

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman First Class JUSTIN T. WEST
United States Air Force**

ACM S30256

23 September 2004

Sentence adjudged 1 October 2002 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 95 days, and reduction to E-1.

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

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

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. In regards to the charge of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892, the military judge properly advised the appellant of the elements of the offense. Thereafter, the appellant admitted that at the time and place alleged, he consumed alcohol while 17 years old, knowing that he "was not allowed to do so" under the age of 21. We find that the appellant did not merely recite conclusions of law. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). To the contrary, the appellant revealed factual circumstances that objectively supported his plea. *See United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). As a consequence, we conclude that there is no substantial basis in law and fact to

question the plea. We hold that the military judge did not abuse his discretion by accepting it. *United States v. Eberle*, 44 M.J. 374 (C.A.A.F. 1996).

The appellant also pled guilty to the wrongful use of nitrous oxide, which was to the prejudice of good order and discipline in the armed forces, in violation of Article 134, UCMJ, 10 U.S.C. § 934. See *United States v. Deserano*, 41 M.J. 678 (A.F. Ct. Crim. App. 1995). During the providence inquiry, the appellant stated that he purchased the nitrous oxide at an adult video store and inhaled it. He stated that, while feeling the effects of this substance, he was impaired in his ability to “be on alert for any moment’s notice that the Air Force might need me.” We conclude that this assertion, without more, does not objectively support his plea to clause 1 of Article 134, UCMJ. The appellant was apparently off duty at the time of the offense. He replied in the affirmative to the military judge’s question of whether nitrous oxide was legal to purchase. Under the circumstances, we hold that the military judge abused his discretion by accepting the plea as to this Charge and its Specification. The findings of guilty as to Charge IV and its Specification, alleging wrongful ingestion of nitrous oxide, are set aside.

Having set aside a finding, we must now reassess the sentence. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). The military judge imposed a sentence of a bad-conduct discharge, confinement for 105 days, and reduction to E-1. The convening authority approved only 95 days of confinement, but otherwise approved the sentence as adjudged.

After considering the record before us, and taking into account the military judge’s statement (after announcing sentence) that the Specification of Charge IV had no effect on his deliberations, we find no cause to approve a lesser sentence. We are convinced beyond a reasonable doubt that, even without the improvident finding, the military judge would have imposed no less than a bad-conduct discharge, confinement for 95 days, and reduction to E-1. *United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002).

Charge IV and its Specification are dismissed. The remaining 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 remaining findings and approved sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court