

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Senior Airman TIMOTHY D. BERCK
United States Air Force**

ACM 35315

8 March 2005

Sentence adjudged 20 August 2002 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Steven A. Gabriel (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Steven R. Kaufman.

Before

**MALLOY, JOHNSON, and GRANT
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MALLOY, Senior Judge:

We have examined the record of trial, the assignment of error, and the government's reply thereto. After reviewing the entire record of trial, we hold that there is no substantial basis in law and fact for questioning the appellant's admission that he wrongfully used marijuana. *United States v. Jordan*, 57 M.J. 236 (C.A.A.F. 2002). The providence inquiry must indicate that the appellant "himself believes he is guilty," and the factual circumstances he provides the military judge during the providence inquiry must "objectively support that plea." *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). If, as in the case sub judice, the appellant cannot recall the facts relating to an offense, due to intoxication or for some other reason, he is not precluded from

pleading guilty if he is convinced of his guilt, and his belief is “predicated on [his] assessment of the Government’s evidence against him.” *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). After being advised of the elements of the offense, the appellant stated that he believed he was guilty of wrongfully using marijuana during the charged timeframe. The appellant explained that he had reviewed the urinalysis report and the report of investigation, and was convinced the test was reliable and accurate. Despite the fact that the appellant stated he did not remember using marijuana, he clearly stated that he was satisfied, based on information that had been provided to him, that during the charged timeframe he knowingly used marijuana, and that at the time he used marijuana he actually knew he was using the substance and knew it was marijuana. Nothing about the appellant’s testimony during the providence inquiry was inconsistent with his admission that he wrongfully used marijuana. *See Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37c(5) and (10) (2002 ed.).

The findings and the 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator