UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER J. WHITLOCK
United States Air Force

ACM S32131

17 January 2014

Sentence adjudged 21 March 2013 by SPCM convened at Hill Air Force Base, Utah. Military Judge: Christopher M. Schumann (sitting alone).

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

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Captain Jeffrey A. Davis.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Terence S. Dougherty; and Gerald R. Bruce, Esquire.

Before

ORR, HARNEY, and MITCHELL
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MITCHELL, Judge:

A special court-martial composed of a military judge sitting alone convicted the appellant, pursuant to his pleas, of one specification of desertion terminated by apprehension and one specification of false official statement, in violation of Articles 85 and 107, UCMJ, 10 U.S.C. §§ 885, 907.

The adjudged sentence consisted of a bad-conduct discharge, confinement for 5 months, restriction for 30 days to Hill Air Force Base, Utah, and reduction to E-1. The convening authority approved the sentence except for the restriction. We affirm the

finding as to the desertion, set aside the finding to the false official statement, and affirm the sentence.

Background

The appellant enlisted in the Air Force in 2009 with a six-year term of enlistment. By the time of his court-martial, he had served over three years at three different duty locations and was stationed at Hill Air Force Base (AFB), Utah. While at Hill AFB, he decided to become a missionary and "applied for citizenship to Canada with the intentions of departing the United States of America permanently" for the purpose of "witnessing to the world this lust beyond these borders." On 26 December 2012, he packed his car full of his belongings, withdrew all his cash from his savings account, and began a circuitous route to Canada. On 31 December 2012, a Nevada state trooper stopped him for a minor traffic violation. The trooper asked him about why he was in Nevada, why his car lacked proper registration plates, and where he was from as his driver's license was not local. The appellant told the trooper that he was on leave from the military. The Nevada trooper queried the law enforcement database, discovered that the appellant was in a deserter status, and apprehended him.

False Official Statement

The military judge conducted an inquiry with the appellant regarding his guilty plea to the false official statement charge. The appellant clearly detailed that his statement was false, that he knew it was false because he had not even applied for leave, and that he made the statement with the intent to deceive as he hoped that if the Nevada trooper believed he was on leave that he was less likely to be arrested. The military judge provided a definition of an official statement[1] for the appellant who stated he understood the definition.

When the military judge asked if the appellant "agree[s] and admit[s] that [his] statement . . . related to [his] official duties," he replied: "Yes, sir, that's correct."

The military judge is required to determine if there is "an adequate basis in law and fact to support [a guilty plea] before accepting it." *United States v. Iabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). We review a military judge's decision to accept the guilty plea for an abuse of discretion by determining whether the record as a whole demonstrates a "'substantial basis' in law and fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

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[1] The military judge explained: "A statement is an official statement when the statement relates to the official duties of either the speaker or the hearer. A speaker may make a false official statement to civilian law enforcement officials if the statement bears a clear and direct relationship to the speaker's official duties." We note that this is not the same definition as provided in the current military judge's benchbook. *See* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-31-1(1 January 2010).

In *United States v. Capel*, 71 M.J. 485 (C.A.A.F. 2013) and *United States v. Spicer*, 71 M.J. 470 (C.A.A.F. 2013), our superior court provided a framework to use when determining if a statement is "official" for the purposes of Article 107, UCMJ. In order for a statement to be "official" it must fall into one of three categories: (1) the statement is made "in the line of duty, or to civilian law enforcement officials if the statement bears a clear and direct relationship to the speaker's official duties"; (2) the "hearer is a military member carrying out a military duty at the time the statement is made"; or (3) the "hearer is a civilian who is performing a military function at the time the speaker makes the statement," *Spicer*, 71 M.J. at 474-75 (internal quotation marks and citations omitted), or is "acting on behalf of military authorities or . . . performing a military function." *Capel*, 71 M.J. at 487. *See United States v. Wagner*, ACM S32076, 2013 WL 6579350 (A.F. Ct. Crim. App. 4 November 2013) (unpub. op.). Statements made to civilian law enforcement officials are not official statements under Article 107, UCMJ, when the statements are not pursuant to any military duties of the appellant, and the civilian police officers are not acting in conjunction with or on behalf of military authorities *at the time* the statements are made. *United States v. Passut*, 73 M.J. 27, __ (C.A.A.F. 2014) (emphasis added).

Here, the record as a whole demonstrates a substantial basis in law and fact for questioning the guilty plea. The Nevada state trooper was not a military member nor was he performing a military function. There is also no evidence that the state trooper was acting on behalf of military authorities at the time the statement was made. The trooper did not know the appellant was in a deserter status until after the false statement was made. Without further evidence in the record, we cannot say that in this case the appellant's statements bear a clear and direct relationship to his official duties. Thus, the statement was not official and we therefore set aside Charge II and its Specification.

Sentence Reassessment

This Court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, ___ (C.A.A.F. 2013). Our superior court has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.A.A.F. 1986). This analysis is based on a totality of the circumstances with the following as illustrative factors: dramatic changes in the penalty landscape and exposure, the forum, whether the remaining offenses capture the gravamen of the criminal conduct, whether significant or aggravating circumstances remain admissible and relevant, and whether the remaining offenses are the type that we as appellate judges have experience and familiarity with to reliably determine what sentence would have been imposed at trial. *Winckelman*, 73 M.J. at ___.

In this case, the landscape penalty has not changed, as the maximum punishment for the remaining charge still reaches the maximum authorized in a special court-martial. This case was also determined by a military judge sitting alone so we can have greater certainty as to what the result would have been, absent the error. The evidence of the false statements made to the Nevada trooper would still be relevant and admissible as evidence regarding the desertion that was terminated by apprehension. The desertion terminated by apprehension captures the gravamen of the offense. Desertion is also the type of offense with which we have experience and familiarity. Based on this totality of the circumstances in this court-martial, we are satisfied that absent the error the military judge would have adjudged no less than the approved sentence of a bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Conclusion

Charge II and its Specification are dismissed. The remaining findings and 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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the remaining findings and sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court