UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JIMMY J. RICOTTONE
United States Air Force

ACM S30337

15 June 2005

Sentence adjudged 16 December 2002 by SPCM convened at Andrews Air Force Base, Maryland. Military Judge: Thomas G. Crossan, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of $737.00 pay per month for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrea M. Gormel.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

Consistent with his pleas, the appellant was found guilty of three specifications involving wrongful use and possession of drugs, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by a military judge sitting as a special court-martial to a bad-conduct discharge, confinement for 8 months, forfeiture of $737.00 pay per month for 8 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant contends his pleas were improvident because the military judge failed to adequately exclude entrapment as an affirmative defense. The appellant also contends his sentence is inappropriately severe.[1] We find no merit in either contention and affirm.

Background

The appellant was friends with Airman First Class (A1C) Svetlana Chentsova and A1C Jessica Huber, and he used drugs with both of them. He used 3, 4-methylenedioxymethamphetamine (commonly known as ecstasy) twice. He possessed a number of ecstasy tablets in addition to a single tablet he used on one of these occasions. He used marijuana on a separate occasion. A1C Chentsova and A1C Huber were involved in all three incidents. Unbeknownst to the appellant, A1C Huber was a confidential informant for the Air Force Office of Special Investigations.

Entrapment

Our superior court has held that the defense of entrapment is not raised unless the accused's commission of an alleged criminal act is proven beyond a reasonable doubt and "there is evidence that the suggestion or inducement for the offense originated with a government agent." *United States v. Vanzandt*, 14 M.J. 332, 343 (C.M.A. 1982). We use a subjective test for entrapment, "balancing the accused's resistance to temptation against the amount of government inducement." *Id*. at 344.

In his unsworn statement during the presentencing stage of the trial, the appellant said A1C Huber "practically begged" him to use drugs and "said things like, 'It would mean a lot to me,' and 'This is our last opportunity to party together.'" He went on to say: "I look back now and understand why she was so gung-ho about wanting me to use drugs, but I am in no way saying that it was not my fault. I was never forced nor coerced to use drugs. I should have said no, and I could have said no."

The appellant's trial defense counsel briefly referred to A1C Huber in her sentencing argument, saying: "The facts in this case [are] that A1C Huber is the one that came to him . . . [t]hey had an intimate relationship, so he bowed to peer pressure and used." When trial defense counsel concluded her argument, the military judge asked the appellant and his counsel whether they had discussed entrapment and whether they believed the defense existed. The appellant said he had discussed it with his counsel, he knew entrapment was a possible defense, but concluded that he did not believe the defense applied in his case. The appellant's trial defense counsel concurred.

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

The appellant submitted a post-trial declaration in which he says his trial defense counsel told him that raising the defense of entrapment "wasn't a good idea." Because he had no "legal training or extensive education in criminal law," he took her advice. The appellant says he relied on that advice because the military judge did not explain what entrapment meant. But, after discussing entrapment with his appellate defense counsel, he contends that he would not have pled guilty had he understood entrapment prior to trial.

At trial, the military judge said he did not believe entrapment was "out there" when he raised the issue with the appellant and his counsel. We agree. The appellant's comment that A1C Huber "practically begged" him to use drugs referred only to the events of 22 June 2002, the last drug episode charged. This conclusion is plain from the sequence of events described by the appellant in his unsworn statement. He said the 22 June 2002 incident came after he was notified in May that he had been accepted for admission to the United States Air Force Academy Preparatory School. His school reporting date was 17 July 2002, so the timeline is consistent with A1C Huber's apparent exhortation that "[t]his is our last opportunity to party together."

The time sequence is important because, apart from the appellant's characterization of A1C Huber as being "gung-ho" for him to use drugs, there is no evidence or suggestion that she pressured him or originated the idea of drug use on the other occasions when he used ecstasy and marijuana.

The evidence the appellant provided during the providency inquiry and in a written stipulation of fact convince us that third parties first approached the appellant about using drugs on the earlier occasions, not A1C Huber. On the first ecstasy use, the appellant was at a club with A1C Huber when he was approached by an unnamed person from whom the appellant purchased the ecstasy. The marijuana use arose when A1C Chentsova's civilian friend asked her, the appellant, and A1C Huber if they wanted to smoke marijuana. There is no evidence that the suggestions or inducements to use drugs prior to the 22 June 2002 incident originated with a government agent, thus the defense of entrapment was not raised. *See Vanzandt*, 14 M.J. at 343.

Further, the appellant's drug use on the two earlier occasions was evidence of his predisposition to use drugs on 22 June 2002. There is no entrapment where there is predisposition. *United States v. Clark*, 28 M.J. 401, 406 (C.M.A. 1989). Consequently, the defense of entrapment was not reasonably raised at trial.

Providency of the Plea

Where an appellant's responses during the providency inquiry or, as here, in matters raised during the presentencing stage, suggest a possible defense to the offense charged, the military judge is "well advised to clearly and concisely explain the elements

of the defense in addition to securing a factual basis to assure that the defense is not available." *United States v. Pinero*, 60 M.J. 31, 34 (C.A.A.F. 2004) (quoting *United States v. Jemmings*, 1 M.J. 414, 418 (C.M.A. 1976)). The military judge must resolve inconsistencies and apparent defenses or the guilty pleas must be rejected. *Id*. at 34; *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996); *Jemmings*, 1 M.J. at 418.

The appellant did not suggest he was entrapped when he explained his misconduct to the military judge during the providency inquiry. As to each of the charged offenses, the appellant admitted he could have avoided using and possessing drugs. It was in his unsworn statement that he went on to say, "I was never forced nor coerced to use drugs. I should have said no, and I could have said no."

The military judge raised the issue sua sponte with the appellant and his counsel. The appellant's trial defense counsel told the military judge that she did not believe the defense of entrapment applied. The military judge was entitled to afford weight to trial defense counsel's judgment that a particular defense does not exist. *See United States v. Lee*, 43 M.J. 518, 522 (A.F. Ct. Crim. App. 1995), *aff'd*, 46 M.J. 123 (C.A.A.F. 1996). However, "the defense is not one for counsel to abjure. When a defense is raised, it is the *accused* who must speak for himself; it is not for his counsel to speak for him." *United States v. Brooks*, 26 M.J. 930, 933 (A.C.M.R. 1988).

The best practice is for the military judge to clearly and concisely explain the elements of a defense to an accused to assure that the defense is not available. *Pinero*, 60 M.J. at 34. However, the law does not require the military judge to explain those elements to an accused, and we decline to create such a requirement. In this case, the military judge conducted sufficient inquiry of the appellant to establish his understanding regarding the potential defense:

> MJ: Have you and your counsel discussed -- you know, when you sat down and discussed everything -- entrapment?
>
> [Defense counsel and accused conferred.]
>
> ACC: Yes, we did discuss it, Your Honor.
>
> MJ: You know entrapment is a possible defense to criminal offenses. Correct?
>
> ACC: Yes, sir.
>
> MJ: Do you believe that you have the defense of entrapment?
>
> ACC: No, Your Honor.

MJ: Defense Counsel, is that your position also?

DC: That's my position, Your Honor.

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)). "[G]uilty pleas are rejected on appellate review only when the record of trial shows a substantial basis in law and fact for questioning the plea." *Pinero*, 60 M.J. at 33-34 (citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). *See also United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). In view of the military judge's inquiry about a potential entrapment defense and the lack of a factual basis to otherwise support the defense,[2] we conclude the military judge did not abuse his discretion by accepting the appellant's pleas. We find no substantial basis for questioning the plea.

Sentence Appropriateness

The appellant contends his sentence was too severe. He asserts in his post-trial declaration that the majority of people he encountered in confinement during his eight-month sentence were surprised by the amount of confinement he received.

"Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). We have given individualized consideration to this particular appellant and the circumstances of his case. Given the appellant's repeated and intentional use of drugs, we find his sentence to be appropriate and in relative uniformity with other sentences for such offenses. *See* Article 66, UCMJ, 10 U.S.C. § 866; *United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).

[2] *Cf. Clark*, 28 M.J. at 401.

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

ANGELA M. BRICE
Clerk of Court