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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.J. MULROONEY**

UNITED STATES

v.

Keith C. VINCI
Private (E-1), U.S. Marine Corps

NMCCA 200000411 Decided 16 May 2005

Sentence adjudged 25 February 1999. Military Judge: R.W. Redcliff. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USN, Appellate Government Counsel

MULROONEY Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of 9 specifications of conspiracy to wrongfully use, possess, or distribute various controlled substances; and 12 specifications of wrongful use, possession, distribution, or introduction with intent to distribute of various controlled substances, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a.

The appellant was sentenced to confinement for 8 years, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the sentence and, except for the dishonorable discharge, ordered the punishment executed. A pretrial agreement had no effect on the sentence.

The appellant claims that (1) his pleas of guilty to two specifications of conspiracy are improvident, (2) several specifications are multiplicious with other specifications, (3) several specifications constitute an unreasonable multiplication

of charges, (4) he was previously punished at a prior special court-martial for one specification of wrongful use of cocaine, (5) improper testimonial evidence was admitted in aggravation and adversely impacted his sentence, and (6) the trial counsel committed prosecutorial misconduct.

We have examined and considered the record of trial, the appellant's assignments of error, the Government's response, and the appellant's reply. We conclude that, after taking corrective action, 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.

Background

From March of 1997 through early June of 1998 the appellant helped four other enlisted Marines, Lance Corporal (LCpl) Jason Harper, LCpl David Dudley, Private First Class (PFC), Anthony Quiroz, and Private (Pvt) Robert Hallbert, obtain and use lysergic acid diethylamide (LSD), marijuana, and cocaine. The appellant would either bring the drugs himself, or take a co-conspirator to someone who would provide them the drugs on request. On some occasions within that time period the appellant brought the drugs onto Marine Corps Base (MCB) Kanehoe Bay, and on some occasions within that time period, the appellant used cocaine himself.

Providence of the Pleas

The appellant avers that his pleas of guilty to two conspiracy specifications under Additional Charge V, Specification 2 and Additional Charge I, Specification 2 were improvident.

Before accepting a plea of guilty, a military judge is required to make sufficient inquiry of the accused to establish that there is a factual basis for the plea. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *see also United States v. Higgins*, 40 M.J. 67 (C.M.A. 1994) (holding providence inquiry must not only establish that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support plea). An explanation of the elements of the offenses by the military judge to the accused must precede the plea. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). The inquiry must be a meaningful one, and mere conclusions of law recited by the accused, standing alone, are insufficient. *United States v. Jordan*, 57 M.J. 236, 239 (C.A.A.F. 2002)(citing *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996)). "[T]he accused must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Discussion. To impart the

seriousness of the *Care* inquiry, an accused is questioned under oath about the offenses to which he has pled guilty. R.C.M. 910(e).

Likewise, although a military judge "may not arbitrarily reject a guilty plea," *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987), when the accused reasonably raises a defense, the military judge must resolve the issue. *United States v. Timmons*, 45 C.M.R. 249, 253 (C.M.A. 1972). However, a guilty plea will not be overturned on the mere possibility of a defense. *United States v. Olinger*, 50 M.J. 365, 367 (C.A.A.F. 1999). Nor will we will speculate as to the existence of facts that might invalidate the plea. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). The factual issue of guilt is ordinarily waived by a voluntary plea of guilty. The only exception to the general rule of waiver is if an error is materially prejudicial to a substantial right of the appellant. Art. 59(a), UCMJ; R.C.M. 910(j).

The first element of the offense of conspiracy under Article 81, UCMJ, requires that an accused enter into an agreement with one or more persons to commit an offense under the Code. The second element is that while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 5(b).

In his first assignment of error, the appellant correctly asserts that the providence inquiry regarding Specification 2 of Additional Charge V was improvident to the extent the specification alleges conspiracy with PFC Quiroz to distribute marijuana. It is clear that the appellant admitted factually to conspire with Quiroz to distribute marijuana. The appellant brought Quiroz to someone who could provide him with marijuana and Quiroz got marijuana from that person. However, when the military judge asked the appellant whether he conspired to distribute marijuana with PFC Quiroz, the appellant responded: "I wouldn't say distribute, but wrongful possess and use, sir." Record at 200. The accused must not only admit the facts necessary to support the elements of the offense, but he must believe he is guilty. *Higgins*, 40 M.J. at 68. At a minimum, additional inquiry of the appellant was required to express that belief and to sustain that portion of the Specification 2 that relates to distribution of marijuana. Since that inquiry did not occur, the distribution aspect of the specification is unsupported, and will be dismissed. The relief granted in this respect will be addressed in the decretal paragraph.

