UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class STEVEN TSCHIP
United States Air Force

ACM S30016

16 August 2002

Sentence adjudged 17 July 2001 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel William B. Smith.

Before

SCHLEGEL, BRESLIN, and PECINOVSKY
Appellate Military Judges

PER CURIAM:

The appellant, pursuant to his guilty pleas, was convicted of 2 specifications of dereliction of duty and dishonorably failing to maintain sufficient funds in his credit union account to pay for checks he uttered, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. His approved sentence was a bad-conduct discharge and reduction to E-1. On appeal, he argues that his guilty plea to the Article 134, UCMJ, offense is entirely or partially improvident, and that the judge committed plain error by instructing the court members that they could disregard the accused's comments in his unsworn statement about an administrative discharge. We find that his plea was provident and that the judge's instruction was not erroneous.

A judge cannot accept a plea of guilty unless a sufficient factual basis for the plea is established. Rule for Courts-Martial (R.C.M.) 910(e). If an accused reveals sufficient facts that objectively support the plea, the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (1996) (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). If, after entering a plea of guilty, an accused raises matters inconsistent with the plea, or it appears he entered the guilty plea improvidently or through lack of understanding of its meaning and effect, the judge must reject the plea. Article 45(a), UCMJ, 10 U.S.C. § 845(a). When an appellant claims his or her guilty plea is improvident, we examine the record of trial to determine whether there is a substantial basis in law and fact for questioning the guilty plea. *United States v. Milton*, 46 M.J. 317, 318 (1997) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). 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 (1996).

The thrust of the appellant's argument is that he was merely negligent in maintaining his checking account at the credit union. We find, after reviewing the record of trial, that the appellant's attitude about his account can properly be characterized as grossly indifferent in accordance with the *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 68(c) (2000 ed.). The appellant told the judge that when he was writing checks, his sole focus was on obtaining the property or services and he did not care whether there would be sufficient funds in the account when the check was presented for payment. The appellant's subsequent irrational hope that by some stroke of luck money would magically appear in the account is indifferent and reckless. He never balanced his checkbook and admitted that he rarely even looked at his bank statements. At the same time, the appellant knew that his checks were bouncing. Finally, although the appellant said he had overdraft protection for the account in the amount of $100.00, he admitted to uttering 44 checks, totaling $1402.12. This was woefully insufficient for the appellant's conduct. We find the appellant's plea to Charge II and its specification provident.

The appellant also claims the judge erred by instructing the court members that they were "free in your discretion to disregard the reference [the appellant made in his unsworn statement that the commander could discharge him if he did not receive a bad-conduct discharge] if you see fit." The appellant did not object to this instruction. He now claims the judge's instruction eviscerated his right of allocution.

"Failure to object to an instruction . . . before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." R.C.M. 1005(f). We find no plain error with the judge's instruction. He merely told the court members that their duty was to determine whether the appellant should be punished with a bad-conduct discharge. He also told them because they could not adjudge an administrative discharge, it was a collateral matter. We believe this falls squarely within the required instruction that court members should select an appropriate sentence without

relying on the possibility of any subsequent action by the convening or higher authority. R.C.M. 1005(e)(4). Importantly, the judge did not instruct the court members to disregard the appellant's desire to remain in the Air Force, nor restrict the content of the appellant's unsworn statement. However, these court members, like any others, could attach whatever weight they desired to the appellant's comment concerning an administrative discharge, including no weight whatsoever because it was not something they had the authority to impose or recommend. When viewed under those circumstances, the judge's instruction was correct and did not affect the appellant's allocution.

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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator