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

BEFORE

Charles Wm. DORMAN **W.L. RITTER** **J.L. FALVEY**

UNITED STATES

v.

Joseph D. WILKERSON
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200300375 Decided 20 December 2005

Sentence adjudged 10 January 2002. Military Judge: T.A. Daly. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, II Marine Division, Camp Lejeune, NC.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

FALVEY, Judge:

The appellant was tried by a general court-martial, before a military judge sitting alone. In accordance with his pleas, the appellant was convicted of conspiracy to distribute ecstasy, lysergic acid diethylamide (LSD), and cocaine; conspiracy to manufacture LSD; wrongful distribution of ecstasy and LSD; wrongful manufacturing of LSD; wrongful use of ecstasy, LSD, and cocaine; and perjury in violation of Articles 81, 112a, and 131, Uniform Code of Military Justice, 10 U.S.C §§ 881, 912a, and 931. The appellant was sentenced to a dishonorable discharge, total forfeiture of all pay and allowances, confinement for 18 years, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 14 years for 14 years from the date of his action.

In three assignments of error, the appellant alleges (1) that his plea of guilty to wrongful manufacturing of LSD was improvident in that his actions did not constitute manufacturing; (2) that his plea of guilty to conspiracy to manufacture LSD was

improvident in that the ultimate object of the conspiracy did not amount to an offense under the UCMJ; and (3) that his sentence was inappropriately severe.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. 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 was committed. See Arts. 59(a) and 66(c), UCMJ.

Improvident Pleas

Among the charges to which the appellant pled guilty were conspiracy to manufacture LSD and wrongful manufacturing of LSD. Review of the record reveals that the appellant placed drops of liquid LSD onto sweet tart candies and sugar cubes and cut an LSD-laced blotter sheet into 100 small squares of LSD tabs. The appellant and his co-conspirators then distributed these candies, cubes, and tabs. The appellant claims that these acts do not constitute the wrongful manufacturing of a controlled substance within the meaning of Article 112a, UCMJ. Similarly, the appellant argues that, because the facts do not support a conviction for manufacturing LSD, the alleged manufacturing cannot be the object of a conspiracy under Article 81, UCMJ. We disagree.

Resolution of this matter requires us to consider the definition of "manufacture" as used in Article 112a, UCMJ. Article 112a states that "[a]ny person . . . who wrongfully . . . manufactures . . . a [controlled] substance . . . shall be punished as a court-martial may direct." Although Article 112a does not define the word "manufacture," the MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 37c(4) defines it as "the production, preparation, propagation, compounding, or processing of a drug or other substance, . . . and includes any packaging or repackaging of such substance."

In interpreting a statute, we employ the following process: (1) we give all operative terms of the statute their ordinary meaning; (2) if any operative term of the statute is ambiguous, we then examine the statute's legislative history and Congress' motivating policies; and (3) if a reasonable ambiguity persists, then we apply the rule of lenity and resolve the ambiguity in favor of the appellant. *United States v. Ferguson,* 40 M.J. 823, 830 (N.M.C.M.R. 1994)(citing *United States v. McGuinness*, 33 M.J. 78 (N.M.C.M.R. 1991)). The following rules of statutory construction also guide our interpretation: (1) we will not dissect a statute and consider its various phrases *in vacuo;* (2) we presume Congress has a definite purpose for every enactment; (3) we favor the construction that produces greatest harmony and least inconsistency; and (4) we construe statutes *in pari materia* together. *Id.* (citing *United States v. Johnson,* 3 M.J. 361 (C.M.A. 1977)). This interpretative process and these rules of

construction apply equally to our interpretation of the MANUAL FOR COURTS-MARTIAL, an executive order. *Id.* at 832. These basic rules of statutory construction mandate that penal statutes and executive orders be strictly construed against the Government. *Id.* at 830. Of course, this interpretive process is unnecessary if the ordinary meaning of operative terms is unambiguous. *Id.*

In our view, the ordinary meaning of the operative terms involved in this case, "manufacture" and "repackaging," are unambiguous and the appellant's acts meet these definitions.

The ordinary meaning of the word "manufacture" is "to make or process (a raw material) into a finished product." Webster's II, New College Dictionary (1995). This broad understanding of the term manufacture is supported by Black's Law Dictionary, which notes that the meaning of "manufacture" has expanded, and includes "nearly all such materials as have acquired changed conditions or new and specific combinations." BLACKS LAW DICTIONARY 977 (8th ed. 2004).

"Repackage" is defined as "to package again, especially to put in a better package," and "package" is defined as "to place in a package (a wrapped or boxed object)." Webster's II, New College Dictionary (1995). Thus, repackaging is the process of placing something in a package again or anew.

In this case, the appellant changed the form of the LSD from liquid to solid to facilitate its distribution. This process was an essential component of bringing about a "finished product" capable of wide distribution. Such acts constitute manufacturing of LSD, as that term is ordinarily understood. Although the LSD remained the same product, it took a different form—a form capable of more efficient distribution. Similarly, the appellant's actions constitute repackaging, as that term is commonly understood. The "packaging" of the LSD as candies, cubes, and tabs facilitated the appellant's intended distribution of the LSD. The appellant claims that his actions are no different than subdividing marijuana into separate baggies and he implies that it would be absurd to consider such acts to be manufacturing marijuana. In such instances, however, the drug maintains its original form and can be easily separated from the container. Here, the LSD was no longer distinguishable from its carrier and could not be easily separated from it. We find this distinction persuasive.

