UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major WILLIAM D. TALLEY, JR.
United States Air Force

ACM 37810

27 April 2012

Sentence adjudged 27 October 2010 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Terry A. O'Brien (sitting alone).

Approved sentence: Dismissal and forfeiture of $2,000.00 pay per month for 2 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A general court-martial composed of military judge alone convicted the appellant in accordance with his pleas of violating a lawful order, dereliction of duty, conduct unbecoming an officer, adultery, and obstruction of justice, in violation of Articles 92, 133, and 134, UCMJ, 10 U.S.C. §§ 892, 933, 934. The court sentenced him to a dismissal and forfeiture of $2,000.00 pay per month for 2 months. A pretrial agreement prevented approval of any adjudged confinement, and the convening authority approved the sentence adjudged. The appellant assigns three errors concerning (1) the validity of his guilty plea to violating a lawful order; (2) the sufficiency of the two Article 134,

UCMJ, specifications to allege an offense; and (3) the appropriateness of his sentence. Finding no error, we affirm.

Background

The appellant worked as a medical resident in the Family Practice Residency Program at Eglin Air Force Base, Florida. During the course of his duties in providing medical care to active duty members and their dependents, the appellant met Mrs. ST, the spouse of an active duty Air Force officer, Captain ET. During a medical appointment with the appellant, the appellant and Mrs. ST had consensual sexual intercourse in the examination room. A few months later, the appellant and Mrs. ST again had consensual sexual intercourse at the appellant's residence. Following a threatening phone call from the appellant's wife, Mrs. ST informed her husband about the relationship. Captain ET contacted security forces to obtain a no-contact order.

The appellant developed a personal relationship with another patient, Mrs. KS, who was also the spouse of an active duty officer. Over the course of two months, the appellant and Mrs. KS exchanged about 1,700 personal emails and text messages which evolved from discussions of marital frustration to sexual subjects. The appellant sent photographs of his exposed penis to Mrs. KS after she had sent sexually suggestive photographs to him.

Providence of the Plea

During the plea inquiry into the charge of violating the no-contact order by responding to an e-mail sent by Mrs. ST, the military judge asked the appellant and his defense counsel about a possible defense of entrapment based on the stipulated fact that a law enforcement agent had prompted Mrs. ST to send the e-mail to the appellant. Trial defense counsel replied that, after exploring a possible entrapment defense, he informed that appellant that he was not convinced it would be "viable." The appellant affirmed that he and his counsel had discussed the possible defense of entrapment and that he did not feel "any inducement or coercion" to respond to the e-mail. The military judge accepted the appellant's plea to violating the order prohibiting verbal, written, or electronic contact with Mrs. ST by sending "about a half dozen" e-mails to Mrs. ST after the initial contact by her. The appellant now argues that the military judge should have inquired further into the possible defense of entrapment before accepting his plea of guilty. We think not.

"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 (C.A.A.F. 1996). An accused may not plead guilty unless the plea is consistent with the actual facts of his case. *United States v. Moglia*, 3 M.J. 216, 218 (C.M.A. 1977); *see also United States v. Logan*, 47 C.M.R. 1, 2-3 (C.M.A. 1973). An accused may not simply assert his guilt; the military judge must elicit facts as revealed by the accused himself to support the plea of

guilty. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). The rejection of a plea requires more than a mere possibility of a defense; to reject a plea there must be "a 'substantial basis' in law [or] fact for questioning the guilty plea." *United States v. Yanger*, 67 M.J. 56, 57 (C.A.A.F. 2008) (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)).

As in *Yanger*, the military judge recognized the *possibility* of a defense and thoroughly questioned both the appellant and his counsel about it. Focusing on the first prong of the entrapment defense, generally referred to as the inducement element, the military judge asked the appellant if he felt "any inducement or coercion on the part of [Mrs. ST] to respond." The appellant acknowledged that he and his counsel had discussed the possible defense of entrapment, that he did not wish to raise it, and that he did not feel coerced or induced to violate the no-contact order. As appellate Government counsel points out, "'[T]he [mere] tactical possibility of raising a defense' does not of itself warrant rejection of an otherwise provident plea." *United States v. Clark*, 28 M.J. 401, 407 (C.M.A. 1989) (quoting *Logan*, 47 C.M.R. at 3). Such is the case here. We find no abuse of discretion in the military judge's acceptance of the appellant's plea of guilty to violating the no-contact order.

Legal Sufficiency of the Article 134, UCMJ, Offenses

The appellant argues that the two specifications under Charge III alleging violations of Article 134, UCMJ, fail to state an offense because neither alleges the terminal element. Specification 1 alleges adultery and Specification 2 alleges obstruction of justice; neither alleges that the conduct was to the prejudice of good order and discipline or service discrediting. The appellant did not challenge the sufficiency of the specifications at trial and pled guilty to both. The military judge correctly explained all the elements of each offense, to include the terminal elements; the appellant acknowledged understanding the elements of both offenses and explained how his conduct in each specification was to the prejudice of good order and discipline in the armed forces and was of a nature to bring discredit on the armed forces.

Our superior court instructs that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry shows that the appellant understood to what offense and under what legal theory he was pleading guilty. *United States v. Ballan*, No. 11-0413/NA, slip op. at 14, 18-19 (C.A.A.F. 1 March 2012). During the providence inquiry concerning both Article 134, UCMJ, specifications, the appellant admitted that his conduct was prejudicial to good order and discipline or service discrediting. As in *Ballan*, the appellant here suffered no prejudice to a substantial right: he knew under what clause he

was pleading guilty and clearly understood how his conduct violated the terminal elements of Article 134, UCMJ.

Sentence Appropriateness

The appellant argues that his sentence to a dismissal is inappropriately severe.[*] We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was convicted, we find the appellant's sentence entirely appropriate.

Conclusion

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court

[*] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).