UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER J. WHALEN
United States Air Force

ACM 38119

7 October 2013

Sentence adjudged 25 January 2012 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Martin T. Mitchell (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Matthew T. King.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Major Rhea A. Lagano.

Before

STONE, ORR, and HARNEY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant, pursuant to his pleas, of one specification of willfully disobeying a superior commissioned officer; two specifications of disobeying a lawful order; two specifications of being derelict in his duties; one specification of divers use of ecstasy; one specification of divers use of marijuana; one specification of use of Morphine; one specification of use of mushrooms; and one specification of divers distribution of Hydrocodone, in violation of Articles 90, 92, and 112a, UCMJ, 10 U.S.C. §§ 890, 892, 912a. The adjudged and approved sentence was a bad-conduct discharge, confinement for 11 months, forfeiture of all pay and allowances, and reduction to E-1.

On appeal, the appellant argues that (1) Specification 4 of Charge III, which alleges the appellant was derelict in his duty for underage drinking, was improvident or was legally insufficient, in that it failed to state a military duty, and (2) the addendum to the staff judge advocate recommendation misadvised the convening authority with regard to the Return to Duty Program.

Providence of the Plea

The appellant argues, based upon our superior court's decision in *United States v. Hayes*, 71 M.J. 112 (C.A.A.F. 2012), which was published after the appellant's trial, that his dereliction charge for underage drinking failed to state an offense. Specifically, he argues that his plea was improvident because nothing in the record establishes the actual source of the duty to refrain from drinking alcoholic beverages while underage.

In this case, the appellant admitted that he drank alcoholic beverages while under the age of 21 years. During the *Care*[1] inquiry, the military judge explained to the appellant that whether he reasonably should have known of his duties "may be demonstrated by regulations, manuals, customs, academic literature and/or testimony of persons who have held similar or related positions or similar evidence." Although a specific reference or citation to the source of the duty was not identified, the appellant admitted he knew there was a military duty which he violated by drinking alcoholic beverages underage. The appellant stated he was "briefed" on that duty "multiple times" and he understood what that duty was before he consumed the alcohol. Additionally, he confirmed that he had no legal justification or excuse for his actions.

In *Hayes*, the appellant filed a motion to dismiss the specification for underage drinking because "pursuant to the state law, he had no military duty from consuming alcohol in a non-public place while under the age of 21." *Id.* at 113. After the military judge denied the motion, the appellant then pled not guilty, thus requiring the Government to prove all of the elements beyond a reasonable doubt. The Government argued, but presented no evidence showing that the appellant had a military duty to follow New Mexico law. *Id.* at 114. Conversely, the appellant in the instant case pled guilty. As a result, we review this case in a different light than in *Hayes*.

"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) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)). "In reviewing the providence of [the a]ppellant's guilty pleas, we consider his colloquy with the military judge, as well [as] any inferences that may reasonably be drawn from it." *United States v. Carr*, 65 M.J. 39, 41 (C.A.A.F. 2007). A military judge abuses his discretion when accepting a plea if he does not ensure the accused provides an adequate factual basis to support the plea during

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

the providency inquiry. *See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). This is an area for which the military judge is entitled to much deference. *Inabinette*, 66 M.J. at 322.

Our reviewing standard for determining if a guilty plea is provident is whether the record presents a substantial basis in law or fact for questioning it. *Id.*; *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). At trial, the military judge must ensure the accused understands the facts (what he did) that support his guilty plea, the judge must be satisfied that the accused understands the law applicable to his acts (why he is guilty), and that he is actually guilty. *See United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

We have no doubt the standards applicable to guilty pleas have been met in this case. The military judge ensured that appellant understood the law, the duty that was breached, and that the appellant believed his actions constituted a violation. There is no basis to question the providency of the plea. The appellant himself explained the existence of the duty, how he was aware of the duty, and how he violated the duty. Therefore, we are convinced that his guilty plea is provident.

In the event that it is later determined that the appellant's plea was improvident, we analyzed the case to determine whether we can reassess the sentence. *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident "that, absent any error, the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A dramatic change in the penalty landscape reduces our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991).

Negligent dereliction has a maximum punishment of confinement for 3 months and forfeiture of two-thirds pay for 3 months. The appellant was facing a maximum punishment of confinement in excess of 23 years and a dishonorable discharge. The punishment landscape would be minimally changed if the appellant's plea to this specification was dismissed. In light of the remaining specifications and charges and their serious nature, we are confident the court would have adjudged a sentence of at least a bad-conduct discharge, confinement for 11 months, total forfeitures, and reduction to E-1.

Erroneous Staff Judge Advocate's Recommendation

The appellant next avers that the staff judge advocate (SJA) addendum to the staff judge advocate recommendation (SJAR) misadvised the convening authority that entry into the Return to Duty Program (RTDP) required "disapproving the adjudged bad-

conduct discharge." In his post-trial submission made pursuant to Mil. R. Evid. 1105, the appellant requested that the convening authority place him in the RTDP. This program gives enlisted Airmen convicted at a court-martial an opportunity to complete a therapeutic and educational program, and having done so, may be returned to Active Duty.[2] The appellant argues that the SJAR was incorrect because approving entry into the RTDP does not require the convening authority to disapprove the bad-conduct discharge. Substitution of an honorable discharge for an adjudged bad-conduct discharge would occur only after the successful completion of the Airman's enlistment. In response, the Government filed an affidavit from the SJA. In it, the SJA confirmed that he remembered specifically discussing the appellant's request and the addendum with the convening authority because such requests were "rare." The SJA stated: "I explained to [the convening authority] that if [the appellant] was entered into the program, and successfully completed the program, that the Bad Conduct Discharge would not go into effect and he would be able to finish his term of service with an honorable characterization . . . . I left the package with [the convening authority] and sometime thereafter . . . he acted upon it."

This Court reviews post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). An accused will put great hope in getting some sort of sentence relief from the convening authority as he or she is said to be an accused's "best chance." *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998). "When a record leaves a question as to whether post-trial matters were [properly] considered before the convening authority's action, we will examine the record in an effort to resolve that doubt." *United States v. Crawford*, 34 M.J. 758, 761 (A.F.C.M.R. 1992). We will not speculate as to whether a convening authority considered matters before taking action. *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989).

The facts in this case are undisputed and there is no need for additional fact-finding. There is no factual ambiguity concerning the convening authority's consideration of post-trial clemency matters. *See Crawford*, 34 M.J. 758; *United States v. Fagan*, 59 M.J. 238 (C.A.A.F. 2004).

Although the addendum to the SJAR can be read to have erroneously advised the convening authority about the RTDP, the SJA's ultimate recommendation is clear. In the addendum, the SJA stated: "I have reviewed the clemency matters as concerns the sentence and find no reason to change the original recommendation made in this case. I do not recommend the accused be entered in the Return to Duty Program." After reviewing the addendum to the SJAR and the SJA's affidavit, we are convinced the personal meeting between the convening authority and his SJA provided the SJA the opportunity to clear up any misconceptions the convening authority may have had about

[2] See Air Force Instruction (AFI) 31-205, *The Air Force Corrections System*, ¶ 11.6 (7 April 2004).

the RTDP. Therefore, the convening authority correctly understood how the program actually affected a punitive discharge before he took action in this case. Because we are convinced the convening authority properly considered clemency matters there is no need to remand the case for new post-trial processing.[3]

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

---

[3] Although not raised by either party, this Court notes that the Secretary of the Air Force ordered the elimination of the in-residence Return to Duty Program in effect under AFI 31-205, no later than 1 October 2013; no new candidates were to be accepted after 31 May 2013. See 355th Fighter Wing Judge Advocate, *May 2013 Crime and Punishment: Elimination of the Return to Duty Program*, AEROTECH NEWS AND REVIEW (June 20, 2013) http://www.aerotechnews.com/davis-monthanafb/2013/06/20/may-2013-crime-and-punishment/.