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.F. FELTHAM**

UNITED STATES

v.

Dexter J. DANIELS
Sergeant (E-5), U.S. Marine Corps

NMCCA 200000835 Decided 18 October 2005

Sentence adjudged 22 February 1999. Military Judge: J.R. Ewers, Jr. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Force Service Support Group, Camp Pendleton, CA.

Capt P.D. SANCHEZ, USMC, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

The appellant was convicted, pursuant to his pleas, of possession of marijuana, distribution of marijuana, and three specifications of use of marijuana, all in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. Officer and enlisted members, sitting as a general court-martial, acquitted the appellant of all other charges and specifications and sentenced the appellant to a bad-conduct discharge, reduction to pay grade E-1, and confinement for 30 months. The convening authority approved the sentence as adjudged, but credited the appellant with 168 days of confinement, solely as an act of clemency. There was no pretrial agreement.

We have examined the record of trial and the appellant's three assignments of error asserting multiplicity between specifications alleging use and possession of marijuana, an improvident plea to distribution of marijuana, and improvident pleas to all other charges and specifications because the first

two allegations of error caused the military judge to improperly instruct the members as to the maximum sentence facing the appellant. We have also considered the Government's answer. We conclude that the findings and the 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.

Facts

During the military judge's inquiry into the providence of the guilty pleas, the appellant described for the military judge his uses of marijuana on 13 April 1998 and on 15 or 16 June 1998 in Pine Bluff, Arkansas. The appellant also used marijuana five or more times during the period between November 1996 and August 1997 in and around Camp Pendleton, California.

With regard to the various uses in and around Camp Pendleton, the appellant used marijuana four or five times with Corporal (Cpl) K, while riding home from work in Cpl K's vehicle. Both Marines worked and lived on board Camp Pendleton. The appellant provided the marijuana on some occasions, while Cpl K provided the marijuana on others. The appellant also used marijuana at Cpl K's on-base residence twice during this time frame.

In addition, the appellant recounted using marijuana during the Super Bowl in February 1997 at a friend's house. He had purchased a "dime bag" of marijuana that morning in Oceanside, California. He took the marijuana to his friend's house, where he smoked some of it and left the rest with his friends.

The appellant described purchasing marijuana and holding it in his possession five or six times. He stated he would typically purchase a "dime bag" of marijuana from one of two dealers in Oceanside, California, a town near Camp Pendleton. The appellant explained to the judge that a "dime bag" typically held enough marijuana for 3 or 4 cigarettes. In describing his possession and use, the appellant stated that he would smoke most or all of the marijuana and get rid of any remainder by giving it away to others. He stated that he did not hold on to the marijuana for any length of time, just long enough to use some or all of it and give the remainder away.

Multiplicity

The appellant claims that the offense of possession of marijuana set forth in Specification 4 of Charge III is multiplicious with the offense of use of marijuana set forth is Specification 3 of Charge III. We disagree.

Absent a timely motion, an unconditional guilty plea waives a multiplicity claim absent plain error.[1] *United States v. Hudson*, 59 M.J. 357, 358-59 (C.A.A.F. 2004)(citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)). "Appellant may show plain error and overcome (waiver) by showing that the specifications are facially duplicative," *United States v. Barner*, 56 M.J. 131, 137 (C.A.A.F. 2001), "that is, factually the same," *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). To determine whether the offenses are factually the same, we review the "factual conduct alleged in each specification," *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997), as well as the providence inquiry conducted by the military judge at trial, *Lloyd*, 46 M.J. at 23.

In the instant case, the appellant admitted to multiple uses of marijuana between November 1996 and August 1997 in and around Camp Pendleton, California. He told the military judge that he would typically purchase a "dime bag" and consume some or all of the marijuana, giving any remainder away. The appellant also told the military judge that he made his purchases from two different suppliers, both located in Oceanside, California. He related specifically the details of his purchase of marijuana on the morning of the Super Bowl in February 1997. The appellant used some of the marijuana while at a friend's house watching the game, then left the remainder of the marijuana with his friends.

The appellant stated that some of the uses during this time frame occurred on base at Camp Pendleton as he rode home from work with his friend, Cpl K. On these occasions, some of the uses involved marijuana that Cpl K provided. Also, it can be inferred from the context of the entire providence inquiry that, on those occasions that the appellant supplied the marijuana, he must have possessed the marijuana for a significant period of time, as his suppliers were off base in neighboring Oceanside. Under these circumstances, the appellant would have had to

[1] The trial defense counsel initially filed a motion before the trial court alleging multiplicity between the use of marijuana and the possession of marijuana. After a discussion of the basis for the motion between the military judge, trial counsel, and trial defense counsel, the motion was withdrawn.

travel to Oceanside, purchase the marijuana, transport it back to Camp Pendleton, and hold it at least through his work day, before using it on the way home with Cpl K.

