

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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UNITED STATES

v.

Airman First Class DANIEL G. KURTEK  
United States Air Force

ACM S31596

16 March 2010

Sentence adjudged 14 October 2008 by SPCM convened at Joint Base Balad, Iraq. Military Judge: Charles E. Wiedie (sitting alone).

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

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Michael A. Burnat.

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

Before

BRAND, JACKSON, and THOMPSON  
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, a military judge sitting as a special court-martial convicted the appellant of four specifications of wrongful use of a controlled substance and one specification of divers larceny of fentanyl from the installation hospital, in violation of Articles 112a and 121, UCMJ, 10 U.S.C. §§ 912a, 921.<sup>1</sup> The adjudged and approved sentence consists of a bad-conduct discharge, four months of confinement, and reduction to the grade of E-1.

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<sup>1</sup> The appellant and the convening authority entered into a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise to refer the charges and specifications to a special court-martial.

On appeal, the appellant asks this Court to set aside the findings of guilt on the wrongful use of hydrocodone specification, to reassess his adjudged sentence to confinement, to set aside his bad-conduct discharge or to provide other appropriate relief. As the basis for his request, he opines that: (1) his plea to the wrongful use of hydrocodone specification was improvident because he previously had a prescription for hydrocodone and used it for a legitimate purpose and (2) his sentence to a bad-conduct discharge is inappropriately severe.<sup>2</sup> Finding no prejudicial error, we affirm.

### *Background*

Between 2–6 June 2008, the appellant, a cardiopulmonary resuscitation laboratory technician at the Joint Base Balad hospital was having trouble sleeping and coping with his deployment so he used oxycodone that he had previously received from his father. During the same time period, the appellant used an approximately one-year-old hydrocodone prescription, a prescription he was provided for a sore throat, to address his sleeping problems. Additionally, during the same time period, the appellant used zolpidem that he had obtained from a fellow airman. Lastly, on several occasions between 10–14 August 2008, the appellant was depressed and used fentanyl that he had stolen from a patient’s intravenous drip bag.

### *Providency of Plea to Wrongful Use of Hydrocodone*

“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). 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); *see also United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973). An accused may not simply assert his guilt; the military 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)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996).

If the providency inquiry raises a potential defense, the military judge must explain the defense and reject the plea if the defense is not negated. Rule for Courts-Martial 910(e), Discussion. However, the rejection of a plea requires more than a mere possibility of a defense; to reject a plea there must be “a ‘substantial basis’ in law and fact for questioning the [appellant’s] guilty plea.” *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

In the case sub judice, the providency inquiry clearly establishes a substantial basis in law and fact for accepting the appellant’s plea. The appellant acknowledged that

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<sup>2</sup> The second issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

he used an approximately one-year-old hydrocodone prescription for a purpose for which it was not prescribed. Such a use was wrongful and properly proscribed as the wrongful use of a controlled substance. See *United States v. Pariso*, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007). In short, we find the appellant's plea provident.

### *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 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, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In the case at hand, the appellant seriously undermined his status as a military member. His offenses are all the more aggravated by the fact that he committed his offenses in a deployed environment. 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 bad-conduct 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, 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



*Christina E. Parsons*  
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Deputy, Clerk of the Court