UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRANDON S. SPANO
United States Air Force

ACM 34904

14 January 2004

Sentence adjudged 28 November 2001 by GCM convened at Altus Air Force Base, Oklahoma. Military Judge: Kurt Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 16 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Teresa Davis and Captain Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain C. Taylor Smith.

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge sitting alone as a general court-martial at Altus Air Force Base (AFB), Oklahoma, found the appellant guilty of numerous drug-related offenses. The appellant pled guilty to the wrongful use on divers occasions of 3, 4-methylenedioxymethamphetamine (also known as ecstasy), methamphetamine, and marijuana, the attempted use of lysergic acid diethylamide (also known as LSD), the wrongful distribution of ecstasy and methamphetamine, and the wrongful introduction of methamphetamine onto a military installation with intent to distribute, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 17 months, and reduction to E-1. The convening

authority approved the sentence adjudged except that he reduced the period of confinement to 16 months pursuant to the terms of a pretrial agreement.

The appellant now contends that his guilty plea to introducing methamphetamine onto a military base with intent to distribute was improvident. He also asserts that the military judge erred in admitting a prosecution exhibit during the sentencing proceedings because it contained "improper opinions." We find error, take corrective action, and affirm.

I. Providence of the Plea

The appellant maintains that his plea to introducing methamphetamine onto Altus AFB with the intent to distribute was improvident because the military judge did not define or explain one element of the offense: that the appellant had the intent to distribute the drug. He argues that because the appellant did not demonstrate his understanding of the meaning and effect of the plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 845(a), the military judge should not have accepted the guilty plea.

Article 45(a), UCMJ, provides that a guilty plea shall not be accepted if it appears the accused "entered the plea of guilty improvidently or through lack of understanding of its meaning and effect." In the seminal case *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969), our superior court ruled that, in order to assure that an accused's guilty plea is provident under Article 45, UCMJ, a military judge must: (1) advise an accused of his right against self-incrimination, his right to a trial of the facts, and his right to confront the witnesses against him and determine that he waives those rights; (2) advise the accused of the elements of the charged offense; and (3) question the appellant about the facts to determine whether the accused's acts or omissions constitute the crimes charged. In the present case, we are concerned with the last two requirements.

Rule for Courts-Martial (R.C.M.) 910(c)(1)-(5) codifies the requirements established by the *Care* decision. R.C.M. 910(c)(1) provides that the military judge is required to advise the accused of the nature of the offense to which he is pleading guilty during the providence inquiry. Ordinarily this requires the military judge to explain the elements of the offense to the accused. *See* R.C.M. 910(c)(1), Discussion. However, "[t]he elements need not be [recited] . . . if it clearly appears that the accused was apprised of them in some manner and understood them and admits . . . that each element is true." Drafters Analysis, *Manual for Courts-Martial, United States* (*MCM*), A21-59 (2002 ed.).

In *Care*, the law officer did not advise the appellant of the elements of desertion or establish the factual components of the offense. Nonetheless, the court found the plea provident because the record demonstrated that the appellant was aware of the elements of the crime and the facts supported the plea. *Care*, 40 C.M.R. at 252-53. Subsequently,

in *United States v. Brooks*, 41 C.M.R. 35, 36 (C.M.A. 1969), the court found a plea provident even though the president of the special court-martial "did not itemize the elements of every offense charged," where the record as a whole showed that "the accused knew what he was pleading guilty to and what acts constituted the offenses charged." Similarly, in *United States v. Kilgore*, 44 C.M.R. 89, 91 (C.M.A. 1971), the court found the plea provident even where the military judge did not advise the appellant of the elements of the offense, where the detailed inquiry into the facts "covered the essential requirements of proof for that offense." *Accord United States v. Jones*, 34 M.J. 270, 272 (C.M.A. 1992) (military judge's failure to explain the elements of the offense was not reversible error where it was "clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty."). *But see United States v. Pretlow*, 13 M.J. 85 (C.M.A. 1982) (declining to apply *Kilgore* for the compound offense of robbery). Most recently our superior court addressed this issue in *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003), holding that if a military judge fails to advise an accused of the elements of an offense, it is reversible error unless "the context of the entire record" shows that the accused was "aware of the elements, either explicitly or inferentially." Thus, if a military judge does not read the elements of an offense to an accused it is error, and we will find the plea improvident unless the factual inquiry demonstrates the accused's understanding of the nature of the charged offense.

Our superior court has also decreed that the military judge must develop a factual basis for the plea by questioning the accused to determine whether his acts or omissions constitute the offense charged. The record of trial must "make clear the basis for a determination by the military trial judge . . . whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *Care*, 40 C.M.R. at 253. The ruling was incorporated into R.C.M. 910(e), which provides that, "The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." "The military judge must elicit facts from the accused that 'objectively' support the plea." *United States v. Horton*, 55 M.J. 585, 586 (A.F. Ct. Crim. App. 2001) (citing *United States v. Shearer*, 44 M.J. 330, 334 (C.A.A.F. 1996)).