The appellant also challenges the providence of his plea regarding Specification 2 of Additional Charge I. This specification alleges a conspiracy with Dudley, on or about 30 May 1998, to wrongfully possess LSD. The providence inquiry establishes that on 30 May 1998 the appellant received a telephone call from Harper and Dudley asking him to bring LSD to Dudley's barracks room. When the appellant arrived with the LSD, he had more than enough for those present and Dudley asked him to leave the remainder for some other Marine. Appellant urges us to hold that since at the time the phone call was placed the co-conspirators did not know there would be extra LSD that would be left over, the agreement element cannot be sustained on the providence inquiry.

While we do not find the appellant's challenge to the providence of his plea to Specification 2 of Additional Charge I persuasive, the issue has been rendered moot by our resolution of his challenge to that specification based on unreasonable multiplication of charges.

Unreasonable Multiplication of the Charges

The appellant seeks dismissal of numerous conspiracy specifications based upon his assertion that they reflect an unreasonable multiplication of charges. We agree, in part, and will grant relief accordingly.

The appellant specifically challenges four areas of the Government's charging scheme.

Additional Charge V: The appellant argues that a specification charging conspiracy with Quiroz to use, possess or distribute LSD (Additional Charge V, Specification 1,) should not have formed the basis of a separate specification and conviction where there was also a specification alleging a conspiracy to do the same with marijuana during the same time period and same location (Additional Charge V Specification 2.)

Additional Charge III: The appellant argues that a specification alleging a conspiracy with Harper to use or possess LSD on divers occasions during February, March, and April 1998 (Additional Charge III, Specification 2), should not have formed the basis of a separate specification and conviction where he was also convicted of a specification alleging a conspiracy with Harper to possess marijuana during April 1998 (Additional Charge III, Specification 3.) The appellant further asserts that in light of these specifications, it is likewise improper that he was also convicted of a specification alleging a conspiracy with Hallbert to use or possess LSD on divers occasions in March and April 1998 (Additional Charge III, Specification 4) where Hallbert merely joined an already existing conspiracy between the appellant and Harper, and the marijuana that was the subject of this conspiracy was transferred at the same time as the LSD.

Additional Charges IV and VI: The appellant argues that a specification alleging distribution of LSD on divers occasions in February, March, and April 1998 (Additional Charge IV, Specification 5), should not have formed the basis of a separate specification and conviction, where he was also convicted of a specification alleging LSD distribution on divers occasions on or between 1 March 1997 and 5 June 1998 (Additional Charge VI, Specification 5.) The location and the distributed contraband are the same, and the time period alleged in the former specification is completely within the time period alleged in the latter.

Additional Charge I: The appellant argues that three specifications alleging conspiracy to use (Additional Charge I, Specification 1), possess (Additional Charge I, Specification 2), and distribute (Additional Charge I, Specification 3) LSD on the same date and location should not have formed the basis of separate specifications and convictions. During the providence inquiry the appellant told the military judge that he delivered the LSD that is the subject of all three specifications as a result of a phone call he received from Dudley and Harper. When he brought the LSD to Dudley's barracks room on MCB Hawaii, Dudley was joined by Harper. When Harper realized that there was an unused LSD hit he asked the appellant to leave it for another Marine.

In determining whether there is an unreasonable multiplication of charges, this court considers five factors: (1) Did the accused object at trial; (2) Are the charges aimed at distinctly separate criminal acts; (3) Do the charges misrepresent or exaggerate the appellant's criminality; (4) Do the charges unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

Regarding the first *Quiroz* factor, trial defense counsel objected effectively and repeatedly, both orally and in writing, at the appellant's court-martial. The trial defense team made repeated, coherent arguments opposing the manner in which the appellant was charged. A considerable amount of pretrial motion litigation was devoted to ultimately unsuccessful attempts to procure bills of particular regarding the specifications that the appellant now challenges. Notwithstanding the appellant's guilty plea, consideration of this factor favorably reflects on the appellant's position on appeal.

The second *Quiroz* factor, whether the challenged specifications are aimed at distinctly separate criminal acts, is something of a mixed bag. Regarding the LSD and marijuana conspiracy specifications that are addressed in Additional Charge V, a close reading of the appellant's responses during the

providency inquiry does not compel the conclusion that the substances were distributed at the same time. On the other hand, it is clear that that the appellant was acting on behalf of the drug-supplying arrangement he had with Quiroz and the others.

