

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JESSICA L. ALDERSON
United States Air Force

ACM S31053

5 October 2007

Sentence adjudged 5 December 2005 by SPCM convened at Charleston Air Force Base, South Carolina. Military Judge: W. Thomas Cumbie (sitting alone).

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

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ZANOTTI, Judge:

A military judge sitting alone as a special court-martial found the appellant guilty, pursuant to her pleas, of one specification of conspiracy to wrongfully appropriate military property, one specification of wrongful appropriation of military property of a value of more than \$500, and one specification of larceny of military property of a value of more than \$500, in violation of Articles 81 and 121, UCMJ, 10 U.S.C. §§ 881, 921. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 5 months, and reduction to E-1. The appellant argues that her plea of guilty to

conspiracy was improvident because the record does not support the existence of an agreement that encompasses the offense of wrongful appropriation. We disagree and affirm the findings and sentence.

Background

The appellant was assigned to the Life Support Flight in the 437th Operations Support Squadron, where issuing property of the sort taken in this case was part of her military duties.¹ During the providence inquiry pursuant to *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), after the appellant was advised of the elements of the offense of conspiracy, the appellant testified that on one day within the charged time period, Senior Airman (SrA) J² visited the appellant at her duty station. The appellant didn't remember the exact date. SrA J looked at the night vision goggles (NVGs) and told the appellant he wanted to use some at their home. The appellant didn't recall the exact words. The appellant said that she knew that SrA J meant that he wanted the appellant to bring a pair of the NVGs home. The appellant could not recall her exact response, but she testified that she knew she agreed to bring a pair of the NVGs home. The appellant also testified that she never told SrA J that she would not do it.

The military judge explored the element of whether an agreement to wrongfully appropriate the property existed between the appellant and SrA J. In response to the military judge's question regarding how SrA J had suggested that the appellant bring the NVGs home, the appellant said that as best she could recall, SrA J said, "it would be cool to have a pair of these at home to use." The military judge asked the appellant whether she understood SrA J's comment to mean "gee, I wish you'd bring a pair home so I could look at them and play with them." The appellant agreed with this factual statement.

Continuing to explore how the appellant responded to SrA J, the military judge emphasized that she had to agree to do it in order to be guilty. He advised the appellant that the agreement need not be formal, stating "you don't have to actually tell him formally I agree, but you have to in your own mind decide, okay, I think I'll do what he asked me to do." When the military judge asked her whether she had decided to do what she said SrA J was asking her, characterizing it as a "meeting of the mind," the appellant said that her response was to turn, nod her head and smile at him "as if, okay, yes, I'll take a pair" Sometime later within the charged time period, the appellant wrongfully took the property home. She admitted that she had no permission, no hand receipt, and that she knew it was the Air Force's property.

¹ The military property listed in the specifications include operational gear likely issued to those deploying: two sets of night vision goggles, two battery packs, two battery pack adapters, and two night vision goggle mounting plates; two sets of level III body armor; two survival vests; and two green plastic rescue lights.

² SrA J was also the appellant's fiancé, and they shared an off-base residence.

There was a stipulation of fact in the case. The stipulation outlines the appellant's admission that she had entered into an agreement with SrA J, and she took the property from her duty section while that agreement continued to exist and while she remained a party to the agreement. The stipulation explains that she took the property on a weekend, "because no one was around at the time and it was easy to do." The stipulation also outlines that the appellant later bragged about her actions, and that SrA J had asked the appellant, "[w]hen are you going to get me a flight helmet to go with the NVGs?"

Discussion

We review the military judge's decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 MJ 374, 375 (C.A.A.F. 1996). Once the military judge accepts the appellant's plea as provident and enters findings thereon, the appellant must establish that a substantial conflict exists between the record and the appellant's pleas. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The mere possibility of defense is inadequate. *United States v. Marcy*, 62 M.J. 611, 613 (A.F. Ct. Crim. App. 2005) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)).

The appellant argues that her plea is improvident because the inquiry did not objectively establish the requisite agreement to commit the offense of wrongful appropriation. The elements of conspiracy are:

- (1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and
- (2) That while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 5(b) (2005 ed.).

