UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman MARCUS J. BENNETT
United States Air Force

ACM S31802

14 November 2011

Sentence adjudged 23 March 2010 by SPCM convened at Eglin Air Force Base, Florida. Military Judge: Le T. Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 45 days, forfeiture of $900.00 pay per month for 1 month, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Reggie D. Yager; and Major Tiwana L. Wright.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HARNEY, Judge:

A special court martial composed of a military judge sitting alone at Eglin Air Force Base, Florida, tried the appellant on 23 March 2010. Consistent with the appellant's guilty pleas, the military judge convicted the appellant of one specification of attempted wrongful distribution of Percocet, one specification of attempted wrongful

distribution of Demerol,[1] one specification of wrongful distribution of Vicodin, and one specification of wrongful use of Spice, in violation of Articles 80, 112a, and 134, UCMJ, 10 U.S.C. §§ 880, 912a, 934, respectively. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 45 days, forfeiture of $900.00 pay per month for 1 month, and reduction to E-1,[2] but the convening authority deferred the adjudged and mandatory forfeitures and waived the mandatory forfeitures for the benefit of the appellant's spouse.

On appeal, the appellant asks this Court to set aside his convictions for attempted wrongful distribution of Percocet and attempted wrongful distribution of Demerol, and to set aside the bad-conduct discharge or, alternatively, order a sentence rehearing. The appellant argues that his guilty pleas to attempted wrongful distribution of Percocet and attempted wrongful distribution of Demerol were improvident because there were no acts showing a substantial step towards the commission of wrongful distribution of Percocet and Demerol. We disagree. Finding no prejudicial error, we affirm.

Background

The relevant facts surrounding the issues on appeal are outlined below. In late September 2009, the appellant was scheduled to have his wisdom teeth extracted. Prior to surgery, the appellant filled a prescription for Percocet. After filling the prescription, the appellant attended a unit party with Airman (Amn) CM. The appellant was driving his car and Amn CM was in the passenger seat. The appellant had the Percocet in his car and offered some to Amn CM, who declined.

The appellant had the wisdom tooth surgery on 2 October 2009. After surgery, the appellant filled a prescription for Demerol. Using the appellant's car, Amn CM drove the appellant back to his room, dropped him off, and left to pick up another friend, Airman First Class (A1C) DS. At some point, the appellant placed the Demerol in his medicine cabinet. A1C DS and Amn CM joined the appellant in his room, where they stayed to talk for awhile. At some point, A1C DS went to the appellant's restroom. The appellant followed him. While A1C DS was standing at the sink near the medicine cabinet, the appellant offered A1C DS some Demerol. He declined.

During the providency inquiry, the military judge advised the appellant of the elements and definitions that accompanied the offense of attempted wrongful distribution

[1] The appellant pled not guilty to the charged offense of wrongful distribution of Demerol, but guilty to the lesser included offense of attempt to wrongfully distribute Demerol, in violation of Article 80, UCMJ, 10 U.S.C. § 880.

[2] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to some of the charges and specifications in return for the convening authority's promise not to approve any confinement exceeding three months. Additionally, the government agreed not to present evidence to prove the remaining charges and specifications to which the appellant pled not guilty: two specifications of wrongful distribution of Demerol, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of obstructing justice, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

of Percocet and attempted wrongful distribution of Demerol. Regarding the offense of attempted wrongful distribution of Percocet, the appellant testified that (1) he offered Amn CM some Percocet; (2) Amn CM declined; (3) his act of offering Amn CM Percocet was more than mere preparation and was a substantial step towards the commission of wrongful distribution of Percocet; and (4) the only reason he did not distribute Percocet to Amn CM was because Amn CM declined. Regarding the offense of attempted wrongful distribution of Demerol, the appellant testified that (1) he offered A1C DS some Demerol; (2) A1C DS declined; (3) his act of offering A1C DS Demerol was more than mere preparation and was a substantial step towards the commission of wrongful distribution of Demerol; and (4) the only reason he did not distribute Demerol to A1C DS was because A1C DS declined. The military judge found the appellant guilty of both offenses.

