IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

C.L. CARVER | **D.O. VOLLENWEIDER** | **E.E. GEISER**

UNITED STATES

v.

Joshua H. ANSELM
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200301904 Decided 24 January 2006

Sentence adjudged 20 February 2003. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group TEN, Kings Bay, GA.

Maj GREGORY L. CHANEY, USMC, Appellate Defense Counsel
CAPT BRIAN K. KELLER, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

Pursuant to mixed pleas, the appellant was convicted by a general court-martial, composed of officer and enlisted members, of wrongful distribution of cocaine on divers occasions and wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 15 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

After carefully considering the record of trial, the appellant's assignment of error regarding a variance in the specification, and the Government's response, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Variance in the Specification

The appellant contends that the military judge committed plain error by failing to modify the alleged dates in the

specification alleging distribution of cocaine prior to submitting the case to the court members, thus resulting in a fatal variance between the proof and the specification. As a remedy, the appellant requests that we reassess the sentence and disapprove the punitive discharge. We decline to grant relief.

Contrary to his pleas, the appellant was convicted of Specification 1 of the Charge, alleging that he "did, at or near, Kings Bay, Georgia, on divers occasions from on or about April 2002 until on or about 15 September 2002, wrongfully distribute multiple grams of cocaine." The four Government witnesses testified that the appellant sold them cocaine on various occasions from sometime in August 2002 until late September 2002. At trial, the appellant did not request that the military judge alter the dates in the specification to adhere to the evidence nor did he request an instruction on exceptions and substitutions. The military judge advised the members of the elements of the offense, including the alleged dates. The appellant did not object to the instructions given. The civilian counsel argued that the Government witnesses were not credible and should not be believed, but he did not argue that the dates in the specification were faulty. Our superior court has provided a test to determine when a variance is fatal:

> A variance between pleadings and proof exists when evidence at trial establishes the commission of a criminal offense by the accused, but the proof does not conform strictly with the offense alleged in the charge. *See United States v. Lee*, 1 M.J. 15, 16 (C.M.A. 1975). "To prevail on a fatal-variance claim, appellant must show that the variance was material and that it substantially prejudiced him." *United States v. Hunt*, 37 M.J. 344, 347 (C.M.A. 1993).
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> Even assuming there was a variance in this case, it was neither material nor prejudicial. The Government charged the rapes as occurring "on or about" each of the six specified weekends. When a charge employs "on or about" language, the Government is not required to prove the specific date alleged in the charge.
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> . . . .
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> Appellant was not prejudiced by the manner in which the offenses were charged. In order to show prejudice, appellant must show both that he was misled by the language of Charge II, such that he was unable adequately to prepare for trial, and that the variance puts him at risk of another prosecution for the same offense. *See Lee*, 1 M.J. at 16.

United States v. Allen, 50 M.J. 84, 86 (C.A.A.F. 1999). We fail to see how the variance in this case was either material or

substantially prejudicial. In particular, we find that the specification did not mislead the appellant, that he was able to prepare adequately for trial, and that the specification protects the appellant against double jeopardy.

The appellant argues that he was prejudiced because of a comment by the trial counsel during rebuttal argument in which she opined that the appellant "sold cocaine to Mason, Hoy, Lauffer, and Gibson, and who knows who else." Record at 738. The military judge gave a limiting instruction to the court members. The appellant asserts that, "it appears that the members disregarded the limiting instruction because they found Appellant guilty of distribution during April and May 2002 despite the fact that no evidence of distribution during these months was presented. The only possible distribution was [sic] during April and May 2002 was to 'who knows who else.'" Appellant Brief and Assignment of Error of 30 Sep 2005 at 4-5. We find no linkage between the trial counsel's improper comment and the findings in this court. Thus, we find no merit to the assignment of error.

Conclusion

Accordingly, the findings of guilty and the sentence, as approved by the convening authority, are affirmed.

Judge VOLLENWEIDER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court