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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

John D. CLARK III
Aviation Electrician's Technician Second Class (E-5), U.S. Navy

NMCCA 200101963 Decided 11 February 2005

Sentence adjudged 11 April 2001. Military Judge: J.P. Winthrop. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Mid-Atlantic, Norfolk, VA.

Maj PHILLIP SANCHEZ, USMC, Appellate Defense Counsel
LT IAN K. THORNHILL, JAGC, USNR, Appellate Government Counsel
Maj RAYMOND BEAL II, USMC, Appellate Government Counsel

HEALEY, Judge:

A general court-martial composed of a military judge, convicted the appellant, pursuant to his pleas, of recklessly wasting or spoiling non-government property and wrongful possession of ecstasy with the intent to distribute, in violation of Articles 109 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 909 and 912a. The sentence consisted of confinement for 48 months, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority approved the adjudged sentence but suspended confinement in excess of 30 months.

We have carefully considered the record of trial, the two assignments of error, and the Government's response. Following our corrective action, 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.

Aggravation Evidence

The appellant contends that the military judge erred by admitting improper aggravation evidence pursuant to RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) during the testimony of two witnesses called by the Government during sentencing. We agree in part, but conclude that the appellant suffered no material prejudice.

This court reviews a military judge's rulings on the admission of sentencing evidence for an abuse of discretion. *See United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003); *United States v. Hursey,* 55 M.J. 34, 36 (C.A.A.F. 2001). R.C.M. 1001(b)(4), sets forth the rule as to what evidence the prosecution can present in aggravation during the pre-sentencing phase of courts-martial, and provides that "[t]he trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Whether evidence is "directly related to or results from" the offense, and is thus admissible in aggravation, calls for considered judgment by the military judge, and such judgment will not lightly be overturned. *United States v. Wilson,* 47 M.J. 152, 155 (C.A.A.F. 1997). Evidence qualifying for admission under R.C.M. 1001(b)(4) must also pass the test of MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). "The appellant has the burden of going forward with conclusive argument that the judge abused his discretion" in applying the MIL. R. EVID. 403, balancing test. *United States v. Mukes,* 18 M.J. 358, 359 (C.M.A. 1984).

The appellant entered pleas of guilty to Charge II, which alleged a single reckless wasting or spoiling of non-military property, and Charge III, which alleged a single possession of 578 ecstasy pills with the intent to distribute. During the providence inquiry, and in his stipulation of fact, the appellant admitted he possessed the ecstasy with the intent to distribute. He also admitted to wasting or spoiling non-military property in the house he was leasing by completely ruining the carpet, hardwood floors, and linoleum floors by hosting weekend parties which 25-100 people attended. The military judge accepted the appellant's pleas and found him guilty of those offenses to which he pled guilty.

The first witness called by the prosecution during the sentencing phase of the trial, was a Navy chief petty officer who lived with her family in the appellant's neighborhood. She testified that she did not know the appellant, had never been in his home, and did not know that he had been found in possession of drugs. She did know that there were parties at the residence, cars were parked all over, trash was left outside, and one person got confrontational. Record at 51. The appellant objected to this testimony on the grounds that this was improper aggravation under R.C.M. 1001, as it did not relate directly to the waste or

spoiling charge. *Id*. at 46. The Government offered the evidence to show the nature of the parties and the damage to surrounding property and general disruption of the peacefulness of the neighborhood. The military judge overruled the objection stating that the evidence appeared to be related to the Article 109 violation and was not unfairly prejudicial. *Id.* at 48.

Assuming, without deciding, that portions of the chief petty officer's testimony were hearsay or not direct evidence relating to or resulting from the offense, as required by R.C.M. 1001(b)(4), the appellant, in effect, waived those objections when he entered into a stipulation of fact containing the essence of the witness' testimony. Prosecution Exhibit 1. Further, we conclude that the appellant suffered no material prejudice because of the trial defense counsel's adept cross-examination. *Id*. at 53.

The second witness called by the prosecution was an investigator for the Vice and Narcotics Division of the Norfolk Police Department. The witness testified he was the lead investigator in the appellant's case. He testified about the appellant's admission that he got a loan to purchase about $10,000 worth of drugs from the New York area and brought them back to Norfolk so he could sell ecstasy and open up his own rave club when he got out of the military. He also testified that Prosecution Exhibits 2-10 were photos of the evidence seized consisting primarily of large amounts of bagged drugs and currency. The witness was present when the evidence was seized and testified the photos accurately represented what he saw during the search and seizure. The photos contained printed captions that were not made by the witness.

The appellant objected to the admission of PE 2-10 on four grounds, including hearsay and improper aggravation. The military judge overruled the objections. Assuming, without deciding, that the captions on the photos were hearsay, we conclude that the appellant suffered no material prejudice because the witness was present at the time the photos were taken, testified regarding his personal knowledge of the evidence and was subject to effective cross-examination. With respect to the improper aggravation, the military judge correctly concluded that the photos related to the drug charge and stated the probative value was substantially outweighed by any prejudicial effect, applying a MIL. R. EVID. 403 analysis. Record at 60, 65.

Over objection from the defense the military judge ruled that evidence of the presence of 18 suspected Tylox pills and plastic baggies in the house was relevant under R.C.M. 1001(b)(4) and not unfairly prejudicial. We conclude that testimony regarding extra baggies found in the house directly relates to appellant's plea to intent to distribute. However, we agree with the appellant that the witness was not able to conclusively testify that the additional 18 pills were confirmed Tylox and he

did not testify that Tylox was a controlled substance.[1] Moreover, the appellant was acquitted of wrongful possession of 18 Tylox pills. For those reasons, the military judge erred in admitting into aggravation evidence of Tylox possession. Having found error in the admission of some of the aggravating evidence, we will address the issue of sentence reassessment below.

Conclusion

We have considered the remaining assignment of error and find it lacking in merit. The findings are affirmed. Having found prejudicial error we must now reassess the sentence. In *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), our superior court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*.

In this case, we are satisfied that we can reassess the sentence. We have considered the offenses of which the appellant was convicted and have taken into account all the matters properly before the court in the sentencing phase of the court-martial, in particular, the large quantity of ecstasy pills possessed with the intent to distribute and the actual distribution which precipitated the search of the appellant's residence. We are satisfied that, even without the errors discussed above, the military judge would have adjudged a sentence no less than a dishonorable discharge, confinement for 48 months, and reduction to pay grade E-1.

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[1]

Q. And how was the Tylox contained?
A. It was inside a mug. It was inside a medicine vial that the label had been—it appeared to be a military prescription bottle. It had some of the label left on it, but no—as far as who the prescription was for, or anything like that.

Q. And was that substance tested?
A. Yes, it was.

Q. And did it—what did it test for, do you know?
A. If I can refer to my notes?

ADC. Objection.
. . .

TC. Your Honor, I'll just move on.

Record at 67-68.

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

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court