Providency Inquiry

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). *See also United States v. Inabinette*, 66 M.J. 320 (C.A.A.F. 2008). An accused may not plead guilty unless the plea is consistent with the facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Moreover, an accused may not simply assert his guilt. Instead, the military judge must elicit facts "as revealed by the accused himself" to support the plea of guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). Where there is a substantial basis in law or fact for questioning the plea, the plea cannot be accepted. *Inabinette*, 66 M.J. at 322. *See also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Article 80(a), UCMJ, provides that "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." The *Manual for Courts–Martial, United States* (*MCM*), Part IV, ¶ 4b (2008 ed.) lists the elements of the offense of attempt as:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

The *Manual* also explains, "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense." *MCM*, Part IV, ¶ 4c(2).

In *United States v. Church*, 32 M.J. 70, 72 (C.M.A. 1991), the (then) Court of Military Appeals noted the difficulty in distinguishing between acts constituting mere preparation and acts constituting actual attempts. "[T]he actual dividing line between the two is shadowy in the extreme." *Church*, 32 M.J. at 72 (quoting R. Perkins & R. Boyce, *Criminal Law* 617 (3d ed. 1982)). There is "no litmus test" for distinguishing between mere "preparation" and "attempt." *United States v. Byrd*, 24 M.J. 286, 289 (C.M.A. 1987). In *Byrd*, the Court of Military Appeals cited with approval the test employed by the Court of Appeals for the Second Circuit; specifically, that an accused "'must have engaged in conduct which constitutes a substantial step toward commission of the crime' and that '[a] substantial step must be conduct strongly corroborative of the firmness of the [accused]'s criminal intent.'" *Byrd*, 24 M.J. at 290 (quoting *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977) (second alteration added)). *See also United States v. Smith*, 50 M.J. 380 (C.A.A.F. 1999); *United States v. Jones*, 32 M.J. 430 (C.M.A. 1991).

We review a guilty plea to determine whether there is a substantial basis in law or fact for questioning the plea. *Inabinette*, 66 M.J. at 322. *See also United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997); *Prater*, 32 M.J. at 436. With respect to an attempt charge, this court will only set aside a guilty plea "if, as a matter of law, the appellant's actions fall *unambiguously* short of being a direct movement toward the commission of the offense." *United States v. Rothenberg*, 53 M.J. 661, 664 (A.F. Ct. Crim. App. 2000). Our superior court has amplified this point as follows:

> Quite simply, where an accused pleads guilty and during the providence inquiry admits that he went beyond mere preparation and points to a particular action that satisfies himself on this point, it is neither legally nor logically well-founded to say that actions that may be ambiguous on this point fall short of the line "as a matter of law" so as to be substantially inconsistent with the guilty plea.

United States v. Schoof, 37 M.J. 96, 103 (C.M.A. 1993) (citing Article 45(a), UMCJ, 10 U.S.C. § 845(a)).

As the *Schoof* court noted, if an appellant pleads guilty to attempt, and the acts fall into that "twilight zone" in which the line between "preparation" and "substantive step" may not be clear, that uncertainty is insufficient to find the plea improvident as a matter of law. *Schoof*, 37 M.J. at 103.

On appeal, the appellant argues that his actions did not go beyond mere preparation and that he was guilty of nothing more than soliciting another to commit an offense, in violation of Article 134, UCMJ. The appellant relies upon *Rothenberg*, wherein the accused and another Airman were at a party when a man whom the accused knew supplied ecstasy approached and asked whether the accused wanted any ecstasy. The accused asked the other Airman if he wanted any; the Airman declined. The accused had the money to buy the ecstasy; if the other Airman had wanted some, the accused would have bought it, given it to the Airman, and collected from him later. The facts are silent about whether the dealer had any ecstasy on his person. The military judge found the accused's guilty plea provident and accepted the plea. *Rothenberg*, 53 M.J. at 663. On appeal, this Court ruled that the accused admitted only to soliciting the other Airman to possess ecstasy under Article 134, UCMJ, and held that the military judge abused his discretion in accepting the guilty plea. But this court still upheld the conviction under the "closely related" doctrine, finding the accused guilty instead of soliciting another to commit the offense of wrongfully possessing ecstasy rather than attempting to distribute ecstasy. *Id.* at 665.

