UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WESTON D. INSLEY
United States Air Force

ACM 35651

24 May 2005

Sentence adjudged 24 June 2003 by GCM convened at Travis Air Force Base, California. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Brandon A. Burnett, Major Rachel E. VanLandingham, Major James M. Winner, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Shannon J. Kennedy.

Before

STONE, SMITH, and PETROW
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's reply thereto. The appellant asks that his conviction for wrongfully possessing ketamine be set aside because he was entrapped by an Air Force Office of Special Investigation's (AFOSI) agent into committing the offense.[1] Accordingly, the appellant requests that this Court find his plea of guilty to Specification 1 of the Charge improvident, set aside the findings of guilty to Specification 1, and reassess the sentence. We conclude the appellant's guilty plea waived the issue of entrapment, that his guilty plea was provident, and that no entrapment occurred.

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

In determining the providency of a guilty plea, the scope of review is limited to the record of trial. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995) (citing *United States v. Bester*, 42 M.J. 75 (C.A.A.F. 1995)). The stipulation of fact admitted in this case states that the accused "raises no defense of entrapment . . . to the charge." During the providency inquiry, the military judge questioned the appellant about entrapment. The appellant agreed that the criminal design or intent originated with himself and that the defense of entrapment was not raised in his case. Additionally, the military judge inquired of the trial defense counsel whether he was satisfied that no defense of entrapment existed, and counsel responded that he was. Rule for Courts-Martial 910(j) states that, unless an accused pleads conditionally, "a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." *See also United States v. Care*, 40 C.M.R. 247, 250-51 (C.M.A. 1969). Based on the above, we conclude that the appellant waived the objection based on his plea of guilty.

Even in the absence of waiver, we find the plea of guilty was provident. Rejection of a guilty plea "requires that the record of trial show a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). In November 2002, the appellant was recruited as a potential AFOSI confidential informant. AFOSI instructed him to purchase methamphetamine from a suspected drug dealer. Unbeknownst to the appellant, the "drug dealer" was a county sheriff's office detective, Mr. James Clark, posing as a dealer. The appellant contacted Mr. Clark and purchased what he believed was methamphetamine. The appellant turned the drugs over to the AFOSI and was deemed a trustworthy informant.

On 18 December 2002, the appellant, on his own initiative, contacted Mr. Clark and asked him to sell him two cases of ketamine. Mr. Clark asked if the appellant could afford it. He replied that he was obtaining it for a third party who would provide the money and that he was to be paid $500 for facilitating the deal. Mr. Clark said he would get back to him with the details in a few days. After an extended period of negotiating over the price of the drugs, the appellant provided Mr. Clark with $200 cash and a personal check for $400. They proceeded to the trunk of Mr. Clark's vehicle where Mr. Clark showed the appellant one bottle of ketamine. He also showed the appellant a brown bag containing 24 bottles of ketamine. The appellant took the bag and proceeded to his own car. The appellant was then arrested by AFOSI agents, and the cash, check, and ketamine were seized. The appellant later provided a written confession.

"Military law recognizes the entrapment defense." *United States v. LeMaster*, 40 M.J. 178, 180 (C.M.A. 1994) (citing *United States v. Whittle*, 34 M.J. 206 (C.M.A. 1992)). An appellant asserting the defense of entrapment has the initial burden of showing that a government agent originated the suggestion to commit the offense, and only afterwards does the burden shift to the prosecution "to prove beyond a reasonable

doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense, 'prior to first being approached by Government agents.'" *United States v. Hall*, 54 M.J. 788, 792 (A.F. Ct. Crim. App. 2001) (quoting *Whittle*, 34 M.J. at 208), *aff'd*, 56 M.J. 432 (C.A.A.F. 2002). The fact that government officers or employees "afford opportunities or facilities for the commission of [an] offense does not defeat the prosecution," nor will the mere fact of deceit, except where the deception actually implants the criminal design in the mind of the accused. *United States v. Bell*, 38 M.J. 358, 360 (C.M.A. 1993) (quoting *Sorrells v. United States*, 287 U.S. 435, 441 (1932)).

There are no facts in the record to support a finding that the appellant's criminal design originated with the government. Quite to the contrary, the appellant made known his predisposition to the government agent who then had to quickly improvise due to the fact the appellant approached him. Accordingly, we find that the appellant's assertion of entrapment is not supported by the facts and that his plea of guilty was provident. *See Prater*, 32 M.J. at 433.

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.

OFFICIAL

ANGELA M. BRICE
Clerk of Court