UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CORAL L. ROSE
United States Air Force

ACM S31668

08 March 2010

Sentence adjudged 08 May 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Andrew J. Unsicker.

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

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of making a false official statement and one specification of divers wrongful use of Ecstasy, in violation of Articles 107 and 112a, UCMJ, 10 U.S.C. §§ 907, 912a. The adjudged and approved sentence consists of a bad-conduct discharge, three months of confinement, and reduction to the grade of E-1.[1]

[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charges and specifications in return for the convening authority's promise not to approve confinement in excess of three months if a bad-conduct discharge was adjudged and not to approve more than five months of confinement if a bad-conduct discharge was not adjudged.

On appeal, the appellant asks this Court to set aside her findings of guilty on the divers wrongful use of Ecstasy charge and specification. As the basis for her request, she asserts that her plea to the specification and charge was improvident because the military judge failed to adequately inquire into and resolve a potential voluntary intoxication defense raised by the appellant's statements in the stipulation of fact. We find the appellant's assignment of error to be without merit and accordingly affirm the findings and the sentence.

Background

During the weekend of 16–18 January 2009, the appellant purchased Ecstasy from a fellow airman and used it. On 23 January 2009, the appellant purchased Ecstasy from the same airman and ingested the drug with other airmen. On 26 January 2009, the appellant's first sergeant summoned her to his office for questioning. After a proper rights advisement, the appellant waived her rights, agreed to answer questions, and informed her first sergeant that she had not used Ecstasy.

On 27 January 2009, agents with the Air Force Office of Special Investigations summoned the appellant to their office for an interview. After a proper rights advisement, the appellant waived her rights, agreed to answer questions, and confessed to ingesting one Ecstasy pill. In her written confession, the appellant stated she had been drinking alcoholic beverages prior to ingesting the Ecstasy on the first occasion and "was already not [her]self." During her providency inquiry, the appellant informed the military judge that her Ecstasy use on each occasion was intentional and that she could have avoided using the Ecstasy if she had wanted.

Discussion

"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 her 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 her guilt; the military judge must elicit facts as revealed by the accused herself 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 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 she intentionally ingested the Ecstasy and could have avoided ingesting it if she had so wanted. Moreover, voluntary intoxication is not a defense to a general intent crime like the wrongful use of a controlled substance. *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997) (quoting *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996)).

Lastly, assuming arguendo, voluntary intoxication was a defense, it would be a defense only if the intoxication was of such severity as to render the appellant incapable of forming the requisite intent; mere intoxication is not sufficient. *Peterson*, 47 M.J. at 234 (quoting *United States v. Box*, 28 M.J. 584, 585 (A.C.M.R. 1989)). Here, at best, the appellant's confession raises the possibility of mere intoxication and then only with respect to her first use.[2] As such, her intoxication still would not have been a defense. In short, we find the appellant's plea provident.

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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[2] There is no evidence the appellant was intoxicated prior to her second use of Ecstasy. Assuming her intoxication was sufficient to invalidate her guilty plea to her first use of Ecstasy, the evidence clearly establishes a substantial basis in law and fact for accepting her plea to her second use of Ecstasy. The appellant still would not be entitled to sentence relief if we were to modify the findings to reflect a one-time use of Ecstasy and to then reassess the sentence.