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996). In order to reject a guilty plea, we must find that the record of trial shows "'a substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

The appellant was charged, inter alia, with introducing 2.6 grams of methamphetamine onto Altus AFB between about 1 November 2000 and 31 December 2000, with intent to distribute the drug. He offered to plead guilty to the charge. The military judge advised him that the charged offense was "wrongfully introducing

methamphetamine onto Altus Air Force Base." He further advised that the elements of the offense were:

> (1) That, between on or about 1 November 2000 and on or about 31 December 2000, at Altus Air Force Base, Oklahoma, you introduced approximately 2.6 grams, more or less, of methamphetamine, also known as "crank" or "speed," a controlled substance, onto an installation used by the Armed Forces, to wit, Altus Air Force Base, Oklahoma; and,
>
> (2) That your introduction of the methamphetamine onto Altus Air Force Base was wrongful.

The military judge did not advise the appellant of the third element of the charged offense: that the introduction onto Altus AFB was with the intent to distribute. *See MCM*, Part IV, ¶ 37b(6); Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, ¶ 3-37-4c (1 April 2001).

The military judge then asked the appellant to explain the facts of the offense. The appellant related that he bought the drugs from a civilian downtown and brought them onto the base in an automobile on three occasions. During the ensuing discussion, some additional information came out.

> MJ: Now, did you just bring it on for yourself, or did you bring it on for other people?
>
> ACC: I brought it on for other people, sir, as well–to be used by other people, with me.
>
> MJ: Okay, and how many people?
>
> ACC: Airmen Clinton, Crocker, and Reed.
>
> MJ: Okay. Each time?
>
> ACC: Yes, sir.
>
> MJ: All three times?
>
> ACC: Yes, sir.

The appellant was also charged with the distribution of the same methamphetamine to the other service members and pled guilty to that offense. During the course of the military judge's inquiry, it was made clear that the appellant collected

money from his friends, went downtown to buy the drugs, and brought them back onto the installation for their mutual use.

The parties entered into a stipulation of fact setting out the facts of the case. It mentioned briefly the appellant's introduction of methamphetamine onto Altus AFB, but did not specifically address the element requiring the intent to distribute the methamphetamine.

The appellant now contends that, because the military judge failed to advise the appellant of the "intent" element for the offense in question, there is no way to determine from the record whether the appellant understood exactly the offense to which he was pleading guilty. This, he argues, is a substantial basis for questioning the providence of the plea. The government counters by arguing that the record as a whole shows the appellant's plea was provident.

We find that the military judge's discussion of the circumstances of the crimes provided an adequate factual predicate to establish the providence of the plea to the offense in question. However, we have reservations about whether it fully apprised the appellant of the nature of the offense. Everything presented to the appellant, including the military judge's instructions and the stipulation of fact, made it seem that the charged offense was simple introduction onto a military installation, rather than the more serious offense of introduction with intent to distribute. As the appellant's defense counsel pointed out, a neutral and detached reader of the *Care* inquiry would not even realize the appellant was charged with the greater offense. This is not like the situation in *Care* where the omitted elements concerned desertion, "one of the simplest of all military offenses." *Care*, 40 C.M.R. at 252. While this crime is not especially complex from a legal standpoint, the distinction between a simple introduction offense and introduction with intent to distribute may not be obvious to the average service member. *Redlinski*, 58 M.J. at 119. This is not a case where the appellant was familiar with the offense because of some prior experience. *See Brooks*, 41 C.M.R. at 36. The maximum punishment for introducing methamphetamine onto a military installation includes 5 years confinement; the maximum punishment for introducing methamphetamine with the intent to distribute the drug includes 15 years confinement. *MCM*, Part IV, ¶ 37e(1) and (2). Considering all the circumstances, we are not convinced the advice to the appellant was sufficient for him to appreciate the nature of the crime. Therefore, we find the appellant's plea was improvident to the charged offense.

The military judge's advice and the appellant's responses were certainly adequate to constitute a provident plea to the lesser included offense of introducing methamphetamine onto a military installation. *MCM*, Part IV, ¶ 37d(6). We affirm the appellant's conviction to the lesser included offense. Article 59(b), UCMJ; 10 U.S.C. ¶ 859(b). The finding of guilt to Specification 6 of the Charge is affirmed, except the words, "with the intent to distribute the said controlled substance."

Having modified the findings, we must reassess the sentence. We may approve a sentence no greater than that which "would have been imposed at the original trial absent the error." *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000) (quoting *United States v. Taylor*, 47 M.J. 322, 325 (C.A.A.F. 1997)).

We are convinced the error would have had no effect on the sentence. The primary considerations in determining the appropriate punishment are the offenses (that is, facts and circumstances of the crimes) and the offender (that is, the appellant's personal history and record of performance). The modification of the charged offense would not change any of the evidence relating to the offense or the offender that was before the military judge in sentencing. The fact that the appellant collected money from his friends, bought the methamphetamine downtown, brought it onto the installation to distribute to his friends, and used it, was still admissible as part of the circumstances of the appellant's introduction, distribution, and use offenses.

