UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JONATHAN L. OAKS
United States Air Force

ACM 34676

10 December 2003

Sentence adjudged 24 May 2001 by GCM convened at Misawa Air Base, Japan. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Marc A. Jones, Major Jeffrey A. Vires, Major Patrick J. Dolan, and Captain Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

PRATT, MALLOY, and STUCKY
Appellate Military Judges

OPINION OF THE COURT

STUCKY, Judge:

The appellant was convicted, pursuant to his pleas of guilty, by a general court-martial consisting of a military judge sitting alone, of one specification of larceny and one specification of wrongful appropriation, in violation of Article 121, UCMJ, 10 U.S.C. § 921; two specifications of housebreaking in violation of Article 130, UCMJ, 10 U.S.C. § 930; and 10 specifications of violation of the general article, Article 134, UCMJ, 10 U.S.C. § 934, including one specification of communicating a threat, one specification of unlawfully entering another's dormitory room, four specifications of disorderly conduct, one specification of communicating indecent language, one specification of wrongfully

impeding an investigation, one specification of false swearing, and one specification of wrongfully intercepting electronic communications belonging to another.[1] He was sentenced to a dishonorable discharge, confinement for 3 years, total forfeitures, and reduction to E-1. In accordance with an approved pretrial agreement, the convening authority reduced the confinement to 2 years but otherwise approved the findings and sentence.

I. Factual Background

The conduct giving rise to the appellant's court-martial stemmed in large measure from his infatuation with a fellow airman, Airman First Class (A1C) HMP. The stipulation of fact introduced at trial recited that the two arrived at Misawa Air Base, Japan, at about the same time, in late 1999. The appellant quickly became infatuated with her; however, she told him that she did not love him and did not want a romantic relationship. In fact, they never engaged in sexual relations. The appellant at first asked his friends to give him updates on her whereabouts and companions. In the spring of 2000, he broke into her commercial e-mail account by guessing her password. Thereafter, he read her e-mail on numerous occasions and gave out her name and password to some of his friends because he was angry with her.

In April 2000, after learning that A1C HMP might be seeing someone else, he posted a letter on her door threatening to "fuck [her] life all kinda up [sic] . . . and make what happened to [another airman] look like a day at the circus." A1C HMP confronted the appellant over the letter, and then went to her supervisor. Ultimately, the appellant was ordered to have no unsupervised contact with her. A few weeks later, she asked that the order be lifted because she believed that the appellant would not hurt her. They resumed being friends, although the appellant continued to push for a more serious relationship. In August 2000, they dated for a few weeks, but A1C HMP soon told him that she wanted just to be friends.

In September 2000, A1C HMP became romantically involved with an airman who had just returned from Saudi Arabia. This airman gave her a gold bracelet from Saudi Arabia, which she wore frequently. The appellant became upset over this relationship. In October 2000, the appellant took his personal camcorder and set it up in a concealed fashion in a Navy BOQ across from A1C HMP's dormitory. He filmed her on two occasions for a total of some 20 minutes; at one point, she was visibly unclothed from the waist up after taking a shower. In late October 2000, while acting as bay orderly for the dormitory, the appellant wrongfully appropriated a key to A1C HMP's room from a cabinet in the dormitory manager's room. Thereafter, he used the key to gain access to her room on several occasions, examining her belongings, reading a private journal that she kept, and deleting a message on her answering machine. On one occasion, he stole

[1] An Article 121, UCMJ, specification of larceny of a wallet from another airman was withdrawn after arraignment.

the bracelet that A1C HMP had received from the other airman. He then sent it to a girlfriend that he had met while on leave in his hometown in Indiana.

In December 2000, the appellant used the key to enter A1C HMP's room twice while she was showering. He watched her through the shower curtain (she could not see him) and masturbated while she showered. Then, in late December 2000, the appellant on two occasions entered her room with his camcorder and videotaped her while she showered; again, she was unaware of his presence. Thereafter, he sent A1C HMP a sexually-explicit e-mail. She was frightened enough by this to spend the night with another female airman; she did not feel safe in her own room. A1C HMP then decided to contact security forces personnel. The appellant, afraid of being found out, hid the videotapes, the stolen key, and other material in the ceiling of his room. He was later interrogated by security forces investigators, and gave a statement under oath in which he falsely denied having videotaped A1C HMP. At a later date, the appellant moved the incriminating items from his room to a potted plant in a public area, where the dormitory manager discovered them.

II. Discussion

The appellant alleges two errors. The first is that it violated public policy to require him, as a condition of the pretrial agreement, to waive his right to present in his unsworn statement information on sentences imposed in other courts-martial. The second is that his plea to wrongfully intercepting A1C HMP's e-mail was improvident, because he accessed stored e-mail rather than intercepting it during transmission.

A. Pretrial Agreement

The appellant first contends that his pretrial agreement violated public policy by preventing him from presenting, in his unsworn statement, sentence comparison material, specifically, calling the military judge's attention to the case of *United States v. Pariseau,* ACM 32677 (A.F. Ct. Crim. App. 13 Jan 1998) (unpub. op.).[2] The pretrial agreement contains a provision in which the appellant waives his rights in sentencing to engage in sentence comparison under *United States v. Grill,* 48 M.J. 131 (C.A.A.F. 1998) and agrees not to raise before the court-martial in his unsworn statement or elsewhere any information concerning the sentences imposed in other courts-martial. The appellant argues, citing *Grill*, that this limitation impermissibly limited his right to "present a full sentencing case to the sentencing authority."

While the right to an unsworn statement in sentencing is not unlimited, it is very broad. *United States v. Tschip,* 58 M.J. 275 (C.A.A.F. 2003). Information on

[2] It should be noted that the *Pariseau* case, while it did involve "Peeping Tom" activities, did not present the communication of a threat, indecent language, impeding an investigation, or computer hacking specifications that this case does. The appellant in *Pariseau* also did not videotape the women he watched.

comparative sentences is the sort of material that, subject to proper presentencing instruction, may be included in an accused's unsworn statement. *Grill*, 48 M.J. at 133.

However, *Grill* is inapposite to this case. In *Grill*, the accused intended to include sentence comparison material in his unsworn statement and was prevented from doing so by the military judge on the basis that it was inappropriate to present to the members. *Id.* at 132-33. Our superior court held that the military judge's action prejudiced the accused. *Id*. at 132. In the present case, the appellant agreed to waive his right under *Grill* in order to obtain the benefits of a pretrial agreement. It is settled that an accused may waive procedural rights, including those of a constitutional nature, at trial. *Ricketts v. Adamson*, 483 U.S. 1 (1987); *Peretz v. United States*, 501 U.S. 923 (1991). Our superior court has recognized this right in the context of the negotiation of pretrial agreements. *See United States v. Edwards*, 58 M.J. 49 (C.A.A.F. 2003) (right to counsel); *United States v. Rivera*, 46 M.J. 52 (C.A.A.F. 1997) (evidentiary objections); *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995) (command influence).

We believe that *Edwards* is dispositive of this argument. In that case, the appellant agreed as a condition of his pretrial agreement to waive any motion relating to his constitutional rights to counsel and his right to remain silent during interrogation by agents of the Air Force Office of Special Investigations. *Edwards*, 58 M.J. at 50-51. The judge conducted a careful inquiry into the waiver, assuring himself that it was voluntary and that the accused understood its consequences. *Id*. at 51. The court held that his waiver of this right in his pretrial agreement did not violate public policy. *Id*. at 53.

This case presents essentially the same fact pattern, except that it did not involve this appellant's constitutional rights. The military judge conducted a searching examination, assuring herself that the appellant did in fact understand that he could have presented the sentence comparison material in his unsworn statement, and that he was freely and voluntarily waiving that right to obtain the benefits of the pretrial agreement. There is nothing in the record to indicate that the appellant was in any way coerced into entering into the pretrial agreement, and the appellant does not contend that he was. Indeed, he assured the military judge that it was a voluntary action on his part. On these facts, we hold that it did not violate public policy for the appellant to waive his rights under *Grill* in order to obtain what, for him, were the very substantial benefits of this pretrial agreement.

B. Providence of Plea to Charge III, Specification 10

The appellant's second contention is that his plea of guilty to Specification 10 of Charge III was improvident, because he merely accessed A1C HMP's stored e-mail rather than intercepting the e-mail during its transmission. The standard for overturning a guilty plea on appeal is that the record must show a "substantial basis" in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Only if

the record fails to objectively support the plea, or if there is evidence in "substantial conflict" with the plea, should it be overturned. *United States v. Bullman*, 56 M.J. 377, 381 (C.A.A.F. 2002), *pet. granted*, 57 M.J. 478 (C.A.A.F. 2002). *See United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994).

Specification 10 of Charge III recited that the appellant did, "at Misawa Air Base, Japan, on divers occasions between on or about 1 November 1999 and on or about 31 August 2000, intentionally intercept electronic communications belonging to [a female airman]," in violation of Article 134, UCMJ. The appellant now argues that his plea was improvident because he did not "intercept" the communications as they were being transmitted, but rather broke into A1C HMP's personal e-mail account and read stored messages.

At trial, there was a substantial amount of discussion of 18 U.S.C. § 2511(1)(a), a federal criminal statute that prohibits the intentional "interception" of any "electronic communication." It was stipulated that that statute was "closely related" to the offense of which the accused was convicted. The appellant now argues that the wrong statute was applied, and that the federal statute most closely related to what the appellant admitted to doing is 18 U.S.C. § 2701(a), which prohibits intentionally accessing without authorization a "facility through which an electronic communication service is provided . . . and thereby [obtaining] access to . . . [an] electronic communication while it is in electronic storage."

With respect to the judicial interpretation of 18 U.S.C. § 2511(1)(a), the appellant is correct. It now appears to be settled (although the answer was less clear when the appellant's court-martial took place) that the "interception" prohibited by 18 U.S.C. § 2511(1)(a) does not include obtaining access to stored electronic communications; rather, the "interception" must be done while the message is being transmitted. *United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003), *cert. denied*, 123 S.Ct. 2120 (2003); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003); *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457 (5th Cir. 1994).

However, this does not, of itself, dispose of the issue. Article 134, UCMJ, prohibits three categories of offenses: (1) conduct prejudicial to good order and discipline in the armed forces; (2) conduct of a nature to bring discredit upon the armed forces; and (3) crimes and offenses not capital under federal law. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 60c (2000 ed.). Had the appellant been charged with a violation of 18 U.S.C. § 2511(1)(a) as a non-capital crime under the United States Code, the government would have had to prove every element of that offense as required

by that statute.[3] *MCM*, Part IV, ¶ 60c(4)(b). It is clear from the record, however, that the government did not do this; rather, it charged it as conduct prejudicial to good order and discipline in the armed forces or conduct of a nature to bring discredit upon the armed forces, under the first two clauses of Article 134, UCMJ. The appellant clearly understood that he was pleading guilty to prejudicial or service discrediting conduct, and stated how his breaking into A1C HMP's e-mail constituted such conduct. The government is under no duty to charge conduct that may come under a similar federal criminal statute as a crime and offense not capital under the third clause of Article 134, UCMJ, rather than as conduct prejudicial to good order and discipline or service discrediting conduct under the first two clauses of Article 134, UCMJ. *United States v. Sapp*, 53 M.J. 90 (C.A.A.F. 2000); *United States v. Williams*, 29 M.J. 41 (C.M.A. 1989); *United States v. Herndon*, 4 C.M.R. 53 (C.M.A. 1952).

Applying the standard for provident pleas set out above, we find the appellant's plea to Specification 10 of Charge III to be provident. The military judge conducted a very searching and thorough *Care*[4] inquiry, which occupied over 130 pages in the record. It is abundantly clear from the record that the appellant understood the elements of the offense as set out under Article 134, UCMJ, i.e., that, on divers occasions between on or about 1 November 1999 and 31 August 2000, he intercepted certain electronic communications belonging to A1C HMP; that his conduct was intentional; that his conduct was willful and wrongful; and that, under the circumstances, his conduct was to the prejudice of good order and discipline or was of a nature to bring discredit upon the armed forces. It is equally clear that he understood and admitted that these elements accurately described what he did, and that, under the circumstances, his conduct was prejudicial to good order and discipline or service discrediting.

The judicial construction of the term "intercept" in 18 U.S.C. § 2511(1)(a) is not controlling in a court-martial where the appellant is charged, pursuant to Article 134, UCMJ, with conduct prejudicial to good order and discipline or service discrediting conduct, rather than with a violation of that statute as a crime and offense not capital. *Williams*, 29 M.J. at 42; *United States v. Long*, 6 C.M.R. 60, 65 (C.M.A. 1952). The military judge elicited from the appellant that his conduct did "intercept" A1C HMP's communications in the sense that she was unable to access or use her account while he was breaking into it. Nothing more is required. There is not only no "substantial basis" in the record for questioning the plea, there is no basis whatsoever. *Prater*, 32 M.J. at 436.

While we have rejected the appellant's argument on the providence of his plea, we still must consider the effect of the application of 18 U.S.C. § 2511(1)(a) to his sentence.

[3] The government may well have charged the offense under Article 134, UCMJ, to avoid problems of extraterritoriality, *see United States v. Cotroni*, 527 F.2d 708 (2d Cir. 1975), but that does not affect our analysis here.

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

The military judge agreed with defense counsel that the maximum sentence to confinement would be 25 years and 1 month. This was arrived at in the case of Specification 10 of Charge III by using the authorized confinement set out in 18 U.S.C. § 2511(4)(a)(i), as required by Rule for Courts-Martial (R.C.M.) 1003(c)(1)(B)(ii). That punishment was confinement for 1 year. As the appellant points out, however, the authorized punishment at the time for a violation of 18 U.S.C. § 2701(a), the statute that is in fact most "closely related," was 6 months. *See* 18 U.S.C. § 2701(b)(2).[5] Thus, the correct total maximum punishment should have been 24 years, 7 months, rather than 25 years, 1 month.

The appellant was in fact sentenced to confinement for 3 years, which was reduced by virtue of the pretrial agreement to 24 months. This is not a case where a significant error was made, such as in *United States v. Pabon*, 37 M.J. 836 (A.F.C.M.R. 1993), which raised the specter of actual prejudice. Moreover, the appellant obtained the benefit of the pretrial agreement, which reduced his actual confinement by one-third. On these facts, we cannot find that this error in calculating the total maximum, which approaches the de minimis level, prejudiced the appellant. *United States v. Ramsey*, 40 M.J. 71 (C.M.A. 1994).[6]

III. 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

HEATHER D. LABE
Clerk of Court

[5] This has since been amended to raise the maximum to 1 year. Act of November 25, 2002, 116 Stat. 2158, sec. 225(j)(2).
[6] We further find that the mistake did not render the appellant's plea improvident, under the circumstances of this case. *United States v. Hunt*, 10 M.J. 222 (C.M.A. 1981); *United States v. English*, 25 M.J. 819 (A.F.C.M.R. 1988).