An application of the second *Quiroz* factor to Additional Charge III also presents an ambivalent picture. The conspiracy objective in Specification 2 is to use, possess or distribute LSD in February, March, and April 1998. The objective in Specification 3 is to possess marijuana in April 1998 on a single occasion. Both specifications identify Harper as the sole co-conspirator. A conspiracy to use or possess LSD with Hallbert on divers occasions is set forth in Specification 4. During the providency inquiry, the appellant told the military judge that on one or two of the occasions where he brought Harper to his drug supplier for LSD, Harper also purchased marijuana. Record at 151-52. In contrast to Additional Charge V, the providency inquiry regarding Additional Charge III indicates that the marijuana was procured at the same moment as the LSD. The appellant's responses during the providency inquiry regarding Specification 4 make it clear that he did not have a separate conspiracy with Hallbert, but that Hallbert was invited to join them and "he came along with us," Record at 157, during the last two months of the conspiracy alleged in Specification 2.

The second *Quiroz* factor favors the appellant when applied to Additional Charges IV and VI. As noted above, the location and the distributed contraband are the same, and the time period alleged in the former specification is completely within the time period alleged in the latter.

It is equally clear that the appellant's position is favored by application of the second *Quiroz* factor to Additional Charge I. Dudley and Harper called the appellant and requested LSD. He brought them LSD. They used it and kept what was left over for a friend.

Application of each of the final three Quiroz factors to the four challenged areas militates in favor of the appellant's position. The charging scheme employed by the prosecution grotesquely exaggerated criminal conduct that needed no exaggeration. There is no question that the appellant's sentencing exposure was exponentially increased by the manner in which the charges were drafted and the findings ultimately were entered. Furthermore, on these facts, it would be impossible to exclude the specter of prosecutorial overreaching.[1]

[1] The conspiracy specifications in this case were consistently and erroneously drafted with disjunctive language in both the object of the conspiracy and in the alleged overt acts. This is error, but inasmuch as it was not the subject of timely objection, or even an assignment of error, the error is not preserved or appropriate for our review here. *United States v. Gonzalez*, 39 M.J. 742, 749 (N.M.C.M.R. 1994), *aff'd*, 42 M.J. 469 (C.A.A.F. 1995); *United States v. Woode*, 18 M.J. 640, 641 (N.M.C.M.R. 1984), *remanded on other grounds*, 19 M.J. 243 (C.M.A. 1984); *see* R.C.M. 307(c)(2), Discussion.

Accordingly, after a careful balancing of the factors set forth in *Quiroz*, the challenged specifications will be consolidated in our decretal paragraph.[2]

Double Jeopardy

Under Specification 4 of Additional Charge VI, the appellant pled guilty to wrongful use of cocaine on or between 1 March 1997 and 5 June 1998. On 5 June 1998, the appellant had pled guilty to wrongful use of cocaine on or about 6 March 1998 and was sentenced to confinement for 6 months (all confinement over 90 days was suspended by the convening authority and ultimately remitted,) forfeiture of $617.00 pay per month for 6 months, reduction to E-1, and a bad-conduct discharge. The appellant seeks dismissal of Additional Charge VI, Specification 4, and sentence credit in the amount of 90 days and $3,702.00 in forfeitures.

On the facts of this case, the appellant's claim that he has been previously tried by court-martial for the same offense has not been preserved for our review. While unquestionably true that multiple punishments may not be imposed for the same offense, Article 44, UCMJ; *United States v. Rosendahl*, 53 M.J. 344, 347 (C.A.A.F. 2000), by entering his plea of guilty the appellant has waived the issue on appeal. *United States v. Broce*, 488 U.S. 563, 570 (1989); *United States v. Troglin*, 44 C.M.R. 237, 242 (C.M.A. 1972). However, in the discretionary exercise of our authority under Article 66(c), UCMJ, we will reduce the sentence we approve by 3 months in our decretal paragraph.

Evidence in Aggravation

The appellant argues that the military judge erred in allowing the testimony of Pvt David Anthony Tucker in the Government's case in aggravation. Over defense objection, Pvt Tucker testified that he received LSD from Quiroz.

During his providence inquiry, the appellant testified that he was providing LSD to Quiroz and that Quiroz was providing it to another Marine friend who had been discharged. Record at 194-95. The admission of this testimony was well within the bounds of the broad discretion afforded to the military judge to decide the admissibility of evidence offered in aggravation under R.C.M. 1001(b)(4). *United States v. Wilson*, 47 M.J. 152 (C.A.A.F.

