

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic BRADFORD C. CHANEY
United States Air Force**

ACM 36138

29 September 2006

Sentence adjudged 8 October 2004 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Robin S. Wink, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Nurit Anderson, Major Jin-Hwa L. Frazier, Major Kimani R. Eason, Captain Daniel J. Breen, and Captain Jefferson E. McBride.

Before

**BROWN, MOODY and JACOBSON
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

The appellant was convicted, in accordance with his pleas, of one specification of wrongful use of methamphetamines on divers occasions, one specification of wrongful use of cocaine, one specification of wrongful use of methylenedioxyamphetamine, and one specification of absence without leave (AWOL) terminated by apprehension, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. § 886, 912a. He was found not

guilty of disorderly conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A military judge sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, nine months confinement, and forfeiture of all pay and allowances. The appellant spent 114 days in pretrial confinement.¹ The convening authority approved the sentence and, pursuant to the military judge's order, credited 31 days to the appellant's nine-month sentence to confinement for illegal pretrial confinement.

The appellant contends that his guilty plea to the charge and specification of AWOL terminated by apprehension is improvident and he is entitled to additional credit for illegal pretrial confinement.

Providency of the Plea

During the providency inquiry,² the military judge informed the appellant of the elements and definitions pertaining to the drug offenses, but forgot to do so regarding the elements and definitions for the AWOL offense. There was neither a stipulation of fact nor a pretrial agreement in this case. After trial and before authentication of the record, the military judge realized his error and held a post-trial conference via telephone with the trial and defense counsel to explain his omission. He offered to conduct a post-trial Article 39(a)³ session to explain the elements of the AWOL specification to the appellant and to hear the respective positions of counsel. He also gave both sides the opportunity to provide input, in writing, regarding the necessity of a post-trial session. In response, the trial counsel sent the military judge an e-mail indicating the government believed the appellant's plea of guilty to AWOL was provident. The defense counsel responded by facsimile indicating she reviewed the case law and she did not request a post-trial hearing to address the issue. Based upon these inputs and his own research, the military judge concluded the providency inquiry into the AWOL specification satisfied the requirements of *United States v. Care*, 18 U.S.C.M.A. 535, 541; 40 C.M.R. 247 (C.M.A. 1969), and the appellant's guilty plea to AWOL was provident. No post-trial Article 39(a) session was held.⁴

The appellant now contends the military judge's failure to advise the appellant of the elements and definitions relating to the AWOL offense render his plea improvident.

In determining whether a guilty plea is provident, the test is whether there is 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,

¹ He was awarded one day of credit for each of these days pursuant to *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984).

² Pursuant to *United States v. Care*, 18 U.S.C.M.A. 535, 541; 40 C.M.R. 247 (C.M.A. 1969).

³ Article 39(a), UCMJ, 10 U.S.C. § 839(a).

⁴ The military judge's ruling and the parties' responses to the post-trial telephone conference are marked as Appellate Exhibits V-VII.

436 (C.M.A. 1991)). “ In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit ‘factual circumstances as revealed by the accused himself [that] objectively support that plea[.]’” *Jordan*, 57 M.J. at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We review a military judge’s decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). Our determination of whether there is a substantial basis in law and fact to question a guilty plea is based upon a review of the entire record. *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004) (citing *Jordan*, 57 M.J. at 238-39).

The military judge is responsible for ensuring the appellant understands the nature of the offense to which a guilty plea is accepted. Failure to explain the elements of the offense charged is error. *Care*, 18 U.S.C.M.A. at 541, 40 C.M.R. at 253. For the more complex offenses, failure to explain the elements will generally result in reversal. See *United States v. Pretlow*, 13 M.J. 85, 88-89 (C.M.A. 1982). However, a guilty plea is not automatically improvident even if the military judge fails to read the elements, if it is clear from the record the accused knew the elements, admitted them, and pleaded guilty because he was guilty. *United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992). When considering simple military offenses such as AWOL, whose elements are commonly known and understood by servicemembers, an explanation of the elements of the offense is not required to establish the providence of a guilty plea if the record otherwise establishes that the appellant understood those elements. *United States v. Kilgore*, 21 U.S.C.M.A. 35, 44 C.M.R. 89 (C.M.A. 1971).

