UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant MARLON G. LEWIS
United States Air Force

ACM 35595

29 August 2005

Sentence adjudged 16 May 2003 by GCM convened at McChord Air Force Base, Washington. Military Judge: Anne L. Burman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel David N. Cooper, and Major Tracey L. Printer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have considered the record of trial, the assignment of errors, and the government's reply thereto. The appellant was convicted, in accordance with his pleas, of one specification of indecent acts with a child, one specification of communicating indecent language to a child, and one specification of indecent acts with another in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant was convicted, contrary to his pleas, of one specification of taking indecent liberties with a child by showing her pornographic images in violation of Article 134, UCMJ. The appellant alleges that his plea of guilty to committing an indecent act with another is improvident and that the action of the convening authority is ambiguous.

Although convicted of indecent acts with another, the appellant was originally charged with taking "indecent liberties with [AMH], a female under 16 years of age, not

the wife of the said [appellant], by exposing his penis in the presence of the said [AMH]." The military judge originally accepted the appellant's plea to the charge as drafted, but she subsequently conducted a proceeding in revision because the charge, as drafted, failed to allege that the appellant acted with the specific intent to gratify his sexual desires, etc. As a result, the military judge concluded that the specification failed to state an offense. Consequently the military judge entered a plea of guilty only as to the lesser-included offense of indecent acts with another. The appellant now alleges that the facts adduced during the providence inquiry do not provide a factual basis to conclude that the appellant's act of exposing his genitals was accomplished with the active participation of another person. *See United States v. Thomas*, 25 M.J. 75 (C.M.A. 1987).

The standard of review for the providence of a guilty plea is whether there is a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Milton*, 46 M.J. 317, 318 (C.A.A.F. 1997) (quoting *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991)). If the "factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (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).

In *United States v. Proctor*, 58 M.J. 792, 799 (A.F. Ct. Crim. App. 2003), *pet. denied*, 60 M.J. 122 (C.A.A.F. 2004), this Court observed that:

> "The offense of committing indecent acts with another requires that the acts be done in conjunction or participating with another person. However, there is no requirement that an indecent act involve a physical touching. It is the affirmative interaction of an accused with another person, voluntarily or involuntarily, that makes what would otherwise be an indecent exposure an indecent act." (citations omitted).

In that case, the accused went to the victim's room, took off his pants, exposed his genitals, and masturbated. He directed his actions at the victim and invited her to join him by asking her to rub his penis. He advanced toward her and left the room only when she threatened to scream. This Court held that these facts were sufficient to establish that the victim was an "involuntary participant" in the accused's act.

In the case sub judice, we have examined the appellant's answers during the providence inquiry as well as his colloquy with the military judge during the proceeding in revision. We find that he admitted only to exposing his penis to AMH for a few seconds while standing ten to fifteen feet from her. He provided no details of any affirmative interaction that the victim may have had with him that would rise to the level of "involuntary participation" within the meaning of *Proctor*. Therefore, we conclude that the facts elicited from the appellant do not objectively support his plea to indecent

acts with another. We hold that the military judge abused her discretion by accepting the plea. We further hold, however, that the facts elicited during the providence inquiry are sufficient to sustain a conviction for the lesser-included offense of indecent exposure, in violation of Article 134, UCMJ. *See United States v. Brown*, 13 C.M.R. 10 (C.M.A. 1953).

Because we have modified a finding of guilt, we must perform sentence reassessment. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308.

In reviewing the case at hand we conclude that we can perform sentence reassessment. When affirming the lesser-included offense of indecent exposure we are not required to discount any facts adduced during the providence inquiry or during the sentencing phase of the trial. Furthermore, we conclude that the gravaman of the case lay with the other specifications, which included the appellant touching the breasts, thighs, and buttocks of AMH, showing her pornography, and communicating sexually indecent language to her. Therefore, we reassess the sentence as follows: Bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to E-1.

We resolve the remaining assignment of error adversely to the appellant. The approved findings, as modified, and sentence, as reassessed, 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, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court