

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WREN A. NANCE
United States Air Force

ACM S31445

12 September 2008

Sentence adjudged 07 January 2008 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Charles Wiedie (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Major Patrick E. Neighbors, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Steven R. Kaufman.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Senior Judge:

In accordance with his pleas, the appellant was convicted of one specification of divers wrongful use of ecstasy and one specification of divers wrongful use of Coricidin HBP Cough and Cold medicine (CCC), such conduct being prejudicial to good order and discipline, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The approved sentence consists of a bad-conduct discharge and a reduction to E-1.

On appeal, the Court specified the following issue: whether the appellant's plea of guilty to engaging in conduct prejudicial to good order and discipline was improvident

because of a lack of evidence in the record that said the conduct was directly prejudicial to good order and discipline. Finding no error, we affirm the findings and the sentence.

Background

The appellant and two other active duty airmen used ecstasy on three separate occasions between March and April 2006. The uses occurred at the on-base residence of one of the other airmen.

Between December 2005 and May 2006, the appellant wrongfully used CCC on five separate occasions. The uses took place in the on-base residence of an active duty airman. The appellant used CCC with four other active duty airmen and an active duty soldier. The appellant explained to the military judge through his *Care*¹ inquiry and the stipulation of fact, that on more than one occasion he used an entire box of CCC containing 12 to 16 pills rather than the recommended dose of one pill. Each time, his purpose was to get high, and he ended up in an extremely altered state. He told the judge that his use was prejudicial to good order and discipline. Further he explained his conduct was of a nature to bring discredit upon the armed forces.

Discussion

In determining whether a guilty plea is provident, the test is whether there is a “substantial basis in law and fact for questioning the guilty plea.” *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). “In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit ‘factual circumstances as revealed by the accused himself [that] objectively support that plea[.]’” *Id.*, at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). “[A] military judge must explain the elements of the offense and ensure that a factual basis for each element exists.” *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). We review a military judge’s decision to accept a guilty plea 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)).

Conduct is prejudicial to good order and discipline if it causes a reasonably direct and obvious injury to good order and discipline. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 60.c.(2)(a) (2005 ed.).²

The appellant explained to the military judge that he wrongfully used CCC with several other active duty airmen at an on-base residence. Further, he did it to get high

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

² The 2008 edition has the same requirement but the 2005 edition was controlling at the time of the appellant’s court-martial.

and eventually ended up in an “extremely” altered state. The appellant further acknowledged that his actions would cause injury to the Air Force if he couldn’t work, that he was not entirely in control, and that it caused a bad image. See *United States v. Erickson*, 61 M.J. 230, 232 (C.A.A.F. 2005). Although there were a number of questions by the military judge to which the appellant answered “yes” and “no,” the appellant provided the facts that formed the basis of the questions. He was not merely acknowledging the military judge’s legal conclusions. See *United States v. Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004) (citing *Jordan*, 57 M.J. at 238).

After reviewing the entire record of trial,³ and the post-trial submissions by counsel, we conclude the appellant’s pleas were provident, and the military judge did not abuse his discretion in accepting those pleas.

Conclusion

The approved findings and the 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 sentence, are

AFFIRMED.

JACKSON, Judge (concurring in part, dissenting in part):

While I concur with the majority’s findings on the providency of the appellant’s plea to divers wrongful use of ecstasy, I respectfully dissent from its findings on the providency of the appellant’s plea to divers wrongful use of CCC. The basis for my dissent is that I believe there is a substantial basis in law and fact to question the appellant’s plea of guilty to divers wrongful use of CCC. Accordingly, his plea to this specification should not have been 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); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

It is instructive to review the relevant portions of the appellant’s *Care* inquiry. During his *Care* inquiry, the appellant stated that his conduct was prejudicial to good order and discipline because “it’s not in the best interests and it puts a bad image on the United States Air Force when airmen or other members sit around and, you know, break the law by doing, you know, partaking of Coricidin or any other type of drugs that are illegal; that brings a bad image upon yourself, and, you know, who we work for.”

³ The Court can consider the entire record when determining the providency of the guilt plea. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

Realizing the appellant was addressing how his conduct could be service discrediting and, in an attempt to get the appellant to address how his conduct was prejudicial to good order and discipline, the following colloquy occurred between the military judge and the appellant:

MJ: And I think that goes to one aspect that could be under an Article 134 offense, which is conduct prejudicial to good order, or excuse me . . . service discrediting conduct; but this one wasn't actually charged as service discrediting conduct. Let me ask you, you said that you became very intoxicated because of the use, is that correct?

ACC: Yes, Your Honor.

MJ: Okay, and given your intoxicated state, were you in full control of your physical self?

ACC: Not entirely, Your Honor.

MJ: Okay, so, was there a risk of injury as a result of that, of how intoxicated you were?

ACC: Yes, Your Honor.

MJ: Would you also agree that there is a risk, a very real risk, of causing yourself some permanent damage by using this drug not for its intended purposes?

ACC: Yes, Your Honor.

MJ: Okay, and certainly that would cause, you know, a direct and obvious injury to the Armed Forces if you are unable to perform your job because of the injuries you'd sustained using this?

ACC: Yes, Your Honor.

MJ: And the other thing is, on this issue of discipline, do you agree that, under the circumstances, using with these other airmen, using this medication in a way that it was not supposed to be used, that . . . does undermine discipline that you've got airmen using the medication the way they weren't supposed to?

ACC: Yes, Your Honor.

MJ: And finally, kind of along that area, one of the things that's important in the military, would you agree, is that airmen, and I'm using airmen kind of in the context of all of us, airmen need to follow the rules and uphold certain standards?

ACC: Yes, Your Honor.

MJ: Okay, and you know, there are some things that may be questionable, but in this case, taking, you know, five-to-six . . . four-to-five times the recommended dosage, do you agree that's way beyond what would ordinarily be deemed as acceptable behavior?

ACC: Yes, Your Honor.

MJ: Okay, and so, by engaging in this behavior, do you understand how that would have an impact on good order and discipline in the Armed Forces?

ACC: Yes, Your Honor.

MJ: Does either side feel further inquiry on this specification is required?

No further inquiry was conducted on the specification and the military judge found the appellant guilty of the specification.

An accused may not simply assert his guilt; the military judge must elicit facts to support the plea of guilty. *Jordan*, 57 M.J. at 238 (quoting *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). Stated alternatively, to guard against improvident pleas, the military judge must elicit "factual circumstances *as revealed by the accused himself* [that] objectively support that plea." *Davenport*, 9 M.J. at 367. (emphasis added).

Our superior court has repeatedly advised against and cautioned judges regarding the use of conclusions and leading questions that merely extract from appellants "yes" and "no" responses during the providence inquiry. *Negron*, 60 M.J. 136, 143 (C.A.A.F. 2004) (citing *Jordan*, 57 M.J. at 238; *United States v. Sweet*, 42 M.J. 183, 185 (C.M.A. 1995); *United States v. Lee*, 16 M.J. 278, 282 (C.M.A. 1983)). In the case *sub judice*, rather than eliciting sufficient facts from the appellant to support a finding that the appellant's use of CCC was prejudicial to good order and discipline, the military judge "spoon fed" the appellant the answers he, the military judge, thought sufficient to factually establish the element. The appellant merely parroted "yes" or "no" responses to the leading questions posed by the military judge and in so doing did not provide sufficient facts to support a finding as to this element.

Moreover, assuming *arguendo* the appellant's "yes" and "no" responses qualify as factual circumstances revealed by the appellant, the factual circumstances still do not objectively support his plea to this specification. For an act to be prejudicial to good order and discipline it must have a direct and palpable effect upon good order and discipline. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 60.c.(2)(a) (2005 ed.).⁴ It is simply not enough for the act to *potentially affect* good order and discipline, the act must *actually affect* good order and discipline. See *United States v. Snyder*, 4 C.M.R. 15, 17-18 (C.M.A. 1952) (holding that "prejudice" means a "sense of detriment, depreciation or as injuriously affecting."). Here, there is no evidence in the record that the appellant's use of CCC actually affected good order and discipline.

In short, the appellant did not reveal sufficient factual circumstances to support a finding that his use of CCC actually affected good order and discipline. The military judge abused his discretion in accepting the appellant's plea to this specification. Accordingly, I would set aside the appellant's finding of guilt on this specification and reassess the sentence. For the aforementioned reasons, I respectfully dissent.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court

⁴ The 2008 edition of the Manual for Courts-Martial enunciates the same requirement. I make reference to the 2005 edition because it was the edition that was controlling at the time of the appellant's court-martial.