UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DANNY L. FRALEY JR.
United States Air Force

ACM 37444

24 November 2009

Sentence adjudged 07 April 2009 by GCM convened at Hill Air Force Base, Utah. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy, Jr., Major Shannon A. Bennett, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's guilty plea, a military judge sitting as a general court-martial convicted the appellant of one specification of attempted wrongful distribution of cocaine, one specification of being absent without leave (terminated by apprehension), one specification of divers wrongful use of cocaine, one specification of wrongful use of methamphetamine, one specification of wrongful use of "ecstasy," one specification of forgery, three specifications of making and/or uttering checks without sufficient funds, one specification of fraud in violation of 18 U.S.C. §1343, and two specifications of fraud in violation of 18 U.S.C. §1028, in violation of Articles 80, 86, 112a, 123, 123a, and 134, UCMJ, 10 U.S.C. §§ 880, 886, 912a, 923, 923a, 934.

The adjudged and approved sentence consists of a dishonorable discharge, 24 months of confinement, and reduction to E-1.[1] On appeal the appellant asks this Court to set aside his attempted wrongful distribution of cocaine conviction, to order a sentence rehearing or reassess his sentence, and to disapprove his dishonorable discharge. The basis for his request is that he asserts: (1) his plea to the attempted wrongful distribution of cocaine is improvident because there was no act that was a substantial step towards the commission of wrongful distribution of cocaine; and (2) in light of his guilty plea, acceptance of responsibility, remorse, and duty history, his sentence to a dishonorable discharge is inappropriately severe.[2] We disagree. Finding no prejudicial error, we affirm.

Background

The relevant facts surrounding the issues on appeal are outlined below. During the late evening of 13 June 2008, Technical Sergeant (TSgt) JP, a friend of the appellant, sent a text message to the appellant asking the appellant if he wanted to socialize after work. The appellant replied yes and sent a text message to TSgt JP asking him if he wanted the appellant to "save [him] a rail." TSgt JP asked the appellant what he meant, and the appellant replied "snow yo." TSgt JP declined. During the early morning hours of 14 June 2008, the appellant accompanied TSgt JP to a party at a local residence, and while en route, the appellant showed TSgt JP a bag of cocaine and asked TSgt JP if he wanted some. TSgt JP became angry and declined.

During the providency inquiry, the military judge advised the appellant of the elements and definitions that accompanied the offense of attempted wrongful distribution of cocaine. The appellant testified that: (1) he offered TSgt JP some cocaine; (2) TSgt JP declined; (3) his act of offering TSgt JP cocaine was more than mere preparation and was a substantial step towards the commission of wrongful distribution of cocaine; and (4) the only reason he did not distribute cocaine to TSgt JP was because TSgt declined. The military judge subsequently found the appellant guilty of the charge and specification.

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) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977). An accused may not simply assert his guilt; the military

[1] The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to a majority of the charges and specifications in return for the convening authority's promise to dismiss the remaining charges and specifications and to not approve any adjudged fine. Additionally, the military judge found two of the fraud offenses multiplicious for sentencing.

[2] The appellant raised the second issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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)) (emphasis added). Where there is "a substantial basis in law and fact for questioning the plea," the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In the case sub judice, sufficient evidence exists to support the military judge's finding that the appellant attempted to wrongfully distribute cocaine to TSgt JP. The appellant's acts of: (1) asking TSgt JP, via text message, if the appellant should "save [him] a rail" of "snow yo;" (2) entering TSgt JP's automobile with the cocaine; (3) showing TSgt JP the bag of cocaine; and (4) asking TSgt JP if he wanted some cocaine are all steps beyond mere preparation, either singularly or cumulative, toward the commission of wrongful distribution of cocaine. Moreover, as the appellant acknowledged, he would have wrongfully distributed cocaine to TSgt JP if TSgt JP had accepted. Simply put, the evidence legally supports a finding of guilty on this offense. We are convinced the appellant is guilty of this offense, and the military judge did not abuse his discretion in accepting the appellant's guilty plea and finding the appellant guilty of this offense.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

While we applaud the appellant for pleading guilty and accepting responsibility for his actions, it does not minimize the seriousness of his crimes. He not only engaged in rampant drug use, he attempted to engage another military member in drug use, and victimized his ex-wife, his father, several businesses, and a financial institution through his nefarious, fraudulent schemes. Put simply, the appellant, by his actions, seriously compromised his standing as a military member.

Moreover, the appellant's record is not spotless. He has received a civilian conviction for driving under the influence and both a letter of reprimand and a letter of counseling for failure to go. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence, one which includes a dishonorable discharge, inappropriately severe.

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; *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, YA-02, DAF
Clerk of the Court