This "market-oriented approach" is analogous to the approach advanced in *Chapman v. United States*, 500 U.S. 453 (1991). In *Chapman,* the Supreme Court held that the blotter paper is included in the weight of LSD for sentencing enhancement purposes. *Id*. at 468. As such, an individual risks a higher sentence by combining liquid LSD with blotter paper than keeping the LSD in liquid form. In so doing, the Court recognized that Congress "adopted a 'market-oriented' approach to punishing drug trafficking, under which the total quantity of what is

distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. *Id*. at 461 (citations omitted). Under this approach, the penalties for drug trafficking were "graduated according to the weight of the drugs in whatever form they were found – cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level." *Id*.

Similarly, the process of combining a pure drug with a cutting agent or carrier medium enhances the marketability of the drug at the retail level. The process of combining liquid LSD with other mediums for distribution or marketing purposes is necessary before it can be efficiently sold in a form that the average user can both use and afford. We hold that this process of combining LSD with a carrier constitutes manufacturing a controlled substance in violation of Article 112a, UCMJ.

In our view, the definition of manufacture contained in Article 112a, UCMJ, appears to cover a broad range of activity. For example, the definition notes that it even includes "labeling or relabeling" of a controlled substance container. MCM, Part IV, ¶ 37c(4). If labeling and relabeling of a controlled substance fall within the definition, surely changing the form of the LSD from a liquid to a solid for distribution or marketing purposes falls within the definition.

The appellant contends that these acts were merely preparatory to the appellant's distribution of LSD more properly charged as overt acts supporting his conviction of conspiracy to distribute LSD. This does not, however, fully describe the appellant's conduct nor prevent his conviction for conspiring to manufacture LSD and manufacturing LSD. The appellant obtained "wholesale" LSD in a liquid or laced blotter sheet form, placed drops of LSD onto candies and sugar cubes and cut the blotter sheet into small squares, and then the appellant and his co-conspirators distributed these candies, cubes, and tabs at the "retail" level. In our view, the process of converting LSD by a "wholesaler" into a marketable form for "retail" distribution constitutes manufacturing of LSD.

The appellant also asks that we distinguish between the preparation that is necessary to bring a controlled substance into a usable state or form and the preparation that facilitates one form of ingestion over another. To the appellant, the former could constitute "preparation" within the meaning of definition of "manufacture", but the latter would not. Thus, to the appellant, drying or curing marijuana leaves would be part of the manufacturing process, but rolling a marijuana cigarette would not be part of the process. By this logic, the appellant was not manufacturing LSD because the LSD was already in a usable state and he was merely facilitating one form of use (solid ingestion) over another (liquid ingestion).

Although we need not reach a complete understanding of Congressional and Presidential intent with respect to the meaning of the word "manufacture," we decline to make the fine distinction suggested by the appellant. We simply conclude that, whatever the meaning, the facts of this case support the conclusion that the appellant wrongfully manufactured LSD and conspired to manufacture LSD. Under the market-oriented approach described above, acts that change the form of a substance and which are not easily reversed taken to facilitate efficient distribution of the end product fall within the definition of "manufacture" for purposes of Article 112a, UCMJ.

We need not resort to rules of statutory interpretation if the ordinary meaning of an operative term is unambiguous. *Ferguson,* 40 M.J. at 832. In such case, the "unambiguous statute is to be applied, not interpreted" and "there is no reason to resort to rules of construction." *Id.* Because we find the meaning of the term "manufacture" to be unambiguous, we need not consider other rules of statutory construction, such as the rule of lenity.

Finally, it is important to note that this alleged error is raised in the context of a guilty plea. The appellant pled guilty, thus foregoing a trial of the facts. This issue was not litigated and is before us only as a challenge to the providence of a guilty plea. "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. Barnes,* 60 M.J. 950, 957 (N.M.Ct.Crim.App. 2005)(citing *United States v. Prater,* 32 M.J. 433, 436 (C.M.A. 1991). Rejection of a plea as improvident "must overcome the generally applied waiver of the factual issue of guilt inherent in a voluntary plea of guilty . . . and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs." *Id.* (citations omitted). We find no such material prejudice and, therefore, find that the appellant waived this factual issue.

Sentence Severity

In his remaining assignment of error, the appellant asserts that that portion of his sentence adjudging confinement for 18 years and a dishonorable discharge is inappropriately severe. We disagree. Based on our review of the entire record we find the sentence appropriate in all respects for the offense and this offender. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Although the appellant demonstrated remorse and had only minimal prior misconduct, he freely entered into extensive criminal conspiracies to distribute ecstasy, LSD, and cocaine. The appellant's decision was not rash and uncalculated. Rather, he remained determined to carry out the object of the conspiracies for over four months, taking a leadership role and

responding to difficulties encountered along the way such as the loss of a supplier. Motivated by his unrestrained greed, he carried out the object of the conspiracies by distributing large quantities of ecstasy and LSD and lesser quantities of cocaine. Additionally, he was found guilty of numerous incidents of wrongful use of all three drugs. There is no evidence that, absent his apprehension and that of his co-conspirators, he was prepared to abandon the concerted effort to distribute these dangerous drugs. To the contrary, although the conspiracy was broken, he committed perjury by making numerous false statements of material fact at the general court-martial of one of his co-conspirators.

It is important to note that the military judge found the conspiracy to manufacture LSD and the wrongful manufacturing of LSD specifications multiplicious for sentencing purposes with the conspiracy to distribute LSD and wrongful distribution of LSD specifications, respectively. Accordingly, the appellant suffered no additional punishment based on pleas to the manufacturing LSD and conspiracy to manufacture LSD charges.

Considering all these circumstances and this offender, we do not find the sentence inappropriately severe and, therefore, decline to grant relief on this ground.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court