There is no requirement for the agreement to be formal. The agreement need not be manifested in any formal words. *United States v. Mack*, 65 M.J. 108, 114 (C.A.A.F. 2007) (citing *MCM*, Part IV, ¶ 5(c)(2); *United States v. Cobb*, 45 M.J. 82, 84 (C.A.A.F. 1996)). It is sufficient if the agreement is "merely a mutual understanding among the parties." *Mack*, 65 M.J. at 114 (citing *Cobb*, 45 M.J. at 85). "The existence of a conspiracy may be established by circumstantial evidence, including reasonable inferences derived from the conduct of the parties themselves." *Mack*, 65 M.J. at 114; *see also MCM*, Part IV, ¶ 5(c)(2).

We are satisfied that a criminal conspiracy existed. The parties to this conspiracy were not mere acquaintances; they were engaged to be married and they lived together.

The appellant testified that she knew what SrA J meant by his comments about how cool it would be to have the NVGs at home, and she gave a nod and a smile in response. Because the appellant claimed she could not recall the exact words used, the military judge proposed a hypothetical dialogue. The appellant concurred that the hypothetical dialogue accurately represented the conversation. The hypothetical dialogue establishes that an agreement to wrongfully appropriate the military property existed between the appellant and SrA J. The hypothetical dialogue was credible and reasonable, because it was drawn from the stipulation of fact in which the appellant admitted she had an agreement with the SrA J to bring the NVGs home, that she had bragged about taking the property, and that SrA J had asked for yet more military property. The appellant seems to be arguing that because she didn't expressly state that the communication shared between the parties was a "code of sorts" for her to further the object of the conspiracy, her plea is improvident. But the hypothetical dialogue the military judge used to ensure the plea was factually based, because the appellant denied recalling the exact words used, said just as much, and permits us to conclude that the plea is provident.

The appellant relies on *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002), characterizing the plea inquiry as the appellant's mere agreement with the military judge's conclusions of law. *Jordan* can be distinguished for two reasons. First, there was no stipulation of fact in *Jordan*. Second, in *Jordan*, questions to the appellant on whether his conduct was service discrediting or prejudicial to good order and discipline were presented as elements of the offense. The appellant concurred with those conclusions of law. The military judge's questions encompassing a *factual description* on those elements however, to support the conclusion of law, were actually denied by the appellant. *Id.* at 240-42 (negative reply to whether the "victim" was upset or agitated).

The appellant also argues that, because there was no discussion over how the appellant *knew* that criminal intentions motivated SrA J to comment on how "it would be cool to have a pair of these at home to use," there is no evidence of a "meeting of the minds." The appellant suggests that her actions could be considered no more than a mere gift to her fiancé, neutralizing his role as the only co-conspirator. The appellant then compares her agreement to the facts in *United States v. Valigura*, 54 M.J. 187 (C.A.A.F. 2000), in which the only "co-conspirator" was an undercover operative, without actual criminal intent. The Court there rejected the unilateral conspiracy theory, instead requiring that there be a "common criminal purpose by at least two persons." *Id.* at 190. The appellant argues that generous gestures to honor her fiancé's lawful wishes would fail to be a bilateral conspiracy.

We reject this argument. As recognized in *Valigura*, the motivation of an undercover operative is law enforcement. *Id.* at 188-89. There could be no conspiracy in *Valigura* as a matter of law. Here, the appellant admitted that she knew SrA J meant for her to bring the goggles home when he told her he found them to be "cool" while visiting her at her duty section. This is a question of fact. That there is no further elaboration

does not trouble us. The Court of Appeals of the Armed Forces has recognized a distinction in post-trial analysis between proof at trial on an element of an offense, and adequate evidence to assess the providence of a plea of guilty. *Faircloth*, 45 M.J. at 174. The Court has acknowledged that guilty pleas by their nature are less developed factually, the facts are not subject to an adversarial test, and that there is a tendency on the part of the one pleading guilty to “conscious[ly] . . . limit the nature of the information that would otherwise be disclosed in an adversarial contest.” *Jordan*, 57 M.J. at 238-39. Thus, a review of the entire record is conducted, rather than merely “end[ing] our analysis at the edge of the providence inquiry.” *Id.* at 239.

We have reviewed the entire record and hold that no substantial basis exists to question the plea in law or fact. The facts as brought out in the stipulation of fact and by the appellant herself convince us that the offense of conspiracy to wrongfully appropriate military property was complete.

Conclusion

The 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 the sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, GS-11, DAF
Clerk of the Court