The appellant asserts that his guilty pleas were improvident and that he cannot be found guilty of soliciting another to possess a controlled substance because our superior court severely limited the "closely related doctrine" in *United States v. Morton*, 69 M.J. 12, 16 (C.A.A.F. 2010) (holding that affirming a guilty plea based on admissions to an offense to which an accused has not in fact pled guilty and which is not a lesser included offense of the offense charged is inconsistent with traditional due process notions of fair notice). Stated another way, the appellant argues that he really pleaded guilty to solicitation under Article 134, UCMJ, with which he was not charged and which is not a lesser included offense of attempt. He further argues that his *Care*[3] inquiry statements to the military judge about how and why he took substantial steps to commit the offenses were based on an erroneous understanding of the law.

The Government distinguishes *Rothenberg*, noting that the appellant in that case did not possess any ecstasy when he made the offer to the other Airman; whereas, in this case, the appellant had both Percocet and Demerol in his possession and at the ready when he offered the drugs to Amn CM and A1C DS. Unlike the accused in *Rothenberg*, the appellant in this case had no further steps to take to complete the offense; he was only stopped from completing the transaction because both Airmen refused his offer. The Government asserts that the appellant's actions were indeed a substantial step toward the commission of a crime and relies on *Smith*, wherein the accused was charged with attempted larceny. The substantial step toward the commission of a larceny was a phone call to confirm the status of a credit card application made by a co-conspirator. Despite the fact that neither the accused nor her co-conspirator actually obtained the credit card, the Court of Appeals for the Armed Forces (CAAF) found that the phone call was more

[3] *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

than mere preparation and the plea was provident. *Id*. at 382. In affirming the lower court, CAAF determined that, when an accused admits that he went beyond mere preparation and points to a specific action that satisfies him on that point, it would be illogical to say that his actions fell short of that line when reviewing the providency of the plea. Looking at the accused's admissions in their entirety, and noting that several steps remained for completing the larceny, the Court nevertheless found that the accused's admissions went beyond mere preparation and that her guilty plea was provident. *Id*. at 383. In reaching this decision, the Court relied on *Schoof*.

In the case before us, we find that the military judge did not abuse her discretion. Rather, sufficient evidence exists to support the military judge's finding that the appellant attempted to wrongfully distribute Percocet to Amn CM and attempted to wrongfully distribute Demerol to A1C DS. The appellant's acts are not ambiguous, but show a substantial step beyond mere preparation toward the commission of wrongful distribution of Percocet and Demerol. The military judge specifically advised the appellant about the difference between "mere preparation" and "substantial step" in the law of attempt. In the face of these definitions, the appellant admitted that his conduct amounted to more than mere preparation. In both attempts, the appellant was with the person to whom he offered the controlled substance: Amn CM in his car and A1C DS in his bathroom. In both attempts, the appellant had the controlled substance within reach. For example, the appellant stated that he had the Percocet in his car where he and Amn CM were seated, and that the Demerol was in the medicine cabinet next to where the appellant and A1C DS were standing. In both attempts, the appellant acknowledged that his actions amounted to more than mere preparation and were a substantial step towards committing the underlying offense. In both attempts, the appellant further acknowledged that he would have wrongfully distributed the Percocet or Demerol if either Amn CM or A1C DS had accepted his offer. Finally, in both attempts the appellant acknowledged that the only reason he did not complete either distribution is because Amn CM and A1C DS declined the offer.

The evidence legally supports a finding of guilty on both offenses. We find no substantial basis in law or fact to question the providency of the appellant's guilty pleas to attempted wrongful distribution of Percocet or attempted wrongful distribution of Demerol. We are convinced the appellant is guilty of both offenses. The military judge did not abuse her discretion in accepting the appellant's guilty pleas and finding the appellant guilty of these offenses.

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

STEVEN LUCAS
Clerk of the Court