We carefully reviewed the record in this case and we are firmly convinced the appellant knew the elements of AWOL terminated by apprehension, admitted facts necessary to establish his guilt of this offense, expressed his belief of his own guilt, and pleaded guilty because he was guilty.⁵ See *Jones*, 34 M.J. at 272. The appellant’s plea of guilty is provident and “the dictates of Article 45, [UCMJ, 10 U.S.C. § 845], [Rule for Courts-Martial] 910, and *Care* and its progeny have been met.” *Jordan*, 57 M.J. at 239.⁶

Additional Credit for Illegal Pretrial Confinement

At trial, the appellant brought a motion for appropriate relief asserting that the conditions of his pretrial confinement violated Article 13, UCMJ, 10 U.S.C. §813, and thus, requested the military judge award him additional credit against his sentence. The appellant testified in support of the motion and the prosecution called two witnesses in opposition. The military judge made findings of fact and concluded the appellant was

⁵ The guilty plea inquiry covering the AWOL charge and specification is attached to this decision as an appendix.

⁶ While we find the plea of guilty is provident, the better practice in this case would have been to hold a post-trial Article 39(a) session with counsel and the appellant present to resolve this matter. Even though the trial defense counsel said she was not requesting a post-trial hearing, the prudent course of action was to hold such a hearing. Our *clear* guidance to military judges in future cases is to order a post-trial Article 39(a) session.

entitled to 31 days of credit because the conditions of his pretrial confinement violated Article 13, UCMJ. The appellant contends on appeal that the military judge erred in not awarding him additional credit. He requests this Court find that he was subject to illegal pretrial punishment and provide appropriate relief in the form of three-for-one administrative credit for each day spent in maximum custody.

Article 13, UCMJ, provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

This Court's determination of whether the appellant suffered from unlawful pretrial punishment involves constitutional and statutory considerations. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979); *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

We will defer to the findings of fact by the military judge unless they are clearly erroneous; however, our application of those facts to the constitutional and statutory considerations, as well as any determinations of whether this appellant is entitled to credit for unlawful pretrial punishment, involves independent de novo review by this Court. *King*, 61 M.J. at 227 (citing *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)). The appellant bears the burden of establishing his entitlement to additional sentence credit because of a violation of Article 13, UCMJ. *King*, 61 M.J. at 227; *See also* Rule for Courts-Martial 905(c)(2).

We hold the appellant has failed to establish his entitlement to additional sentence credit beyond that already awarded by the military judge. We, like the military judge, conclude the appellant is only entitled to 31 days of credit for illegal pretrial punishment. The appellant's additional complaints fail to establish that he was subject to pretrial punishment or unnecessarily rigorous conditions warranting additional credit. *See King*, 61 M.J. at 228.

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.

Senior Judge MOODY participated in this decision prior to his retirement.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

MJ: Airman Chaney, your counsel had entered a plea of guilty for you to Charges I and II and their respective Specifications. Your plea of guilty will not be accepted unless you understand its meaning and effect. I'm going to be discussing your plea of guilty with you now. If at any time you have questions of me, feel free to ask. If you have questions of your counsel, you may certainly ask her, and if we need to take a recess in order for you and Captain to speak privately, you just let me know and we can make that happen.

Do you understand?

ACC: Yes, sir.

MJ: A guilty plea is the equivalent of a conviction and is the strongest form of proof known to the law. On your plea alone and without receiving any evidence, this court can find you guilty of the charges to which you have pled guilty. Your plea will not be accepted unless you realize that by your plea you admit every act or omission and element of the offenses to which you've pled guilty and that you're pleading guilty because you actually are, in fact, guilty. If you don't believe that you're guilty, you should not plead guilty for any reason.

Do you understand?

ACC: Yes, sir.

MJ: Now by your plea of guilty, you give up three important rights, but you give up those rights solely with respect to the offenses to which you have pled guilty. First, you give up the right against self-incrimination. That is, your right to say nothing at all about these offenses.

Secondly, you give up the right to a trial on the facts by this court. That is, your right to have this court decide whether you're guilty or not guilty based on the evidence the prosecution would present and any evidence that you may choose to present and, third, you give up the right to be confronted by and to cross-examine witnesses against you.

Do you have any questions at all about these rights?

ACC: No, sir.

MJ: And do you understand that by pleading guilty you no longer have these rights?

ACC: Yes, sir.

MJ: Now if you continue with your guilty plea, you'll be placed under oath and I'll question you to determine whether you are, in fact, guilty. Anything you tell me can be used against you in the sentencing portion of this trial.

Do you understand?

ACC: Yes, sir.

MJ: Now if you tell me anything that is untrue, your statements can be used against you later for charges of perjury or making a false statement. Do you understand that as well?

ACC: Yes, sir.

MJ: Trial Counsel, would you place the accused under oath?

ATC: Yes, your Honor.

[The accused was sworn by assistant trial counsel.]

MJ: Is there a stipulation of fact in this case?

ATC: No, your Honor.

MJ: Airman Chaney, I'm going to explain to you the elements of the offenses to which you have pled guilty. By "elements," I mean those facts which the prosecution would have to prove beyond a reasonable doubt before you could be found guilty if you had pled not guilty. When I state each of these elements, I want you to ask yourself two things. First, is the element true and, secondly, are you willing to admit that the element is true? And after I've provided you with the elements and some definitions, it'll be necessary for you and I to talk about these offenses.

Do you have a copy of the charge sheet there in front of you?

ACC: Yes, sir.

MJ: I want you to take a look at Specification 1 of Charge I. That offense alleges wrongful use of methamphetamine on divers occasions. The elements of that offense are as follows:

One, that within the Continental United States, on divers occasions, between on or about 7 March 2004 and on or about 17 March 2004, you, the accused, used methamphetamine; and

Two, that the use by you was wrongful.

In Specification 2 of Charge I, you're charged with the offense of wrongful use of cocaine. The elements of that offense are as follows:

One, that within the Continental United States, between on or about 9 March 2004 and on or about 17 March 2004, you, the accused, used cocaine; and

Two, that the use by you was wrongful.

MJ: And, Airman Chaney, is that accurate? Were there two urine sample conducted during that charging window on the methamphetamine?

ACC: Yes, sir.

MJ: And have you had the opportunity to review the paperwork in both of those?

ACC: Yes, sir.

MJ: So was it, then, that the first urinalysis that you took tested positive only for methamphetamine, and that the second that the second one tested positive for all three drugs?

ACC: Yes, sir.

MJ: Okay. And, again, you've had the opportunity to review all these documents, and you're satisfied that Brooks Lab has accurately reported a positive urine sample for those three drugs?

ACC: Yes, sir.

MJ: And, again, are you satisfied in your own mind that you wrongfully used each of these three drugs?

ACC: Yes, sir.

MJ: Talk to me about the absence without leave. What happened--

ACC: Around the--

MJ: --then?

ACC: --14th of May 2004, I left Shaw Air Force Base, which is where I'm stationed. I'm assigned to the 20th Component Maintenance Squadron and, at that time, I was working for Chief

at the squadron's main building. My duty hours were from 0700 to 1600. I did not report to work on the 14th and, instead, I went to Mississippi where my family lives.

I didn't have any permission from anyone to be on pass or leave. After awhile, I decided to return to base, but I didn't return right away. I went to Florida first and then eventually headed North back towards Shaw back through Georgia.

In Georgia, I was hospitalized on the 16th of June. OSI found me there and told authorities to keep me there until the Air Force could come pick me up. Master Sergeant and a couple of other people from Security Forces picked me up from the hospital on the 17th of June.

MJ: So your unit of assignment on the 14th of May was the 20th Component Maintenance Squadron at Shaw Air Force Base; is that right?

ACC: Yes, sir.

MJ: Okay. And you indicated that you left on or about the 14th of May and went to Mississippi, and that's where your family is?

ACC: Yes, sir.

MJ: Was the 14th of May a regular duty day?

ACC: Yes, sir.

MJ: And did you have a duty to be at the 20th Component Maintenance Squadron on the 14th of May?

ACC: Yes, sir.

MJ: And you indicated that no one in a position of authority gave you permission to go on leave or to take a few days off or anything like that?

ACC: Yes, sir.

MJ: They did not? No one gave you permission, correct?

ACC: No one gave me permission.

MJ: Even though no one gave you permission, did you believe that you had any authority to be absent from your unit?

ACC: No, sir.

MJ: And did anything or anyone force you to leave your unit on the 14th of May?

ACC: No, sir.

MJ: And you said you went to Mississippi. Then you went to Florida, and you were kind of making a what? A circle route coming back to Shaw?

ACC: Yes, sir.

MJ: And you were hospitalized where?

ACC: Augusta, Georgia.

MJ: Okay. How was it that you came to be hospitalized?

ACC: I'm not-- I don't remember, sir.

MJ: Without getting into how it was that you managed to get hospitalized, what-- did you wake up in the morning in the hospital?

ACC: Yes, sir.

MJ: And when you left your unit on the 14th of May, was that a freely made and voluntary decision on your part? I mean,--

ACC: Yes, sir.

