17 October 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

RICHARD K. PRICE, JR.,
Airman First Class (E-3), USAF
Appellant.

Crim. App. No. S32330
USCA Dkt. No. 16-0611/AF

GRANT BRIEF ON BEHALF OF APPELLANT

JEFFREY A. DAVIS, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34253
Appellant Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
jeffrey.davis.42@us.af.mil

Counsel for Appellant

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil

Counsel for Appellant

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USAF,	)	
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Granted

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY FORCING APPELLANT TO ADMIT TO MISCONDUCT GREATER THAN WAS NECESSARY FOR A PROVIDENT PLEA.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c). This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 2 April 2015, Appellant was tried by a special court-martial before a military judge at Joint Base Charleston, South Carolina. Pursuant to a pre-trial

agreement, he pled and was found guilty of one charge and six specifications in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, for wrongfully using, possessing, and distributing various controlled substances. Appellant was sentenced to a bad conduct discharge, four months confinement, and reduction to E-1. JA 118. The convening authority approved the sentence as adjudged. JA 134-136.

On 26 April 2016, the Air Force Court affirmed the approved findings and sentence. JA 1-6. On 16 September 2016, this Court granted Appellant's petition to review whether the military judge abused his discretion by forcing Appellant to admit to misconduct greater than was charged and necessary for a provident plea.

Statement of Facts

Appellant pled guilty to using cocaine and alprazolam, and distributing cocaine, all on divers occasions. JA 7-9, 12. Appellant also pled guilty to distributing codeine on one occasion. *Id.*

Prior to questioning Appellant on his guilt, the military judge defined the phrase "divers" for Appellant as "on more than one occasion." JA 17. The military provided this same definition twice more during the plea inquiry. JA 25, 43. For Specification 1 of the Charge, the military judge and Appellant had the following exchange:

> MJ: At this time, I want you to tell me why you're guilty of the offense listed in Specification 1 of the Charge. Tell me what happened.

> ACC: Specification 1, use of cocaine, I used cocaine multiple times between 1 June 2014 and 10 December 2014, primarily in June and July 2014. I knew it was cocaine because when I purchased it I was told by the person I purchased it from that it was cocaine. Each time the substance was a white powdery substance, which I recognized as cocaine from television and movies. Furthermore, the substance produced a brief feeling of euphoria, which I know cocaine is supposed to cause. Each time I knew I was using the cocaine because I would snort it through my nose using a rolled up dollar bill. No one forced or coerced me to use cocaine, and I had no lawful reason for using cocaine. I had no medical justification for using cocaine and was not cooperating with law enforcement officers when I used cocaine.

JA 19. The military judge then questioned Appellant as follows:

> MJ: In your description you said that you used cocaine on multiple occasions throughout the charged timeframe. You did say mostly in June and July. Is that correct?
>
> ACC: Yes, sir.
>
> MJ: Now were there other uses outside of those 2 months during the charged timeframe?
>
> ACC: Yes.
>
> MJ: What months did those occur in?
>
> ACC: October and August.
>
> MJ: How many total times do you believe that you used cocaine?
>
> DC: Sir, I don’t believe that he has to answer that question in order to plead guilty for this offense.
>
> MJ: I believe that he does. How many times did you use the cocaine?
>
> ACC: [Conferring with counsel.] Six times, Your Honor.

JA 21.

For Specification 2 of the Charge, the military judge and Appellant had the following exchange:

> MJ: At this time, I'd like you to tell me why you're guilty of Specification 2 of the Charge.
>
> ACC: Specification 2, use of Alprazolam, during this specification I would use Alprazolam, trade name of Xanax. I used Xanax multiple times between 1 June 2014 and 10 December 2014, in Charleston, South Carolina. Xanax is a brand name for a drug that contains Alprazolam, a Schedule IV controlled substance. I knew the substance I used was Xanax because when I purchased it I was told by the person I purchased it from that it was Xanax. Each time the substance was in the form of a pill which was yellow and rectangular.

JA 27. When the military judge again pressed Appellant on exactly how many times he used the drug, defense counsel renewed and further clarified his objection, which the military judge overruled:

> MJ: When did you use it? Was it every month during the charged timeframe? Was there a particular period of time?
>
> DC: Your Honor, I'm sorry, I think we're going to do this a few more times but I just want to put my objection on the record. The government has charged divers use, meaning two or more times. My client has said he used it multiple times, meaning two or more times. By getting into specifics as to how often he used the court is forcing him to give up evidence in aggravation which is the government's responsibility to provide the court. I understand that there's a difference of opinion here. I'm just going to put the objection on the record.
>
> MJ: Understood, but what I asked was when did he use it specifically.

> DC: No, I understand, but part of the question though, sir, was, was it each month and so if he answered, yes, it was each month then I think we would be up to seven at least.
>
> MJ: When did you use the Alprazolam?
>
> ACC: [Conferring with counsel.] It was between June 1st and to the beginning of November.
>
> MJ: And you said it was on more than one occasion. How many times was it?
>
> ACC: [Conferring with counsel.] Your Honor, truthfully, I'm not sure of an exact number but I would go with saying that on a weekly basis it would be between 1 to 3 times a week.
>
> MJ: Even though you're not sure of the number, it was on more than one occasion though?
>
> ACC: Yes, sir.

JA 28-29.

The military judge and Appellant next had the following exchange with regard to Specification 4 of the Charge:

> MJ: At this time, please tell me why you're guilty of Specification 4.
>
> ACC: I distributed cocaine to Senior Airman Ian DeSilva at least two times between the 1st of June 2014 and 10 December 2014, in North Charleston, South Carolina. I knew it was cocaine because when I purchased it I was told by the person I purchased it from that it was cocaine. Each time, the substance was a powdery white substance, which I recognized as cocaine from television and movies.

JA 45. Consistent with his previous inquiries, the military judge then pressed Appellant on the exact number of times he distributed cocaine, over defense's standing objection:

> MJ: How many times did this occur? You're standing, objection is noted.
>
> DC: The same objection as I've placed before, thank you, Your Honor.
>
> ACC: [Conferring with counsel.] At about six times I distributed cocaine to him. Not all times I had used the cocaine. Other times I had gone to get Xanax and he was aware of that and instead of requesting Xanax he would ask for cocaine. I did not try the cocaine at that time, and all of that's between June and July.

JA 47.

Regarding Appellant's distribution of codeine under Specification 6 of the Charge, Appellant admitted to providing the drug (in cough syrup form) to another airman upon the airman's request. JA 58. The military judge then pressed Appellant for additional details:

> MJ: Did you just give it to him or did you sell it to him?
>
> DC: Your Honor, I don't believe that he needs to answer that question in order to plead guilty to this offense.
>
> MJ: Was there a sale or was it that you just gave it to him?
>
> ACC: [Conferring with counsel.] I sold the Codeine to Airman DeSilva.

JA 58-59.

The government referenced much of the information the military judge forced Appellant to admit to during its sentencing argument:

> What is important here is that he made the decision to use drugs but we know that it wasn't just a one-time mistake or it was experimentation. We know that he used drugs, he used cocaine multiple times. In fact, he told us he used cocaine at least six times through August and October 2014, but that wasn't it. He also used another drug. He used Xanax and he told you today, also, that he used that one to three times a week. This is a drug user we're talking about.

JA 103-104.

Summary of the Argument

The military judge abused his discretion by compelling Appellant to admit during his guilty plea to misconduct greater than what was necessary to establish a provident plea to the charged offenses. In so doing, the military judge forced Appellant to admit to evidence in aggravation, which the government exploited in sentencing argument, and the military judge considered in deliberating upon an appropriate sentence in Appellant's cases.

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION BY FORCING APPELLANT TO ADMIT TO MISCONDUCT GREATER THAN WHAT WAS NECESSARY FOR A PROVIDENT PLEA.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Finch*, 73 M.J. 144, 148 (C.A.A.F. 2014). A

military judge abuses his or her discretion if his or her decision is based on an erroneous view of the law. *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012). Questions of law are reviewed *de novo*. *Id.*

Law & Analysis

The military judge has a duty to determine when an accused has established a sufficient basis in law and fact to support a guilty plea. *Finch*, 73 M.J. at 148. Although a military judge is generally provided substantial deference in deciding which facts to elicit in order to establish a factual basis for a guilty plea (*see*, *e.g.*, *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)), it is the government's sole responsibility to present aggravating facts (Rule for Court-Martial (R.C.M.) 1001(b)(4)). Moreover, an accused has a constitutional right to an impartial judge. *See*, *e.g.*, *United States v. Wright*, 52 M.J. 136 (C.A.A.F. 1999).

In this case, Appellant was charged with using and distributing drugs on "divers occasions." "On divers occasions" means that the charged offense occurred on at least two occasions within the charged timeframe. *See* DEPARTMENT OF THE ARMY PAMPHLET 27-9, *Military Judge's Benchbook* (*Benchbook*), 7-25. During Appellant's guilty plea to Specification 1 of the Charge, the military judge defined the term "divers" using a definition consistent with the *Benchbook.* JA 17. Accordingly, Appellant admitted to using cocaine

"multiple times" during the respective charged time frame. JA 19. The military judge nevertheless proceeded to question Appellant regarding his specific number of uses. JA 21. Defense counsel appropriately objected, noting the requested information was not required for Appellant "to plead guilty for [the] offense." *Id.* Without providing an explanation for the record, the military judge disagreed with defense counsel and resumed his line of questioning. *Id.*

Over defense counsel objections, the military judge compelled Appellant to provide similar information regarding Specifications 2 and 4 of the Charge. Again, the military judge never explained the purpose of his questions, even after defense counsel objected that the questions would elicit "evidence in aggravation which was the government's responsibility to provide the court." JA 28. Likewise, the military judge never explained his purpose in forcing Appellant to admit he sold codeine rather than merely giving it away (JA 58-59); an aggravating fact the military judge previously noted was not required to prove distribution (JA 36, 44; *cf. Benchbook*, 3-37-3(d)).

The military judge abused his discretion by applying an erroneous legal standard during the plea inquiry that adversely affected Appellant. The military judge erred by forcing Appellant to specify the exact number of times he used and distributed drugs, and by forcing Appellant to admit he sold codeine, all of which was evidence in aggravation and not required for a provident plea. Appellant's use

of the word “multiple” was clearly sufficient in both law and fact to support Appellant’s guilty pleas to using and distributing drugs “on divers occasions.”

The Merriam-Webster Online Dictionary defines “multiple” as “more than one.” Merriam-Webster Online Dictionary, http://www.merriam-webster.com (last visited 12 Oct. 2016). The Manual for Courts-Martial similarly references “multiple” as being “more than one” (R.C.M. 307(c)(5)) or “two or more” (*see*, *e.g.*, Article 79(b)(2), UCMJ (discussing multiple lesser included offenses)), as does the *Benchbook* (*See*, *e.g.*, 2-7-3 (discussing waiver of conflict-free counsel when defense represents multiple accused); 3-9-1(d), note 6 (discussing multiple unauthorized absences under single specification); 3-9-3(d), note 6 (discussing multiple unauthorized absences); 3-10-2(d), note 5 (discussing multiple unauthorized absences)). The discussion section of R.C.M. 910(e), relating to the accuracy of a guilty plea, is also instructive:

> The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless, the accused must be convinced of, and be able to describe all the facts necessary to establish guilt.

R.C.M. 910(e), *Discussion.* Consequently, Appellant’s use of the word “multiple” to describe his drug use and distribution should have been both legally and factually sufficient for the military judge to accept his guilty plea.

By forcing Appellant to admit to the exact number of drug uses and distributions, and admit to selling codeine, the military judge also stepped outside

his duty to be an impartial factfinder. The government is solely responsible for presenting evidence in aggravation; it should not be aided by a military judge compelling such evidence from the accused. *See* R.C.M. 1001(b)(4). This is not to say that there will never be cases in which an accused will have to admit certain aggravating facts to provide a provident plea. However, where aggravating facts are not necessary to satisfy an element of proof, or to otherwise establish a factual or legal basis for a guilty plea, a military judge should not depart from his or her role as an impartial fact-finder and compel an accused to provide evidence in aggravation which the government is otherwise burdened to present.

A reasonable observer of this case, having witnessed Appellant confess to using or distributing drugs "multiple times," would surely view the military judge's specificity requirements as an attempt to elicit evidence in aggravation. This is especially true given that the military judge never explained the purpose of his additional questions. A reasonable observer would have a similar interpretation of the military judge's question regarding whether Appellant sold codeine. Indeed, the military judge's phrasing of this question – which he repeated following defense counsel's objection – demonstrates his belief that selling a drug is more aggravating than "just" giving it away. JA 59-60. Having then witnessed the military judge elicit evidence in aggravation on multiple occasions (i.e., more than one), a reasonable observer could form but one conclusion: the military judge is

not impartial.

Finally, the military judge's questions violated Appellant's Fifth Amendment (U.S. CONST. amend. V) right to not be "compelled in any criminal case to be a witness against himself." Although Appellant waived his right against self-incrimination in certain respects, this waiver did not extend to providing aggravating evidence without his consent.

In *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983), this Court held that without the accused's consent, he could not be questioned during sentencing proceedings regarding a prior nonjudicial punishment. Specifically, the Court focused on the military judge's questioning of the accused to determine whether a record of nonjudicial punishment – offered by the government against the accused during the sentencing phase – contained defects which would preclude its reception into evidence. *Id.* The Court held that under the circumstances, such questioning did not serve a "neutral purpose" and noted that the Manual for Courts-Martial did not "contemplate that an accused, after he has been convicted, may be forced to provide damaging information relevant to his sentencing." *Id.* at 117. The Court rested its opinion on the Supreme Court's holding in *Estelle v. Smith*, 451 U.S. 454 (1981), which emphasized "[t]he essence of the privilege against self-incrimination is the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its

officers, not by the simple, cruel expedient of forcing it through his own lips." *Id.* at 116 (quoting *Smith*, 451 U.S. at 462)(emphasis in original)(internal citations omitted).

This Court later extended its *Sauer* holding to a case involving an accused who pled guilty. *United States v. Cowles*, 16 M.J. 467 (C.M.A. 1983). Addressing a similar fact scenario, the Court held:

> That appellant elected, by his own guilty plea, to relieve the Government of the burden of proving his *guilt* does not cause a conclusion that he also thereby elected to relieve the Government of its usual burden of producing, 'by the independent labor of its officers,' its presentencing evidence affecting his *punishment*. In view of the bifurcated procedure of a court-martial separating the findings and sentencing portions of the trial, we conclude that appellant, by his plea, waived his right against self-incrimination only as to the findings and that his constitutional and statutory rights against self-incrimination remained extant in the presentencing phase of his trial.

Id. at 468 (quoting *Smith*, 451 U.S. at 462)(footnotes omitted)(emphasis in the original).

While the military judge in the present case did not force Appellant to answer questions during the sentencing phase, his questions certainly did not serve a neutral purpose; they were not required to establish a factual or legal basis for Appellant's guilty plea, and elicited only aggravating information. Regardless of the timing, the military judge's questions were akin to those addressed in *Sauer* and *Cowles*: he forced Appellant to provide evidence in aggravation that could be,

and later was, used in sentencing even though it was not otherwise required for a provident plea.

The government was free to attempt to establish, as evidence in aggravation, that Appellant committed drug offenses beyond those he wished to admit during the providence inquiry. The government similarly had the opportunity to establish, as evidence in aggravation, the fact that Appellant sold codeine. Had it chosen to do so, the government should have relied on the independent labor of its officers to present such aggravating facts. Instead, the military judge usurped the government's role and elicited this evidence in aggravation through the cruel expedient of forcing it through Appellant's own lips.

Conclusion

The military judge abused his discretion by forcing Appellant to admit to misconduct greater than was charged and greater than was necessary for a provident plea. The military judge's actions resulted in Appellant being forced to admit to evidence in aggravation, which the government used in their sentencing argument to justify their sentence recommendation. Further, given the military judge's repeated insistence that Appellant admit to this greater misconduct, it follows logically that the military judge took this information into consideration when crafting an appropriate sentence for Appellant's misconduct. Accordingly, Appellant should be granted a new sentence hearing.

Respectfully Submitted,

JEFFREY A. DAVIS, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34253
Appellant Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
jeffrey.davis.42@us.af.mil

Counsel for Appellant

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on 17 October 2016.

MARK C. BRUEGGER, Maj, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Legal Operations Agency
Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.c.bruegger.mil@mail.mil