UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRICE M. WILSON
United States Air Force

ACM 35897

13 December 2005

Sentence adjudged 6 February 2004 by GCM convened at Eglin Air Force Base, Florida. Military Judge: John J. Powers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Brandon A. Burnett, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Thomas A. Monheim.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of disobeying the lawful order of a superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890; one specification each of wrongful use of codeine, Xanax, and Darvocet, one specification of divers wrongful uses of marijuana, and one specification of wrongful possession of marijuana, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by a military judge to a bad-conduct discharge, confinement for

11 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Before us, the appellant claims that the military judge erred in denying his motion for alleged unlawful pretrial punishment. As further discussed below, the assignment of error is without merit. However, during our review of the providency inquiry, we noted an inconsistency – not raised by appellate counsel – between the appellant's admissions and the findings of the court. We address the second issue first.

Providency of the Appellant's Plea

In the sole Specification of Additional Charge II, the appellant pled guilty to wrongful possession of "an amount greater than 30 grams of marijuana." He signed a stipulation of fact in which he admitted that he possessed more than 30 grams of marijuana. During his *Care* inquiry,[1] however, he engaged in the following discussion with the military judge concerning the possession:

> MJ: Okay. Why don't you tell me, in your own words, why you feel you are guilty of this offense.
>
> ACC: Well, I was at a bar with a friend of mine from work, and I had an ounce of marijuana in my back pocket … 30 grams.
>
> . . .
>
> MJ: And it was an ounce of marijuana you say?
>
> ACC: Yes, Sir.
>
> MJ: Is that more than 30 grams?
>
> ACC: That's about 30 grams.
>
> MJ: Okay. The specification reads possess more than 30 grams of marijuana. It says "an amount greater than 30 grams." Was it an amount greater than 30 grams?
>
> ACC: An ounce weighs 30 grams exactly, so---
>
> MJ: I'm sorry.

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

ACC: Yes, Sir. It was about--it was either 30 grams or more.

MJ: Okay. You knew it was at least 30 grams?

ACC: Yes, Sir.

The appellant's admissions, that he possessed "*about* 30 grams," "30 grams *or more*" and "*at least* 30 grams," are not enough to unambiguously establish his guilt to possession of "greater than 30 grams of marijuana." Further complicating matters, the appellant also used another measure: "an ounce of marijuana." Unfortunately, the appellant's guess as to the relationship between ounces and grams was incorrect; an ounce is *not* equal to "30 grams exactly," but is instead 28.349 grams. 16 C.F.R. § 500.19(a). Where there is "a substantial basis in law and fact" for questioning the appellant's plea, the plea cannot be accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). We must therefore address whether the appellant's varying estimates of the marijuana he possessed amount to such a substantial difference.

The difference – less than two grams – appears at first glance to be de minimus; but in fact, it has legal consequence. Possession of an ounce (less than 30 grams) of marijuana is punishable by up to two years of confinement, while possession of 30 grams or more is punishable by up to five years. *Manual for Courts Martial, United States (MCM)*, Part IV, ¶ 37e(1)(a)-(b) (2002 ed.). Because we are unable to determine from the appellant's providency inquiry the precise amount of marijuana he possessed – more than 30 grams, exactly 30 grams, or less than 30 grams – we modify the findings to reflect the smallest amount to which there is no ambiguity by excepting the words "an amount greater than 30 grams" and substituting therefor the words "28.349 grams."

Appellant's Claims of Illegal Pretrial Punishment

At trial, the appellant made a motion seeking credit against his sentence, arguing that he was subjected to unlawful pretrial punishment when he was required to surrender his unit hat and patch and was detailed to the squadron "beautification team" prior to trial. The motion was litigated with commendable thoroughness by both sides. The military judge found that the appellant's superiors acted within the scope of their command authority and harbored no intent to punish the appellant. Concluding that the appellant's command did not violate the prohibitions against pretrial punishment contained in Article 13, UCMJ, 10 U.S.C. § 813, or the Rule for Courts-Martial (R.C.M) 304(f), the military judge denied the motion.

We review the military judge's findings of fact using a "clearly erroneous" standard. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000). Examining the record, we are satisfied that the military judge ruled correctly. *See United States v. Starr*,

53 M.J. 380, 382 (C.A.A.F. 2000). The appellant was not subjected to illegal pretrial punishment.

Sentence Reassessment

Because we have modified the finding as to the Specification of Additional Charge II, we must consider whether we can reassess the sentence. The purpose of reassessing a sentence is to purge the prejudice that occurred at trial. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990). If we can determine that, "absent the error, the sentence would have been at least of a certain magnitude, then [we] may cure the error by reassessing the sentence instead of ordering a sentence rehearing." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)).

Although there is legal significance to the difference between 1 ounce and 30 grams, the fact remains that the physical difference – less than 2 grams – is still exceedingly small. The military judge was not misled as to the nature of the appellant's conduct and the difference between the aggregate maximum sentence as calculated at trial was not so substantially different from the maximum, as modified, that it distorted the sentencing landscape. Given the repeated nature of the appellant's offenses and the substantial testimonial and documentary evidence in the record reflecting his lackluster performance of duty and numerous disciplinary infractions, we conclude that, even absent the improvident plea, the military judge would have awarded no less than a bad-conduct discharge, confinement for 11 months, and reduction to the grade of E-1.

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

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court