MJ: --nothing happened that forced you to leave your unit?

ACC: No, sir.

MJ: And did you realize it that when you left on the 14th of May that you were beginning a period of unauthorized absence?

ACC: Yes, sir.

MJ: Now while you were absent during this period of time, did you have any contact at all with military authorities?

ACC: No, sir.

MJ: In other words, did you call your unit or anything like that?

ACC: No, sir.

MJ: So no contact with the commander or the first sergeant, supervisor or anyone else in your unit?

ACC: No, sir.

MJ: Did you have any contact with any other military installations to let them know that you were AWOL and that you wanted to come back?

ACC: No, sir.

MJ: At least up until the time that you went in the hospital, was there anything that prevented you from returning to your unit if you'd wanted to?

ACC: No, sir.

MJ: Now, do you know how it was, first off, that civilian authorities found out that you were military, and then do you have any idea how it was that OSI found out that you were in the hospital?

[The accused conferred with his defense counsel.]

ACC: Yes, sir. My-- my girlfriend called, I think it was OSI, and--

[The accused conferred with his defense counsel.]

MJ: Let me break this down a little bit. Was your girlfriend with you in Augusta?

ACC: Yes, sir.

MJ: Okay. So something happened and you got put in the hospital, and then she called the base or something to let them know that you were there in the hospital?

ACC: Yeah. We got separated.

MJ: Okay.

ACC: She didn't know where I was.

MJ: Okay. You can go ahead and talk to your defense counsel if you need to.

[The accused conferred with his defense counsel.]

ACC: All right. Well, we just got separated and she just didn't know where I was.

MJ: Okay.

ACC: She called OSI.

MJ: So she called-- oh. Okay. I think I got it. All right. So the two of you got separated sometime during the evening?

ACC: Right.

MJ: She didn't know where you were.

ACC: [Nods head in the affirmative.]

MJ: So she called your unit to tell them that you were-- that--

ACC: She had no idea where I was.

MJ: That you all had been in Augusta, but she now didn't know where you were?

ACC: Yes, sir.

MJ: And as a result of her making a call-- do you know if she made it to your unit, or to who, or do you know?

ACC: Oh, she called the unit first.

MJ: Okay.

ACC: And then I think she called maybe OSI.

MJ: Okay. Had you told her to do that, or asked her to do that?

ACC: No, sir.

MJ: So when you woke up^{IN} the hospital, did you tell them that you were military and that you were AWOL, or had they already figured that out by then? WTV

ACC: They had already figured it out by then.

MJ: And after the hospital got notified who you were, that you were military and that you were AWOL, did they turn you over to the local sheriff or something, or what happened?

DC: Can we have a moment,--

MJ: You may.

DC: --your Honor?

[Defense counsel conferred with the accused.]

ACC: All right. It was a university hospital, and it had its own police, and the police there had me on police hold.

MJ: And were you placed on police hold as a result of the OSI asking the local cops to hold you until they could get there?

ACC: Yes, sir.

MJ: Okay. So, again, I don't want to put words in your mouth, and if you think this is not accurate, I want you to tell me, but it appears to me what happened was you got put in the hospital. As a result of you being in the hospital, your girlfriend called the base who, in turn,

contacted OSI. OSI then called the local hospital you were in and said, "Arrest him and hold him for us till we can get there"? Is that a fair summary of what went on?

ACC: Yes, sir.

MJ: Anything you disagree with in that summary or that you'd like to add to it?

ACC: No, sir.

MJ: So what did the local cops do? They just tell you that-- I mean, obviously, you were in the hospital. So they didn't take you to jail, or did they?

ACC: No, sir. They didn't.

MJ: Did they restrict you somehow, or how did you know you just couldn't get up and leave, or did you know?

ACC: All I-- I did not know until I had got up and got out and walked around, and then they supposedly had a police guard on duty--

MJ: Okay. So,--

ACC: --watching me.

MJ: Okay. So,--

ACC: So I knew by then.

MJ: So, at that point, you realized that you had been arrested by the university police and held at the request of the military until they could come get you?

ACC: Yes, sir.

[The accused conferred with his defense counsel.]

MJ: Who actually came and got you?

ACC: It was Master Sergeant [redacted] and a few others from-- from the Security Forces.

MJ: And what day was that?

ACC: Seventeen June.

MJ: Okay. And they brought you back here and put you in pretrial confinement?

ACC: Yes, sir.

