UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class THA YANG
United States Air Force

ACM 34775

27 February 2003

Sentence adjudged 5 September 2001 by GCM convened at Travis Air Force Base, California. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 years, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Cheryl D. Lewis.

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was tried by a military judge sitting alone as a general court-martial. The appellant was charged with eighteen specifications of wrongfully making worthless checks with the intent to defraud, in violation of Article 123a, UCMJ, 10 U.S.C. § 923a. He pled guilty to thirteen of these specifications as charged. To four other specifications he pled guilty to the lesser-included offense of dishonorably failing to maintain funds in his checking account, in violation of Article 134, UCMJ, 10 U.S.C. § 934, but was found guilty of the greater offense. The appellant pled guilty to one other specification, excepting certain charged checks. The military judge accepted his plea, but with regard to the excepted checks also found him guilty of the charged offense and, for some checks, the lesser-included offense of dishonorably failing to maintain funds. The appellant was

also charged with one specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. He was found guilty, in accordance with his plea, of the lesser-included offense of wrongful appropriation. Finally, the appellant was convicted, contrary to his pleas, of four specifications of dishonorable failure to pay just debts, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The sentence adjudged and approved included a bad-conduct discharge, confinement for 2 years, and reduction to E-1.

The appellant alleges the military judge erred by admitting a confessional stipulation concerning the contested specifications alleging a dishonorable failure to pay just debts, without conducting the inquiry required under *United States v. Bertelson*, 3 M.J. 314 (C.M.A. 1977). We find no error, and affirm.

Facts

At trial, the appellant entered into a lengthy stipulation of fact regarding all the charged offenses. The stipulation also provided facts concerning the offenses alleged in the four specifications of Charge II, to which the appellant pled not guilty. The military judge advised the appellant that he was not required to stipulate, that the stipulation could not be entered into evidence without his consent, that the stipulation would be used to determine his guilt of the offenses to which he pled guilty, and that the stipulation could not be contradicted. The military judge did not, however, advise the appellant that the stipulation amounted to a confession to the specifications to which he entered not guilty pleas.

In addition to the factual matters contained in the stipulation, the prosecution presented additional evidence, including documents and the testimony of witnesses, to prove the contested specifications of Charge II.

Law

The first *Manual for Courts-Martial, United States* (*MCM*), 1951, provided that, "a stipulation . . . should not be accepted if any doubt exists as to the accused's understanding of what is involved. If an accused has pleaded not guilty and the plea still stands, the court should not accept a stipulation which practically amounts to a confession." *MCM*, ¶ 154b(1) (1951). This provision afforded special protection for an accused, and complemented Article 45, UCMJ, 10 U.S.C. § 845, which made unacceptable any plea entered improvidently or without an understanding of its meaning and effect.

Notwithstanding the general policy against admitting such stipulations, this Court determined that it was not error to do so where the accused knowingly and intelligently entered into the stipulation and the military judge conducted an inquiry that met the basic requirements for a guilty plea. *United States v. Rempe*, 49 C.M.R. 367, 368 (A.F.C.M.R.

1974). In *United States v. Bertelson*, 3 M.J. 314, 315-17 (C.M.A. 1977), the (then) Court of Military Appeals similarly held that a confessional stipulation was admissible if the military judge: 1) determines that the accused has knowingly, intelligently, and voluntarily consented to its admission, 2) conducts an inquiry similar to a guilty-plea inquiry, and 3) conducts a plea bargain inquiry. In *Bertelson*, the Court defined a confessional stipulation as "a stipulation which practically amounts to a confession. We believe that a stipulation can be said to amount 'practically' to a judicial confession when, for all facts and purpose, it constitutes a de facto plea of guilty, i.e., it is the equivalent of entering a guilty plea to the charge." *Id.* at 315, n.2.

Later case law clarified what was meant by a "confessional stipulation." In *United States v. Long*, 3 M.J. 400 (C.M.A. 1977), the accused pled not guilty to possession of marijuana and attempted, unsuccessfully, to suppress the marijuana which had been seized from the appellant's car. Thereafter, the appellant stipulated that 18 plastic bags containing over 300 grams of marijuana were found in his automobile. No other evidence was introduced at trial. The defense argued that the evidence did not prove the appellant placed the marijuana in his car and therefore the evidence did not prove his knowing possession of the drug. The accused was convicted. On appeal, the Court found that this was not a "confessional stipulation," even though the stipulation contained all the evidence upon which the appellant was convicted. The Court noted that the "stipulation neither admitted the fact of the appellant's possession nor the wrongfulness thereof." *Id.* at 401. Because the appellant vigorously litigated at trial the issue of the appellant's possession of the drugs, the Court held that the stipulation was not a de facto guilty plea. *See also United States v. Brahm*, 16 M.J. 487 (C.M.A. 1983) (the appellant's stipulation that he was the owner of certain drug abuse paraphernalia was not confessional where the defense contested whether the ownership was knowing, conscious, or exclusive); *United States v. Dulus*, 16 M.J. 324, 327 (C.M.A. 1983) (not a confessional stipulation where the defense contested the inference that he knowingly possessed the drugs).

