retractable Cable Kit with a USB Adapter, and a Gerber Paraframe Serrated Knife. After placing the items in the shopping basket, the appellant entered the dressing rooms, removed the items out of their packaging and exited a few minutes later with an empty shopping basket. On one of the three occasions, he proceeded to the checkout counter and purchased an energy drink. The appellant left the store before the loss prevention personnel discovered the packing for the items in the dressing rooms.[1] On 15 April 2012, the appellant returned to the Base Exchange. Once inside, he took an external hard drive valued at $129.99 from the electronics section of the store to the customer service counter. He told the clerk that he wanted to return the hard-drive to the store but he did not have the store receipt. The clerk told him that she could not give him cash, but instead she would give him a store credit for the value of the hard drive. The appellant accepted her offer and the clerk loaded $129.99 on a plastic card. The appellant used the plastic card to purchase other items from the Exchange.

Specification 2 of the Charge alleged that the appellant, on or about 15 April 2012, stole "store credit of a value less than $500.00, the property of the Army and Air Force Exchange Service" (AAFES). During his *Care*[2] inquiry, the appellant admitted that he stole the property with the intent to permanently defraud the AAFES of the use and benefit of the property. The military judge accepted the plea after asking the appellant:

MJ: Now, I asked you sort of two theories for your larceny. One was the little plastic card itself, and one was the value on the card. Do you believe that you wrongfully obtained both the little plastic card, as well as the store credit that was loaded on to it?

ACC: Yes, ma'am.

MJ: And both those things were in the possession of and belonged to AAFES?

ACC: Yes ma'am.

MJ: And both of those things together were of a value of less than $500.00?

ACC: Yes, ma'am.

[1] Security Forces investigators recovered all six items after receiving a warrant to search the appellant's room.
[2] *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969).

For clarification, the appellant's trial defense counsel asked the military judge to ask the appellant whether he believed the value of the plastic card by itself was less than $500.00. The appellant told the military judge that the card itself was of very little value—it was not worth more than a couple of bucks. Both counsel agreed that the appellant could be found guilty of larceny as charged in Specification 2, on the theory that he wrongfully obtained just the plastic card alone, without modification to the Specification.

Guilty Plea

In his first assignment of error, the appellant asserts that his plea of guilty to Specification 2 of the Charge was improvident. In the alternative, he argues that the Specification failed to state an offense. He asks this Court to dismiss Specification 2 of the Charge and set aside the sentence.

We review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from the guilty plea de novo. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citation omitted). "In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *Inabinette*, 66 M.J. at 322; *see also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991) (guilty plea should not be overturned as improvident unless record reveals a substantial basis in law or fact to question it). "An accused must know to what offenses he is pleading guilty," *United States v. Medina*, 66 M.J. 21, 28 (C.A.A.F. 2008), and a military judge's failure to explain the elements of the charged offense is error, *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Accordingly, "a military judge must explain the elements of the offense and ensure that a factual basis for each element exists." *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)).

In the instant case, the military judge correctly read and explained the elements of larceny to the appellant. When asked, the appellant admitted sufficient facts to support each element of the offense. He was represented by counsel and given the opportunity to consult with his counsel when questioned by the military judge about the elements and consequences of the offense. In fact, upon his counsel's request, he took the opportunity to confirm his understanding that he could be found guilty of Specification 2 for the value placed on the store credit card or the just the plastic card itself. Additionally, the record does not disclose any matter inconsistent with the appellant's plea. Based on the factors listed above, we find the military judge did not abuse her discretion by accepting the appellant's guilty plea. *See United States v. Ferguson*, 68 M.J.

431 (C.A.A.F. 2010) (plea provident accused's concessions satisfy elements and record does not disclose matter inconsistent with plea).

Legal and Factual Sufficiency

In his second assignment of error, the appellant argues that the evidence used to support his conviction for Specification 2 is not legally or factually sufficient to support his conviction. Additionally, he contends that because the military judge's findings are not clear, this Court cannot properly conduct its review under Article 66 (c), UCMJ, 10 U.S.C. § 866(c). We find that both of the appellant's assertions are without merit.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Turner*, 25 M.J. at 324 (citation omitted), *quoted in United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The appellant argues that the Specification 2 of the Charge is legally and factually insufficient because the military judge raised some pretrial concerns about whether stealing a store credit could be charged under Article 121 of the UCMJ. As a result, he avers the military judge's findings were not clear. We disagree. The military judge asked the appellant to describe how he obtained the store credit. After the appellant described his actions, which included his admission that he purchased other items with the plastic card, the military judge stated that: "I also want to note that I find the accused's plea of guilty provident under both theories for Specification 2, that is, obtaining by false pretenses or larceny of the plastic card itself, as well as the value of the

value represented on that card, which I find a negotiable instrument to get merchandise from AAFES. So, just to be clear I believe both of those are encompassed in Specification 2, and including with the value amount, that they both come under $500.00." Because the military judge explained the elements of larceny to the appellant, announced her specific findings, and considered both theories as one offense, we are able to conduct our mandatory Article 66(c), UCMJ, review. In doing so, we had no difficulty concluding that the appellant's guilty plea as to this Specification was provident and the Specification has been proven beyond a reasonable doubt. Moreover, we find the appellant's conviction on this Specification legally sufficient.

Sentence Appropriateness

Finally, the appellant avers that we should not approve his punitive discharge because it is inappropriately severe in comparison to other unrelated cases similar in nature and seriousness and in light of his remorse and acceptance of responsibility. Specifically, he contends the shoplifting of property significantly less than $500 in value is a minor offense that is usually handled though nonjudicial punishment. In support of his contention, he provided case summaries from a legal research database indicating that the vast majority of shoplifting cases in the Air Force are not tried by courts-martial and only one accused received a punitive discharge in 2012. Because of this disparity in dispositions across the Air Force, he believes his punitive discharge is inappropriately severe.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). Article 66(c), UCMJ, requires us to independently review the sentence of each case within our jurisdiction and only approve that part of the sentence that we find should be approved. *Baier*, 60 M.J. at 383–84. We are required to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). In determining sentence appropriateness, we are mindful that it is distinguishable from clemency, which is a bestowing of mercy on the accused and is the prerogative of the convening authority. *Healy*, 26 M.J. at 395.

The appropriateness of a sentence generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). We are not required to engage in comparison of specific cases "except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (quoting *Ballard*, 20 M.J. at 283; *United States v. Brock*, 46 M.J. 11 (C.A.A.F. 1997)). The appellant has the burden to make that showing. *Id.* If the appellant satisfies his burden, the Government

must then establish a rational basis for the disparity. *Id.* "Closely related" cases are those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); *see also Lacy*, 50 M.J. at 288 (listing examples of closely related cases to include co-actors in a common crime, service members involved in a common or parallel scheme, or "some other direct nexus between the service members whose sentences are sought to be compared").

The appellant has not met his burden of showing that the cases he provided from the database warrant sentence comparison. After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service, we find the sentence to be appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384–85; *Healy*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

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; *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court