However, we will correct this error in the consolidated specification set forth in our decretal paragraph.

[2] Inasmuch as the appellant's assignments of error based upon multiplicity virtually mirror the relief he requests based on an unreasonable multiplication of charges, the relief granted herein makes it unnecessary to reach the issue of multiplicity.

1997); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995); *United States v. Dezotell*, 58 M.J. 517, 520 (N.M.C.C.A. 2003). Thus, this assignment of error presents no basis upon which relief will be granted.

Prosecutorial Misconduct

The appellant seeks sentence reassessment based on prosecutorial misconduct. Specifically, the appellant avers that the trial counsel procured the testimony of Pvt Tucker by threats and/or misstatements for its case in aggravation during the sentencing proceedings.

Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996). If there is prosecutorial misconduct, "the trial record as a whole [is reviewed] to determine whether such a right's violation was harmless under all the facts of a particular case." *Id*.

Inasmuch as there were numerous other means at the Government's disposal to secure Pvt Tucker's appearance, and there is no allegation that his testimony was, in any way, influenced or inaccurate as a result of any of the actions ascribed to the trial counsel, it is not necessary to determine the veracity of the appellant's allegations regarding the trial counsel's conduct. *See United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997)

Prosecutorial misconduct only forms the basis of error which merits relief on appeal when, based on the record as a whole, it has resulted in prejudice to the accused. *United States v. Golston*, 53 M.J. 61, 65 (C.A.A.F. 2000); *Meek*, 44 M.J. at 5. No cognizable prejudice is alleged here and the appellant has stated no basis upon which relief is appropriate.

Conclusion

As a result of our disposition of the unreasonable multiplication of charges issues raised in this matter, Specification 5 of Additional Charge IV will be set aside. Furthermore, we will consolidate Specifications 1 and 2 of Additional Charge V, Specifications 2, 3, and 4 of Additional Charge III, and Specifications 2 and 3 of Additional Charge I, into a single specification. Findings of guilty under Additional Charge III and Additional Charge I and the specifications under those charges will be set aside. Based on the result we have reached regarding the providency of the appellant's plea to Specification 2 of Additional Charge V, the distribution of marijuana language from that specification will not be included

in the consolidated specification. The consolidated Specification under Additional Charge V will read as follows:

> In that Private Keith C. Vinci, U.S. Marine Corps, Headquarters Company, 3d Marines, 3d Marine Division, on active duty, did, on divers occasions, on the Island of Oahu, Hawaii and Marine Corps Base, Hawaii, on or between 1 March 1997 and 5 June 1998, conspire with Private First Class Anthony Quiroz, U.S. Marine Corps, Lance Corporal Jason B. Harper, U.S. Marine Corps, Private Robert S. Hallbert, U.S. Marine Corps, and Lance Corporal David I. Dudley, U.S. Marine Corps, to commit an offense under the Uniform Code of Military Justice, to wit: wrongful distribution of lysergic acid diethylamide and wrongful possession of marijuana, and in order to effect the object of the conspiracy, the said Private Vinci, Private First Class Quiroz, Lance Corporal Harper, Private Hallbert, and Lance Corporal Dudley did wrongfully possess lysergic acid diethylamide and the said Private First Class Anthony Quiroz, U.S. Marine Corps, did possess marijuana.

We find that all other findings of guilty are correct in law and fact. However, having set aside some findings of guilty, we must reassess the sentence. In conducting reassessment, we are guided by the following principles: When a court of criminal appeals reassesses a sentence, its task differs from that which it performs in the ordinary review of a case. Under Article 66, UCMJ, we must assure that the sentence adjudged is appropriate for the offenses of which the appellant has been convicted; if the sentence is excessive, we must reduce the sentence to make it appropriate. However, when prejudicial error has occurred in a trial, not only must we assure that the sentence is appropriate in relation to the affirmed findings of guilty, but we must also assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986); *see also United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having reassessed the sentence, we affirm a sentence of confinement for 90 months, total forfeiture of pay and allowances, and a bad-conduct discharge. We conclude that such a sentence is appropriate for the offenses, and the offender; and that such an affirmed sentence is no greater than would have been awarded by a court-martial for the charges and specifications that we here affirm.

Accordingly, the findings, as modified, and sentence, as reassessed, are approved.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court