UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KYLE L. BREZNAK
United States Air Force

ACM S30396

29 April 2005

Sentence adjudged 1 May 2003 by SPCM convened at Goodfellow Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel Michael E. Savage.

Before

STONE, GENT, and SMITH
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant raises four issues for our consideration.

The appellant asserts that his guilty pleas to two specifications of divers larceny are improvident. We first note that consolidating similar acts into a single specification may benefit an accused by reducing the maximum punishment or avoiding an unwarranted exaggeration of charges. *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988). The appellant did not object to the joinder of multiple larcenies and thus waived any complaint he may have had about the pleadings, barring plain error. Rules for Courts-Martial (R.C.M.) 905(b)(2) and 910(j); *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998). We find no plain error and conclude the appellant's pleas were

otherwise provident. The military judge properly advised the appellant of the elements of larceny. A fair reading of the providence inquiry reveals that the appellant understood the phrase "divers occasions" and admitted to facts that established he committed larceny on divers occasions. Guilty pleas are rejected on appellate review only when the record of trial shows "a substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). We find no substantial basis in law or fact for questioning the appellant's pleas to the two specifications of larceny. Therefore, we hold the military judge did not abuse his discretion in accepting the appellant's pleas. *See United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996).

The appellant next asks for new post-trial processing because of two errors in the staff judge advocate's recommendation (SJAR). The SJAR advised the convening authority that the adjudged sentence was a bad-conduct discharge, 4 months' confinement (rather than the 5 months announced by the military judge), and a reduction to E-1. The misstatement about the period of confinement violated R.C.M. 1106(d)(3)(A), which requires the SJAR to include the "sentence adjudged by the court-martial." The SJAR also did not contain a statement of the action the convening authority was obligated to take under the pretrial agreement (PTA). This omission violated R.C.M. 1106(d)(3)(E). The convening authority agreed to approve no more than 4 months' confinement, but the PTA placed no other restrictions on punishment. Because the appellant failed to comment on these errors when the SJAR was served on him, his claim is waived absent plain error. R.C.M. 1106(f)(6). The appellant concedes he did not serve more than 4 months in confinement, but he avers he was prejudiced because the convening authority approved the sentence as adjudged, in violation of the PTA.

We conclude the errors in the SJAR were obvious, but find the appellant has not established a colorable showing of prejudice. *See United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999); *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998). First, the convening authority who acted on the findings and sentence was well acquainted with the PTA because he signed it. Second, the SJAR advised the convening authority to approve a sentence that was consistent with the PTA: a bad-conduct discharge, 4 months' confinement, and a reduction to E-1. Next, in his clemency submission, the appellant repeated the error in the SJAR by stating that he was serving a period of confinement of 4 months. He asked the convening authority to approve only 3 months of confinement. Although appellate defense counsel argue otherwise, we find he did not ask that his bad-conduct discharge be disapproved.

We can see no logical connection between the errors in the SJAR and the opportunity for clemency. *Cf. United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005) (no connection between failure to include pretrial restraint in SJAR and effect on the appellant's opportunity for clemency). The promulgating order, report of result of trial, and a confinement order in the allied papers accurately reported the adjudged sentence

and the terms of the PTA. The appellant does not dispute that he received the benefit of his bargain. Yet, while we do not find prejudice, the action contains an error and must be corrected. We address this more fully in our decretal paragraph.

The appellant also contends the military judge erred when he permitted, over defense objection, the appellant's commander to testify in presentencing that the appellant "is a person of dubious character." We find the military judge indicated that he could put this comment in the proper perspective. We conclude that the military judge did not give undue weight to the evidence. *See United States v. Key*, 55 M.J. 537, 539 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (C.A.A.F. 2002); *United States v. Gargaro*, 45 M.J. 99, 102 (C.A.A.F. 1996); *United States v. Davis*, 44 M.J. 13, 17 (C.A.A.F. 1996); *United States v. Talbert*, 33 M.J. 244, 247 (C.M.A. 1991). Further, we hold that the military judge did not abuse his discretion. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003); *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997).

Finally, the appellant suggests that we apply the cumulative error doctrine because the military judge improperly considered certain evidence and argument by the trial counsel. *United States v. Walters*, 16 C.M.R. 191, 209 (C.M.A. 1954). We conclude that none of the errors, either individually, or in their "combined effect," was "so prejudicial so as to strike at the fundamental fairness of the trial." *United States v. Dollente*, 45 M.J. 234, 236 (C.A.A.F. 1996) (quoting *United States v. Parker*, 997 F.2d 219, 222 (6th Cir. 1993)). *See also United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992). Therefore, we hold that the doctrine of cumulative error does not require setting aside the findings or sentence in the case sub judice.

The findings 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). The findings are affirmed. By way of clarification, we approve and affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for 4 months, and reduction to E-1.

The convening authority's action, dated 9 June 2003, is set aside. The record of trial is returned to The Judge Advocate General for administrative correction of the action. The case need not be returned to the Court following this administrative correction unless further appellate review is required.

OFFICIAL

ANGELA M. BRICE
Clerk of Court