The appellant argues that the possession and use of marijuana are the exact same amounts and that there is no evidence of possession separate and apart from that necessary for the use of the substance. This is in error, as the use offense includes marijuana provided by Cpl K and the appellant admits facts sufficient to establish his possession of more marijuana than he used. In addition, there is evidence that the appellant possessed some of the marijuana for extended periods of time, at least that necessary to transport it from Oceanside to Camp Pendleton, as well as to hold it through the course of his normal work day.

Under the circumstances of this case, we cannot say that the two specifications are facially duplicative. Nor is one a lesser included offense of the other. *Lloyd*, 46 M.J. at 23; *Harwood*, 46 M.J. at 28. *See also United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)(specifications of rape and assault with intent to commit rape were facially duplicative because the assault specification did no more than describe the force used to commit the rape).

Improvident Plea

The appellant next alleges that his plea of guilty to distribution of marijuana was not provident because there was no evidence of a distribution separate and apart from that necessary to share the marijuana cigarettes. We disagree.

We start with the premise that the appellant has the right to offer a guilty plea, and to do so pursuant to a pretrial agreement. Art. 45, UCMJ; RULES FOR COURTS-MARTIAL 705(b)(1) and 910(a)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). In this regard we are mindful that "a provident plea of guilty is one that is knowingly, intelligently and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders,* 33 M.J. 1026 (N.M.C.M.R. 1991)). Furthermore, "the accused must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion. A factual basis is required for a military judge to accept an accused's guilty plea and the military judge is required to question an accused to establish this factual basis. *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982); *United*

States v. Care, 40 C.M.R. 247, 253 (C.M.A. 1969); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 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). Rejection of the plea "must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs." *United States v. Dawson,* 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999) (citing R.C.M. 910(j) and Art. 59(a), UCMJ).

In our review of the record, we find that the military judge accurately listed the elements and defined the terms contained in the elements of the offense to which the appellant pled guilty. We also find that the appellant indicated an understanding of the elements of the offense and the legal definitions, and stated that they correctly described the offense he committed.

The appellant urges us to apply the rationale used by the United States Court of Appeals, Second Circuit, in *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977):

> Similarly, where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse - simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

We are not persuaded that the holding in *Swiderski* should be applied to the facts of the case before us. The precise issue resolved by the United States Court of Appeals for the Second Circuit was "whether a statutory 'transfer' may occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." *Swiderski*, 548 F.2d at 449.

This court has followed the lead of our superior court in rejecting similar arguments based on the *Swiderski* rationale as it pertains to similar offenses under Article 112a, UCMJ. *United States v. Manley*, 52 M.J. 748, 750 (N.M.Ct.Crim.App. 2000)(citing *United States v. Ratleff,* 34 M.J. 80, 82 (C.M.A. 1992). The holding in *Swiderski* is limited to "the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use." *Swiderski*, 548 F.2d at 450-51.; *see also United States v. Oestmann*, 60 M.J. 660, 666 (N.M.Ct.Crim.App. 2004), *rev'd in part on other grounds*, 61 M.J. 103 (C.A.A.F. 2005); *United States v. Hill*, 25 M.J. 411, 412-14 (C.M.A. 1988).

Whereas Swiderski and his fiancee had earlier purchased the cocaine together and, thereby, acquired joint possession, there is no evidence in the appellant's case that the individuals he passed the marijuana cigarettes to had previously acquired any possessory interest in the marijuana. In any case where *Swiderski* is applied, there must be some evidence of such joint possession prior to the distribution. Only in cases where the possessory interest predates the distribution will we apply the *Swiderski* analysis. In a case such as the one at bar, where the evidence indicates only that the possessory interest resulted from the distribution, that analysis is inapplicable.

Assuming, *arguendo*, that *Swiderski* applies to the case at bar, we would still reject the appellant's argument. In this case, the appellant clearly stated that, on at least one occasion, he left marijuana that he had purchased with his friends for their use. This distribution is clearly separate and apart from any joint use of marijuana. We are convinced that the providence inquiry established that the appellant believed he was guilty and that the factual circumstances revealed by him objectively support his guilty plea. *See United States v. Garcia,* 44 M.J. 496, 497-98 (C.A.A.F. 1996)(holding appellate court will not reject the plea unless it finds substantial conflict between plea and the appellant's statements or other evidence of record). Therefore, we conclude that the appellant's guilty plea was provident.

Conclusion

The appellant's third assignment of error, where the requested relief is conditioned on our decision in his favor on one or both of the first two assignments of error, is moot.

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

Senior Judge CARVER and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court