The Court faced similar circumstances–with drastically different results–in *United States v. Aiello*, 7 M.J. 99 (C.M.A. 1979) and *United States v. Reagan*, 7 M.J. 490 (C.M.A. 1979). In both cases, the parties entered into stipulations that presented a prima facie case of drug possession, but the military judge did not conduct the *Bertelson* inquiry. Unlike *Long*, the defense did not litigate any elements of the offense–rather it appears the confessional stipulation was offered to preserve suppression motions on appeal. In both cases, the Court of Military Appeals found the stipulations to be confessional, and reversed the findings.

The policy against confessional stipulations was included in subsequent versions of the *Manual for Courts Martial*. *See MCM*, ¶ 54*f* (1969 Revised ed.). In the 1984 revision of the *Manual*, Rule for Courts-Martial (R.C.M.) 811(c) was amended to provide simply that, "[b]efore accepting a stipulation in evidence, the military judge must be

satisfied that the parties consent to its admission." The non-binding Discussion of the rule provides:

> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and the effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are.
>
> A stipulation practically amounts to a confession when it is the equivalent of a guilty plea, that is, when it establishes, directly or by reasonable inference, every element of a charged offense and when the defense does not present evidence to contest any potential remaining issue of the merits. Thus, a stipulation which tends to establish, by reasonable inference, every element of a charged offense does not practically amount to a confession if the defense contests an issue going to guilt which is not foreclosed by the stipulation. For example, a stipulation of fact that contraband drugs were discovered in a vehicle owned by the accused would normally practically amount to a confession if no other evidence were presented on the issue, but would not if the defense presented evidence to show that the accused was unaware of the presence of the drugs. Whenever a stipulation establishes the elements of a charged offense, the military judge should conduct an inquiry as described above.

R.C.M. 811(c), Discussion. *See also United States v. Davis*, 50 M.J. 426, 429 (1999). Finally, the Analysis to R.C.M. 811(c) offers this definition of a confessional stipulation: "[A] stipulation practically amounts to a confession when it amounts to a 'de facto' plea of guilty, rather than simply one which makes out a prima facie case." *MCM*, A.21-50 (2002 ed.).

Even though the *Manual* relegates the policy against confessional stipulations to the non-binding discussion of R.C.M. 811(c), military case law still applies the requirements of *Bertelson* and its progeny. Thus, a stipulation practically amounts to a confession "when it establishes, directly or by reasonable inference, *every element* of a charged offense and when the defense does not present evidence to contest any potential remaining issue on the merits." *United States v. Honeycutt*, 29 M.J. 416, 419 (C.M.A. 1990) (quoting R.C.M. 811(c)) (emphasis added). "A corollary to this proposition is that a stipulation which does not establish directly or by reasonable inference every element

of a charged offense is not a confessional stipulation." *United States v. Dixon*, 45 M.J. 104, 107 (1996). "Moreover, the rule does not apply where an accused presents evidence actively contesting an element of the offense." *Id.*

Analysis

In this case, the stipulation of fact contained extensive detail about the appellant's conduct with regard to the debts, including false statements made to convince friends and acquaintances to lend him money and his repeated failures to make promised payments. The stipulation clearly presented a prima facie case capable of proving the charged offenses. However, the parties did not stipulate that the appellant's conduct was dishonorable so as to foreclose litigation on that essential element. From the outset the defense counsel made it clear that they were litigating that element, and did so strenuously in trial before the military judge. While the defense did not call their own witnesses, trial defense counsel elicited from prosecution witnesses some facts favorable to the defense argument, such as the appellant's repeated acknowledgment of his debts, his efforts to make payments, and his financial straits.

We find there was no confessional stipulation in this case that would trigger the requirement for a *Bertelson* inquiry. The stipulation did not conclusively establish the dishonorableness of the appellant's failure to pay his debts, and thus did not include every element of the charged offenses. *United States v. Kepple*, 30 M.J. 213 (C.M.A. 1990) (summary disposition). Moreover, the defense actively litigated this element, and elicited evidence in an attempt to contest the allegations. *Dixon*, 45 M.J. at 107.

Conclusion

The approved findings 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. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court