The maximum possible punishment for the offenses at trial was a dishonorable discharge, confinement for 62 years, total forfeitures, and reduction to E-1. The modification of the findings reduces the maximum possible confinement to 52 years. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 17 months, and reduction to E-1. The sentence adjudged was such a small fraction of the maximum possible punishment, that we are convinced that the modification of the maximum possible sentence would have had no effect on the punishment adjudged.

II. Admissibility of Rebuttal Evidence

During the sentencing proceedings, the prosecution introduced evidence of the appellant's personal data and character of service, including certified copies of his performance reports and a letter of reprimand. The government also called a witness who testified about the impact of the appellant's offenses upon the unit. On cross-examination, the defense elicited evidence of the appellant's good duty performance and an opinion on the appellant's rehabilitative potential. The government then rested.

The defense counsel offered Defense Exhibits A through N, a collection of unsworn character statements and letters of appreciation. The trial counsel objected on the grounds that the documents were hearsay, but noted that she would withdraw her objection if the military judge relaxed the rules of evidence in sentencing. The defense counsel asked that the military judge relax the rules of evidence. The military judge admitted the defense exhibits. The military judge also admitted a transcript of the testimony of the Air Force Office of Special Investigations agent who took the appellant's confession, to show the appellant's cooperation with authorities. The appellant made an unsworn statement apologizing for his misconduct, relating the

circumstances of his upbringing, and asking for leniency in sentencing. The defense rested.

In rebuttal, the prosecution offered Prosecution Exhibit 6, a character statement from Master Sergeant (MSgt) Randall Boze, as rebuttal evidence. The defense counsel objected on the grounds that it was hearsay; trial counsel responded that the rules of evidence had been relaxed. The defense counsel had no other objection. The military judge admitted the document into evidence.

The appellant now complains that the military judge abused his discretion in admitting Prosecution Exhibit 6 in evidence. We find no error.

It is important to note that the only objection to Prosecution Exhibit 6 raised at trial was "hearsay"; trial defense counsel specifically declined to raise any other objection. As noted above, the military judge had relaxed the rules of evidence for the defense to admit the defense exhibits under R.C.M. 1001(c)(3). Under R.C.M. 1001(d), "The prosecution may rebut matters presented by the defense. . . . If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree." The rules of evidence having been relaxed at the defense request, there was no basis for the defense counsel to assert that Prosecution Exhibit 6 was hearsay. The military judge did not err in overruling that objection.

Before this Court, the appellant raises new grounds challenging the admissibility of the document. Of course, the appellant's failure to raise these additional grounds for objection waives the issue on appeal, absent plain error. Mil. R. Evid. 103(a)(1); *United States v. Armon*, 51 M.J. 83, 87 (C.A.A.F. 1999). To constitute "plain error," we must find (1) that there was an "error"; (2) that the error was "plain," "clear" or "obvious," and (3) that it materially prejudiced the appellant's substantial rights. *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003); *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998). We will test for plain error.

The appellant argues that Prosecution Exhibit 6 was not proper rebuttal to the appellant's unsworn statement. Citing R.C.M. 1001(c)(2)(C), he contends that there were "few" factual assertions in the unsworn statement, and that Prosecution Exhibit 6 did not "explain, repel, counteract or disprove" that evidence. *See United States v. Cleveland*, 29 M.J. 361 (C.M.A. 1990). Although not fleshed out on the record (no doubt because the objection was not raised at trial), it appears that Prosecution Exhibit 6 was offered as rebuttal to the character statements introduced into evidence by the defense, rather than the appellant's unsworn statement. Thus, an objection based upon specific limitations upon rebuttal to unsworn statements is inapplicable.

The appellant also argues that Prosecution Exhibit 6 was inadmissible because it did not meet the specific requirements for opinion testimony of rehabilitative potential under R.C.M. 1001(b)(5)(C). We find this unpersuasive on several grounds. First, the statement on its face indicates the declarant had personal knowledge of the appellant as his supervisor. If there were any other problem with the foundation for the witness's testimony, the appellant's failure to raise it at trial forfeited the issue. Secondly, Prosecution Exhibit 6 did not offer an opinion on rehabilitative potential, so the unique rules limiting such testimony simply do not apply.

The defense introduced five statements from service members who were the appellant's co-workers and supervisors, praising his good character and work ethic. The defense character statements included comments such as, "SrA Spano is an excellent AMN," "he is dedicated to the mission and a role model at work," and "SrA Spano's job knowledge makes him an asset to our flight." The prosecution offered Prosecution Exhibit 6 to rebut these general statements of good character, including such observations as, "SrA Spano is a person with deplorable moral turpitude and weak in character." The document also opined that he would not be an asset, because his presence would create a negative environment for younger airmen. This was simple rebuttal to the favorable character statements introduced by the defense, properly admitted under R.C.M. 1001(d). The military judge did not err–let alone commit plain error–in admitting Prosecution Exhibit 6.

III. Conclusion

The approved findings, as modified, and the 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 findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator