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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Jeffery D. WOOD
Airman Apprentice (E-2), U.S. Navy

NMCCA 200201420 Decided 22 November 2005

Sentence adjudged 20 September 2001. Military Judge: D.A. Wagner. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Air Force, U.S. Atlantic Fleet, Norfolk, VA.

Capt RICHARD A. VICZOREK, USMC, Appellate Defense Counsel
LT GUILLERMO J.ROJAS, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PRICE, Senior Judge:

The appellant was tried by a general court-martial consisting of officer and enlisted members. Pursuant to his pleas, he was found guilty of unauthorized absence (three specifications), wrongful use of lysergic acid diethylamide (LSD), and breaking restriction, in violation of Articles 86, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a, and 934. Contrary to his pleas, he was convicted of conspiracy to distribute 3,4-methylenedioxy methamphetamine (ecstasy), wrongful possession of ecstasy, and wrongful distribution of LSD, in violation of Articles 81 and 112a, UCMJ. The adjudged and approved sentence is confinement for 18 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. There was no pretrial agreement.

The appellant asserts that the military judge erred by denying a challenge for cause against the senior member. The only other assignment of error follows:

THE GOVERNMENT PRESENTED EVIDENCE ONLY THAT APPELLANT AND MSSR HARRING ENTERED INTO AN AGREEMENT TO PURCHASE ECSTASY BUT PRESENTED NO EVIDENCE REGARDING AN AGREEMENT TO DISTRIBUTE ECSTASY. THE MILITARY JUDGE MISSAPPLIED THE LAW REGARDING DISTRIBUTION IN FINDING THAT A PURCHASER OF DRUGS IS ALSO A DISTRIBUTOR OF DRUGS. THEREFORE, THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S MOTION FOR A FINDING OF NOT GUILTY TO THE CHARGE OF CONSPIRACY TO DISTRIBUTE ECSTASY.

Appellant's Brief of 30 Sep 2004 at 4. Having carefully considered the record of trial, the two assignments of error, the Government's response, and the appellant's reply, we conclude that following our 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

According to his confession, Prosecution Exhibit 1, the appellant was approached by a Seaman (SN) Smith, who asked the appellant if he could get SN Smith some LSD. The appellant then approached Mess Management Specialist Seaman Recruit (MSSR) Charles Harring. In order to buy "some drugs" for himself, the appellant told MSSR Harring to get the appellant's ATM card, get some money from the appellant's account and buy "the drugs." PE 1. Three days later, Harring met the appellant to hand over "the drugs." *Id.* The next two sentences in the confession state that the appellant delivered LSD to Sumblim, Landrum, Smith, and Cook.

MSSR Harring testified that the appellant asked him to use the appellant's ATM card to withdraw $300.00 and buy the appellant some ecstasy. MSSR Harring contacted Mr. Patrick Reardon, bought some ecstasy from him using the appellants' money, then delivered the ecstasy to the appellant. We note that MSSR Harring had obtained LSD for the appellant the previous evening, handling and delivering it to the appellant as he did the ecstasy.

Under Additional Charge I and its sole supporting specification, the appellant was charged with conspiring with MSSR Harring to wrongfully distribute ecstasy. The alleged overt acts for this conspiracy were that the appellant requested MSSR Harring to purchase ecstasy and LSD and that the appellant then received ecstasy and LSD from MSSR Harring.

Conspiracy to Distribute Ecstasy - Sufficiency of the Evidence and Wharton's Rule

At the conclusion of the Government's case-in-chief, the trial defense counsel (TDC) made a motion for a finding of not guilty for all the contested charges and specifications. In

support of his motion as to Additional Charge I, the TDC argued that there was no evidence of a conspiracy to distribute to a third party and that the only agreement in evidence was between the appellant and his co-conspirator, MSSR Harring, to distribute from MSSR Harring to the appellant. The trial counsel, the TDC, and the military judge agreed that, if such were the state of the evidence, the conspiracy would not lie, apparently based upon an application of Wharton's Rule.

The military judge and counsel then discussed the charge, the evidence and the applicable law at length. This discussion was rife with confusion on the part of each of the participants, including a misstatement of the law by the military judge, as assigned by the appellant.[1] However, that misstatement did not prevent the military judge, in the end, from properly concluding that the evidence was sufficient to withstand the motion.

In particular, we will discuss whether Wharton's Rule is of any relevance to the motion. In *United States v. Jiles*, 51 M.J. 583 (N.M.Ct.Crim.App. 1999), we cited the U.S. Supreme Court's definitive explanation of the rule:

> This Court's prior decisions indicate that the broadly formulated Wharton's Rule does not rest on principles of double jeopardy, *see Pereira v. United States*, 347 U.S. 1, 11, 98 L. Ed. 435, 74 S. Ct. 358 (1954); *Pinkerton [v. United States*], [328 U.S. 640], at 643-644, [66 S. Ct. 1180, 90 L. Ed. 1489] [1946]. Instead, it has current vitality only as a judicial presumption, to be applied in the absence of legislative intent to the contrary. The classic Wharton's Rule offenses -- adultery, incest, bigamy, dueling -- are crimes that are characterized by the general congruence of the agreement and the completed substantive offense. The parties to the agreement are the only persons who participate in commission of the substantive offense, and the immediate consequences of the crime rest on the parties themselves rather than on society at large. *See United States v. Bobo*, 477 F.2d 974, 987. Finally, the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. It cannot, for example, readily be assumed that an agreement to commit an offense of this nature will produce agreements to engage in a more general pattern of criminal conduct. *Cf. Callanan v. United States*, 364 U.S. 587, 5 L. Ed. 2d 312, 81 S. Ct. 321 (1961); *United States v. Rabinowich*, 238 U.S. 78, 59 L. Ed. 1211, 35 S. Ct. 682 (1915). . . .

[1] The military judge mistakenly stated that the purchaser and seller of drugs are equally guilty of wrongful distribution of those same drugs. Record at 268. That theory of criminal culpability was laid to rest by our superior court in *United States v. Hill*, 25 M.J. 411, 413-14 (C.M.A. 1988).

> Wharton's Rule applies only to offenses that require concerted criminal activity, a plurality of criminal agents. In such cases, a closer relationship exists between the conspiracy and the substantive offense because both require collective criminal activity. The substantive offense therefore presents some of the same threats that the law of conspiracy normally is thought to guard against, and it cannot automatically be assumed that the Legislature intended the conspiracy and the substantive offense to remain as discrete crimes upon consummation of the latter. Thus, absent legislative intent to the contrary, the Rule supports a presumption that the two merge when the substantive offense is proved. [Footnotes omitted.]

Jiles, 51 M.J. at 589 (citing *Ianelli v. United States* 420 U.S. 770, 782-84, 785-86 (1975).

Given the evidence, we conclude that Wharton's Rule does not apply. First, we note that the appellant was not charged with the underlying offense of wrongful distribution of ecstasy. Second, both the appellant and his co-conspirator knew that a third party was necessary to complete the intended distribution. Thus, the appellant told MSSR Harring to buy the drugs. Mr. Reardon became the necessary third party. From this we hold that there was no "congruence of the agreement and the completed substantive offense," no need for "concerted criminal activity" in order to complete the underlying offense, and no basis to conclude that the charged conspiracy and uncharged distribution merged at trial. As in *Jiles*, the policy considerations underlying Wharton's Rule do not exist here. *Id.*

Our decision in *United States v. Oestmann*, 60 M.J. 660 (N.M.Ct.Crim.App. 2004), *affirmed in part and set aside in part*, 61 M.J.103 (C.A.A.F. 2005) is distinguishable. In *Oestmann*, the conspiracy barred by Wharton's Rule was one of possession. The only two parties to the offense were the appellant and another Sailor, who simply agreed to purchase hashish together and use it together. However, Oestmann was charged with conspiracy to possess hashish with intent to distribute, as well as the underlying offense of possession of hashish with intent to distribute. The record clearly indicated that the only distribution anticipated by the agreement was from Oestmann to his co-conspirator or vice versa to facilitate the possession.

Given the military judge's misstatement of the law in ruling on the motion, we will also briefly address his instructions to the members. We first note that the TDC had no objections to the instructions. Next, we observe that the military judge's instructions are not the subject of an assignment of error. Finally, after careful review of the record, we find no prejudicial error in the instructions.

Sufficiency of the Evidence

Although not assigned as error, we will address the factual sufficiency of the evidence supporting Specification 4 of Additional Charge II, alleging wrongful distribution of LSD. The primary evidence supporting this specification is that part of the appellant's confession stating that the appellant sold LSD to three shipmates and gave some to another. The only other evidence was the hearsay testimony of Airman Recruit (AR) Kamel that he learned the appellant had "hooked up" some friends with drugs. Record at 250. However, AR Kamel's testimony regarding the meaning of "hooked up" is less than credible, and the particulars of the interaction with the friends was never specified. AR Kamel did not specify what drugs he referred to or the specific time frame of the transaction(s). Accordingly, we are not convinced of the appellant's guilt beyond a reasonable doubt and conclude that the evidence is factually insufficient. Art. 66(c), UCMJ.

Conclusion

We have considered the assignment of error regarding the challenge for cause and find it lacking in merit. The finding of guilty of Specification 4, Additional Charge II is set aside. That specification is dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). We affirm only so much of the sentence extending to confinement for 15 months, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court