MJ: And just to make it clear, you didn't do anything to turn yourself in to the university cops? Say, "Hey," you know, "I'm an Airman. I'm AWOL. Could you call the OSI and tell them I'm here?" Nothing like that happened?

ACC: No, sir.

MJ: They already had you and were already holding you for the military by the time you woke up?

ACC: Yes, sir.

MJ: One last question. I think I've already asked it. When your girlfriend called the base, that wasn't anything you knew anything about? In other words, you didn't ask her to do it?

ACC: No, sir.

MJ: Trial Counsel, do you believe any further inquiry is required on any of these offenses?

TC: One moment, your Honor.

[Trial counsel conferred with assistant trial counsel.]

TC: Yes, your Honor. There are two items, two matters that I ask that you follow up on a little more. The first one is with regard to Charge I, Specification 1.

MJ: Uh-huh?

TC: I believe the accused said that he took methamphetamine at a hotel and at a house party, and then we had some more discussion of the house party that happened on 15 March. Perhaps the accused will remember the date he used at the hotel, specifically to show that that was a different use. It wasn't like he used at a hotel and a house party on the same day; to make sure that it is actually two separate uses.

MJ: I think we got there, but let me ask again, Airman Chaney. You talked about that you used on multiple occasions. I took that to mean from the conversation that we had that it was different uses over a several day period of time as opposed to a bunch of uses in one day. Which was it?

ACC: Different-- over-- over several days.

MJ: Okay. So use at the house party on one day, and use at the hotel on another day?

ACC: Yes, sir.

MJ: Satisfactory [to trial counsel]?

TC: Yes, sir. Thank you, Judge.

MJ: Anything further?

TC: Yes, sir. With regard to Charge II. Specifically, I'd ask for a little more discussion of the apprehension itself to show where the accused was when he was apprehended and get a little better information about exactly what date he was apprehended on, if he could tell us that?

Where he was when he was apprehended, and really who notified him of his apprehension.

MJ: My understanding-- and, again, I want you to tell me, Airman Chaney. The folks at the squadron came and got you on the 17th of March. How much earlier than that--

ACC: Seventeen June.

MJ: Or 17 June. How much earlier than that were you put in the hospital? Do you remember how many days before they actually showed up?

ACC: I think it was-- [no further verbal response.]

[The accused conferred with his defense counsel.]

ACC: June 14th.

MJ: June 14th? The evening of June 14th is when you went in the hospital, and then June 15th is in the morning and I guess that's when you found out that OSI had already called the local cops and told them to hold you for them until they could get there?

ACC: I didn't find out till the 16th.

MJ: Okay. But in that interim period of time, did you tell them, "Hey, I'm in the Air Force"? You know, "Can you call my unit and tell them where I am," and that sort of thing?

ACC: No, sir.

MJ: Okay. So you don't know exactly what day it was that your girlfriend called the unit?

ACC: No, sir.

MJ: But all you know is that after being arrested on the evening of the 14th, that on the 16th, that's why they told you that you were being held at the request of the military until they could get there and pick you up?

ACC: Yes, sir.

MJ: Satisfied, Trial Counsel?

TC: One moment, your Honor.

[Trial counsel conferred with assistant trial counsel.]

MJ: Let me ask defense counsel. Are you satisfied we have a proper plea?

DC: Yes, sir.

MJ: Judge, there's just one fine point here on the same Charge II. I think when you asked the accused the question just a minute ago, I think you used the term that he was arrested on the 14th on the June, and I'm not sure that's what he said. I think really what he said is he doesn't remember how he got to the hospital.

MJ: That's correct. That's--

TC: Okay.

MJ: --my understanding. Don't remember how you got there, but then on the 16th-- you don't know when OSI or someone actually told the hospital to hold you until they could get there, is--

ACC: Correct.

MJ: --that right?

ACC: Correct.

MJ: But you found out on the 16th that you were being held by university authorities until the OSI or someone from your unit could get there; is that right?

ACC: Yes, sir.

MJ: And then they actually showed up on the 17th?

ACC: Yes, sir.

MJ: Okay.

TC: Thank you, sir.

MJ: Trial Counsel, what do you calculate the maximum punishment to be in this case based solely on the accused's plea of guilty?

ATC: A dishonorable discharge, total forfeitures, 16 years and six months confinement, and a reduction to E-1. However, I would note that the accused is already an E-1.

MJ: I would concur with one exception. I believe the maximum is 16 years, not 16 years and six months because the accused pled not guilty to the disorderly conduct specification; is that right? Well, no. It's over 30 days terminated by apprehension.

ATC: Yes, sir.