UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHAYNE E. WYATT
United States Air Force

ACM 36435

31 May 2007

Sentence adjudged 18 July 2005 by GCM convened at Hurlburt Field, Florida. Military Judge: Dixie A. Morrow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Carrie E. Wolf, and Captain Jamie L. Mendelson.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his pleas, of wrongfully using marijuana and cocaine on divers occasions, wrongfully distributing cocaine on divers occasions, wrongfully distributing marijuana, and a separate single wrongful use of marijuana, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge, sitting alone as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for ten months, total forfeitures of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. On appeal, the appellant raises three errors pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no merit in the appellant's assertions of error, we affirm.

The appellant first asserts the military judge erred in denying him credit under Rule for Courts-Martial (R.C.M.) 305 and Article 13, UCMJ, 10 U.S.C. § 813 when she

ruled he was properly kept in pretrial confinement and did not suffer illegal pretrial punishment. Whether the appellant suffered illegal pretrial punishment presents a mixed question of law and fact. *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). We will overturn a military judge's findings of fact only if they are clearly erroneous. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We review *de novo* the question of whether an appellant is entitled to credit for an Article 13 violation. *Id.* In regard to the question of the legality of pretrial confinement, we review for an abuse of discretion. *United States v. Wardle*, 58 M.J. 156, 157 (C.A.A.F. 2003), *United States v. Gaither*, 45 M.J. 349, 351-52 (C.A.A.F. 1996).

In the case *sub judice*, the military judge considered documents submitted by both parties, took testimony, and heard argument prior to ruling that the appellant had legally been placed in pretrial confinement and had not been illegally punished prior to trial. We find the military judge's findings of fact and conclusions of law to be detailed, concise and correct, and adopt them as our own. We further find that the military judge's rulings were fully supported by the evidence and she did not abuse her discretion in ruling as she did. Thus, we hold the appellant's first assignment of error to be without merit.

The appellant next asserts that his guilty pleas were improvident "where the promises made from OSI[1] induced appellant's pleas of guilty in order to receive a reduced sentence." The appellant did not make this claim at trial. In his declaration, the appellant claims OSI agents met with him while he was in pretrial confinement and made certain promises to him in order to gain his cooperation in ongoing drug investigations. According to the appellant, the agents told him they were "friends" of the prosecutor, would testify in his favor at his court-martial and would get him a lesser sentence than the 13-month sentence cap in his pretrial agreement.

In determining whether a guilty plea is provident, we review to determine whether there is a "substantial basis" in law and fact for questioning the guilty plea. *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 436 (C.M.A. 1991)). When reviewing the providence of a plea, we consider the entire record in the case. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). A mere possibility that a defense might exist does not render a plea of guilty improvident; on appeal, "a guilty plea should be overturned only if the record fails to objectively support the plea or there is evidence in substantial conflict with the pleas of guilty." *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002) (quoting *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994)); *Prater*, 32 M.J. at 436.

After carefully reviewing the entire record of trial, we find no basis in law or fact for questioning the appellant's guilty plea. According to the appellant's own declaration, the OSI agents apparently met with the appellant and made their supposed promises *after* the appellant had struck his bargain with the convening authority and agreed to plead

[1] The appellant here refers to the Air Force Office of Special Investigations.

guilty in exchange for a 13-month limitation on confinement. Thus, any statements made by the agents do not seem to have influenced the appellant's decision to plead guilty. Additionally, while the appellant complains that the trial counsel argued for 18 months of confinement – in the appellant's view, a violation of the promises made to him by the OSI agents – the fact remains that the appellant was only sentenced to 10 months of confinement, which falls well under the sentence limitation. Most significantly, however, we note that, in response to the military judge's extensive questioning during the providence inquiry, the appellant confirmed he had not been offered anything in exchange for his pleas except the confinement limitation noted in the pretrial agreement, and told the judge that, besides that limitation, no one made him any promises in an attempt to persuade him to plead guilty. *See Johnson*, 42 M.J. at 445. (rejecting the defense's invitation to speculate post-trial as to the existence of facts which may invalidate an accused's guilty plea, especially where the inference sought to be drawn would contradict express admissions by the accused). We therefore find the appellant's pleas to be provident and his assignment of error to be without merit.

Finally, the appellant asserts that his sentence is inappropriately severe. We reviewed the record of trial, the appellant's argument on this issue, and the government's reply. In determining the appropriateness of a sentence, this Court exercises its "highly discretionary" powers to assure that justice is done and the appellant receives the punishment he deserves. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give "individualized consideration" to an appellant "on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). After a careful review of the appellant's case, we hold that the appellant's sentence is not inappropriately severe.

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 findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator