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

BEFORE

W.L. RITTER **C.L. SCOVEL** **K.K. THOMPSON**

UNITED STATES

v.

Jeremy B. KLIMEK
Mess Management Specialist Third Class (E-4), U. S. Navy

NMCCA 200200975 Decided 18 May 2006

Sentence adjudged 19 January 2001. Military Judge: K.E. Grunawalt. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Submarine Squadron Support Unit New London, Naval Submarine Base New London, Groton, CT.

Col KATHERINE GUNTHER, USMCR, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

SCOVEL, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of two specifications of violating a lawful general regulation by distributing and possessing drug paraphernalia, two specifications of distributing marijuana, use of marijuana, and two specifications of false swearing, in violation of Articles 92, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, and 934. The military judge sentenced the appellant to confinement for 105 days, reduction to pay grade E-1, forfeiture of $608.00 pay per month for four months, and a bad-conduct discharge. The convening authority approved only so much of the sentence as provided for confinement for 71 days, reduction to pay grade E-1, forfeiture of $608.00 pay per month for four months, and a bad-conduct discharge.

We have considered the record of trial, the appellant's two assignments of error[1] and two summary assignments of error,[2] and the Government's answer. We have also considered the appellant's brief and the Government's answer submitted in response to three issues[3] specified by the court to aid us in resolving the appellant's second assignment of error. After taking corrective action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Failure to State an Offense

The appellant asserts that the two specifications under Charge II, alleging violation of a general regulation prohibiting the possession and distribution of drug abuse paraphernalia, fail to state an offense because the substance identified as paraphernalia--vitamin B12, also referred to in the record of trial as niacin--cannot properly be so classified. We disagree.

The Secretary of the Navy prohibits the use, possession, or distribution of drug abuse paraphernalia, except for authorized medicinal purposes, by persons in the Department of the Navy.

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[1] I. THE SPECIFICATIONS UNDER CHARGE II DO NOT CONSTITUTE OFFENSES IN THAT VITAMIN B12 CANNOT BE CLASSIFIED AS DRUG ABUSE PARAPHERNALIA.

II. APPELLANT WAS DENIED DUE PROCESS AND EQUAL PROTECTION AS EVIDENCED BY THE PRETRIAL POSTURING IN HIS CASE, WHEREIN HE WAS NOT AFFORDED THE PROTECTIONS OF NAVY POLICY FOR SELF-REFERRAL FOR DRUG DEPENDENCE.

[2] I. THE COURT MAY HAVE LACKED JURISDICTION TO TRY APPELLANT FOR THE OFFENSE ALLEGED UNDER ADDITIONAL CHARGE II, IN VIOLATION OF ARTICLE 134, UCMJ, AND CONSEQUENTLY HIS PLEA WAS IMPROVIDENT.

II. NEITHER THE CONVENING AUTHORITY'S ACTION NOR THE STAFF JUDGE ADVOCATE'S RECOMMENDATION PUBLISHES THE RESULTS OF TRIAL IN TWO RELATED CASES, THOSE OF SONAR TECHNICIAN FIREMAN APPRENTICE (STFA) GREGORY M. LAWRENCE AND OF MESS MANAGEMENT SPECIALIST SEAMAN APPRENTICE (MSSA) MARK R. WATSON.

[3] I. DID THE CONSULTATION REQUEST FROM SQUADRON MEDICAL TO THE MENTAL HEALTH CLINIC AND THE SUBSEQUENT PSYCHOLOGICAL EVALUATION OF THE APPELLANT SATISFY THE REQUIREMENT OF SECNAVINST 5300.28C, ENCL. 2, ¶ 6A, THAT SAILORS AND MARINES WHO REFER THEMSELVES FOR DRUG ABUSE "SHALL BE SCREENED FOR DRUG DEPENDENCY" OR OF OTHER REGULATIONS (E.G., BUMED, "DAPA") THAT MAY APPLY IN SUCH CASES?

II. DID THE PSYCHOLOGICAL EVALUATION REPORT SUBMITTED BY LT MINARIK SATISFY THE REQUIREMENT OF SECNAVINST 5300.28C, ENCL. 2, ¶ 6A FOR AN "OFFICAL DETERMINATION" OF DRUG DEPENDENCY, OR WAS IT REQUIRED TO INCLUDE A SPECIFIC FINDING OR OPINION ON WHETHER THE APPELLANT WAS DRUG DEPENDENT?

III. DOES THE EXEMPTION FROM DISCIPLINARY ACTION ORDERED BY SECNAVINST 5300.28C FOR SAILORS AND MARINES DEPTERMINED TO BE DRUG DEPENDENT APPLY TO OFFENSES ALLEGEDLY COMMITTED BEFORE AND/OR AFTER A PARTICULAR DATE, AND WHAT IS THAT DATE IN THE CONTEXT OF THIS CASE?

Secretary of the Navy Instruction 5300.28C at ¶ 5b (24 Mar 1999). Drug abuse paraphernalia is defined as:

> All equipment, products, and materials of any kind that are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, *concealing*, injecting, ingesting, inhaling or otherwise introducing into the human body controlled substance in violation of [21 U.S.C. § 801 *et seq*.].

Id. at encl. (3), ¶ 1i (emphasis added).

The regulation attempts to guard against the possibility that innocently possessed items might be classified as drug abuse paraphernalia by making criminal intent a "key element" of the definition. *Id*. at encl. 3, ¶ 1i(3). It then lists evidentiary factors to consider in determining criminal intent:

> (a) Statements by the person in possession or by anyone in control of the object concerning its use;
> (b) The proximity of the object, in time and space, to the unlawful use, possession, or distribution of drugs;
> (c) The proximity of the object to controlled substances;
> (d) The existence of any residue of controlled substances on the object;
> (e) Instructions, oral or written, provided with the object concerning its use;
> (f) Descriptive materials accompanying the object which explain or depict its use;
> (g) The existence and scope of legitimate uses for the object in the community; and
> (h) Expert testimony concerning its use.

Id.

The military judge conducted a thorough inquiry into the providence of the appellant's guilty pleas to the specifications alleging distribution and possession of drug abuse paraphernalia. *See* Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). The appellant's answers to the military judge's questions read like a checklist of the criminal intent factors identified in the regulation: the appellant

acknowledged that he considered the vitamin B12 (niacin) pills to be drug abuse paraphernalia; he believed that they would "clean" a marijuana user's system so that marijuana use could not be detected by urinalysis; he explained the use of the pills to the Sailor to whom he distributed marijuana and, on one occasion, handed him niacin pills at the same time he distributed marijuana to him; he admitted that while niacin had legitimate medical uses, he possessed the pills not for medical reasons but to "flush" the physical effects of marijuana use from his body and thereby avoid detection by urinalysis. Record at 185-92, 217-19.

The appellant now asserts that the only rationale for classifying niacin pills as drug abuse paraphernalia is as a substance for concealing a controlled substance, and points out that the niacin's purpose was not to conceal marijuana itself but to "hurry along" the elimination from his body of the effects of that drug's use. Appellant's Brief of 14 May 2004 at 6-7. We need not strain to classify as drug paraphernalia a substance intended by this appellant to remove more quickly from the human body the active ingredient of marijuana, tetrahydracannabinol (THC), thereby making its detection by the Navy less likely. That niacin may act so as to reduce the window of time when urinalysis may be effective in detecting THC does not make it any less a substance that can conceal marijuana use from the Navy's detection efforts—and therefore punishable under this regulation. We find that Specifications 1 and 2 under Charge II state an offense, and we further find that the providence inquiry established a factual basis for the appellant's pleas of guilty to these specifications. *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980).

Navy Policy on Self-Referral for Drug Dependence

The appellant asserts that the Government failed to accord him the protections due a service member who refers himself or herself for drug abuse treatment; *i.e.*, medical treatment, exemption from disciplinary action, and processing for administrative separation. We conclude that the appellant did not qualify for exemption from disciplinary action.

The Secretary of the Navy's regulation addressing substance abuse prevention and control provides that Sailors and Marines who refer themselves for drug abuse shall be screened for drug dependency and, if determined to be drug dependent, shall be

exempt from disciplinary action, processed for administrative separation, and offered medical treatment. SECNAVINST 5300.28C at encl. 2, ¶ 6a. Self-referred service members who are screened as "not drug dependent" are not eligible for exemption from disciplinary action. *Id*. at encl. 2, ¶ 6b.

The Navy's instruction implementing SECNAVINST 5300.28C specifies that self-referral for drug abuse must be made to a "qualified self-referral representative." OPNAV Instruction 5350.4C at encl. 2, ¶ 10 (29 Jun 1999). Such representatives are defined as the Drug and Alcohol Program Advisor (DAPA); commanding officer, officer in charge, executive officer, or command master chief; Navy drug and alcohol counselor; DoD medical personnel; chaplain; or Family Service Center counselor. *Id*. at encl. 1, ¶ 2b.

In this case, the appellant confided to his division officer that he smoked marijuana to relax and cope with his personal problems and the difficulties of shipboard life. Defense Exhibit B. Soon thereafter, he was referred to a psychologist who concluded that he was "unsuitable for continued military service." The psychologist did not make an explicit determination concerning the appellant's drug dependency, but diagnosed "Axis I: Cannabis Abuse" and stated, "He does not require a medical disposition . . . and there are no psychological issues to preclude any disciplinary or legal action." DE D at 1. "Cannabis abuse" and "cannabis dependence" are both diagnoses recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV). A diagnosis of cannabis abuse "necessarily means that a diagnosis of 'Cannabis Dependence' was not appropriate." Affidavit of Captain M. T. Sammons, MSC, USN of 13 Feb 2006.

Given these facts, we conclude that the appellant's prosecution did not violate Navy policy. First, we find that he failed to meet a prerequisite established by the regulation for exemption from disciplinary action. By reporting his marijuana use to his division officer, the appellant did not make a valid self-referral to a qualified self-referral representative. Second, assuming *arguendo* that his self-referral for drug abuse was not defective, the appellant was screened by a psychologist and determined to be a drug abuser, not drug dependent. Finally, assuming *arguendo* a valid self-referral, any exemption from disciplinary action would apply only to those offenses committed before 8 May 2000, the date he reported his drug abuse. *See* SECNAVINST 5300.28C at encl. 2, ¶ 8. The appellant committed the drug-related offenses of which he was convicted

after that date, except for those "divers occasions" between November 1997 and 8 May 2000 when he used marijuana, as charged in Specification 3 under Charge III.

Jurisdiction

In a summary assignment of error, the appellant claims that the court-martial may have lacked jurisdiction to try him for the false swearing offense alleged in the specification under Additional Charge II because it is not clear from the record of trial that he made a false statement under affirmation after his official enlistment in the Navy was complete. We agree.

When a person with the requisite capacity voluntarily takes the oath of enlistment, a change of status from civilian to service member occurs and a court-martial thereafter has personal jurisdiction over that person until that status is changed. Art. 2(b), UCMJ; *see* RULE FOR COURTS-MARTIAL 202(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion.

In this case, in response to the military judge's questions during the providence inquiry, the appellant described a ceremony in which he and other enlistees faced the flag and took an oath that appears to have been the oath of enlistment. He also described a "Moment of Truth" in which he made a false statement under affirmation about prior doctor visits and illegal drug use. Record at 213-17.

We cannot determine from the record of trial whether the Moment of Truth and the appellant's false statement preceded or followed his oath of enlistment. If the former, the appellant's status had not yet changed from civilian to service member and jurisdiction was lacking to try him for this preservice offense. While the Government might have properly charged the appellant with the offense of fraudulent enlistment under Article 83, UCMJ, it chose not to do so. *See United States v. King*, 28 C.M.R. 243 (C.M.A. 1959). We will take corrective action in our decretal paragraph.

Error in Convening Authority's Action

In his final summary assignment of error, the appellant alleges that the convening authority erred by failing to note two related cases in his action. We disagree.

The requirement to note companion cases is contained in the Manual of the Judge Advocate General, Judge Advocate General

Instruction 5800.7C § 0151a(2)(CH-3, 27 Jul 1998). The purpose of this requirement is to ensure that the convening authority makes an informed decision when taking action on courts-martial in companion cases convened by the same convening authority. *United States v. Ortiz*, 52 M.J. 739, 741 (N.M.Ct.Crim.App. 2000).

We note that the record of trial in this case identifies two other Sailors as part of the same Naval Criminal Investigative Service investigation that focused on the appellant. Record at 107-08; Appellate Exhibit II. This court does not know if they became companion cases, *i.e.*, whether they were charged and subjected to disciplinary action. Moreover, if they were tried by court-martial, this court does not know which convening authority referred their charges to trial. If a different convening authority referred them to trial, then the companion-case requirement would not apply. Finally, assuming, *arguendo*, that the companion-case requirement applied in this case, we note that the appellant asserts no prejudice in the form of disparity in the convening authority's actions on the findings and sentences between these cases. In view of the relative lightness of the adjudged sentence and the convening authority's action in approving only 71 days of confinement when the pretrial agreement required only suspension of confinement in excess of 71 days, any error in failing to list such companion cases would be harmless.

Conclusion

The findings of guilty of Additional Charge II and its specification are set aside and that charge and specification are dismissed. The remaining findings of guilty are affirmed. We have reassessed the sentence on the basis of the error noted and the entire record in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). In view of the remaining charges and specifications, we are confident that the approved sentence would not have been lower even without the

false-swearing offense. Accordingly, we affirm the sentence as approved by the convening authority.

Senior Judge RITTER and Judge THOMPSON concur.

For the Court

R.H. TROIDL
Clerk of Court