UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTIAN S. CLARK
United States Air Force

ACM S30112

31 March 2003

Sentence adjudged 13 March 2002 by SPCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Bryan T. Wheeler (sitting alone).

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

BURD, ORR, W.E., and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

The appellant was convicted, consistent with his pleas, of one specification of dereliction in the performance of his duties on divers occasions, one specification of failure to obey a lawful order on divers occasions, two specifications of drunken operation of a vehicle, one specification of larceny, one specification of wrongful use of a military identification card with the intent to defraud, one specification of incapacitation for the performance of his duties through prior wrongful indulgence in intoxicating liquor, and one specification of drunk and disorderly conduct, in violation of Articles 92, 111, 121 and 134, UCMJ, 10 U.S.C. §§ 892, 911, 921, 934. His adjudged and approved

sentence consists of a bad-conduct discharge, confinement for 5 months, and reduction to E-1.

The appellant claims that his pleas to the specification of wrongful use of a military identification card and to the specification of incapacitation for performance of his duties through prior wrongful indulgence in intoxicating liquor were improvident. He alleges the military judge failed to establish an adequate factual predicate for the guilty pleas to these two offenses. He also claims the military judge failed to inform him of an element of the offense of incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor.

The following factual circumstances concerning the two offenses in issue were established through the providence inquiry and the stipulation of fact. As to the first offense of wrongful use of a military identification card, the appellant wanted to buy a computer. When his initial effort to purchase a computer through Dell Computers was unsuccessful due to his poor credit, he used the name and social security number from another member's military identification card to purchase the computer on credit. That service member neither knew nor approved of the use of his name or social security number. When the computer arrived through the mail, the appellant took possession. A few days later when the 48-month purchase plan agreement arrived, the appellant had the postal officials forward the agreement to the unsuspecting service member, who had recently been reassigned to Korea. The appellant made no payments on the computer.

As to the second offense, the appellant was detained at 0415 for drunk driving and had his blood taken at 0510. His blood alcohol level was 0.258 grams of alcohol per 100 milliliters of blood, well above the level of legally drunk. The appellant's duty day was to have commenced at 0600. The appellant acknowledged that when he was to have started his duties, he would have been above the level of being drunk. As to both offenses, the appellant conceded in his stipulation of fact that "[u]nder the circumstances, the conduct of [Airman] Clark was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces."

The appellant contends that the military judge failed to ask him whether he agreed that his conduct as to both specifications was prejudicial to good order and discipline or service discrediting, and in addition failed to inquire as to the facts and circumstances that would satisfy this element. As to the second specification, the appellant alleges that the military judge failed to advise the appellant that one of the elements of the offense was that his conduct had to be prejudicial to good order and discipline or service discrediting. This latter contention can be quickly dismissed. The transcript of the providence inquiry reflects the military judge noted this element and referred the appellant to the definition of prejudicial conduct in the preceding specification. The appellant then stated that he recalled that advice and did not need it repeated.

The issue of the providence of a guilty plea to an Art. 134, UCMJ, offense was recently addressed by our superior court in *United States v. Jordan*, 57 M.J. 236 (2002). In *Jordan*, a guilty plea to unlawful entry of a boat, by leaning on the rail of a sailboat without the owner's permission, was held improvident. The Court held the record of the providence inquiry lacked any factual basis for concluding the appellant's conduct was prejudicial to good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Jordan is a factually distinguishable case from the one before us. For one, the Court in *Jordan* noted that the appellant's statements that the owner appeared neither upset nor agitated and that she declined to press charges when invited to do so suggested that the service's reputation might not have been impugned at all. In addition, there was no stipulation of fact in the *Jordan* case. In the instant case there was an extensive stipulation of fact that was admitted into evidence after the appellant acknowledged its accuracy.

A factual basis for a guilty plea may be established by both an inquiry of the accused on the record and a stipulation of fact. *United States v. Sweet*, 42 M.J. 183 (1995). In discussing the requirements for a provident guilty plea, the Court in *Jordan* stated:

> To guard against improvident pleas under Article 45, RCM [Rule for Courts-Martial] 910(e), Manual, *supra*, provides: "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." 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[.]" *United States v. Davenport*, 9 MJ 364, 367 (CMA 1980). It is not enough to elicit legal conclusions. The military judge must elicit facts to support the plea of guilty. *United States v. Outhier*, 45 MJ 326, 331 (1996).

Jordan, 57 M.J. at 238.

An examination of the record reflects ample facts to establish that the conduct was both prejudicial to good order and discipline and service discrediting for both specifications. Surely the appellant's conduct in using the identity of another service member and fraudulently obtaining a computer is prejudicial to good order and discipline and brings discredit to the service. In a similar manner, the appellant having a 0.258 blood alcohol content 50 minutes before he is to start his duty day can only be viewed as prejudicial to good order and discipline and service discrediting. These facts are clearly laid out in the providence inquiry and the stipulation of fact. In addition, the appellant admits in his stipulation that "under the circumstances" his conduct "was to the prejudice

of good order and discipline in the armed forces or was a nature to bring discredit upon the armed forces." We hold that the appellant's plea was provident.

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner