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

BEFORE

W.L. RITTER **C.L. SCOVEL** **E.E. GEISER**

UNITED STATES

v.

Jayson A. WILLIAMS
Boatswain's Mate Seaman Apprentice (E-2), U.S. Navy

NMCCA 200300712 Decided 29 November 2005

Sentence adjudged 17 September 2001. Military Judge: R.B. Wities. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southwest, San Diego, CA.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

SCOVEL, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of wrongfully importing ketamine into the customs territory of the United States, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. Contrary to his plea, he was convicted of wrongfully possessing ketamine with intent to distribute, in violation of Article 112a, UCMJ. The military judge sentenced the appellant to 15 months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the adjudged sentence.

The appellant asserts seven assignments of error: (1) the military judge abused his discretion by denying the appellant's request for production of U.S. Customs Service documents; (2) the military judge erred by denying the appellant's motion to dismiss based on double jeopardy; (3) a sentence that includes a dishonorable discharge is inappropriately severe;

(4) the specifications alleging possession and importation of ketamine constitute an unreasonable multiplication of charges; (5) the evidence was legally and factually insufficient to support the conviction of possession with intent to distribute; (6) post-trial delay; and (7) the appellant's plea of guilty to the specification alleging importation of ketamine was improvident.

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 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

On 12 January 2001, the appellant attempted to enter the United States from Tijuana, Mexico, at the San Ysidro, California, border checkpoint. After initially clearing the immigration area, he was approached by a U.S. Customs Service inspector who asked him if he had purchased items in Mexico that should be declared for customs purposes. The appellant declared that he had acquired nothing in Mexico. In response to a question concerning his purpose for being in Mexico and his destination in the United States, the appellant stated that he was returning to his ship in San Diego. As the appellant held up his military identification card, the Customs official noted that his hand was shaking. The official directed him to a table for further examination, where he instructed him to remove all items from his pockets. The appellant removed two 10-millimeter vials of ketamine from his jacket pocket. When asked if he knew what they were, the appellant stated that he thought they were steroids and he had acquired them for a friend in Arizona. The appellant was directed to a security office for further inspection. As the Customs official prepared him for a pat-down search, the appellant stated that he possessed two more vials in the small of his back above his waistline. The official conducted the pat down, and the appellant removed the vials from under his shirt, which was tucked tightly under his belt. Four vials of ketamine, totaling 40 milliliters, were seized.

The appellant was not arrested and a Customs Service special agent declined prosecution. The appellant signed a promissory note to pay a penalty of $700.00 for failure to declare the ketamine to Customs officials as he entered the United States, pursuant to 19 U.S.C. § 1497. The amount was

calculated based on 10 times the domestic value of the contraband ($17.49 per vial). Before his release that day, the appellant was advised that because he was a member of the Navy, the Naval Criminal Investigative Service (NCIS) would be informed.

Double Jeopardy

The appellant contends that Specification 2 of the Charge should have been dismissed on double jeopardy grounds, because he was already punished for the importation of ketamine when the U.S. Customs Service assessed a penalty under 19 U.S.C. § 1497. We disagree, concluding that the Double Jeopardy Clause does not bar the appellant's criminal prosecution in a trial by court-martial because the failure-to-declare penalty imposed by the Customs Service was civil, not criminal. Our resolution of this issue will guide us in considering the appellant's assertion that the military judge erred in denying his request for the production of certain U.S. Customs Service documents.

Double jeopardy is a constitutional question we review de novo. *See United States v. Collier*, 36 M.J. 501, 504 (A.F.C.M.R. 1992). The Fifth Amendment to the U.S. Constitution provides, "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V; *see also* Art. 44, UCMJ. The Double Jeopardy Clause prohibits a second prosecution for the same offense after acquittal or conviction and successive punishments for the same criminal offense. *See Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 769 (1994).

The appellant was assessed a penalty when he failed to declare to a Customs Service inspector at a border checkpoint that he possessed articles for which a customs declaration was required. Under 19 U.S.C. § 1497(a)(2)(A), his penalty of $700.00 was determined by the fact that the articles he possessed were four vials of ketamine, a controlled substance, and therefore subject to a penalty of "either $500 or an amount equal to 1,000 percent of the value of the article, whichever amount is greater." An antecedent of this provision, which specified a penalty equal to the value of the undeclared article (without identifying controlled substances for different treatment), was determined to have been part of a civil, not criminal, statute, the purpose of which was to aid in the enforcement of tariff regulations and reimburse the Government for its investigation and enforcement expenses. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972).

The appellant argues that since *One Lot Emerald Cut Stones*, 19 U.S.C. § 1497 has been changed to the point that it is now a criminal statute in effect, if not by design. It was amended in 1986 to differentiate between controlled substances and other articles and to require an increased penalty (200 percent of the value) for a failure to declare the former. Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 3116, 100 Stat. 3207-83 (1986). The statute was again amended in 1988 to provide for an even stiffer penalty for failure to declare a controlled substance: the greater of either $500 or 1,000 percent of the substance's value. Anti-Drug Abuse Act of 1988, Pub. L. 100-690 § 7367(a), 102 Stat. 4479 (1988). This formula was applied in the appellant's case to calculate his penalty. The appellant argues that this legislative history clearly signals Congress's intent to incorporate this section into its broader anti-drug effort and, in doing so, impliedly adopted a criminal, not a civil, label for this provision, rendering inapplicable the conclusion of *One Lot Emerald Cut Stones*. *See Hudson v. United States*, 522 U.S. 93, 99 (1997); *United States v. Ward*, 448 U.S. 242 (1980).

We are guided by the Supreme Court's decision in *Hudson*, which reemphasized the validity of its seven-factor double-jeopardy analysis[1] in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). We first address the threshold question of whether the legislature intended the particular punishment to be civil or criminal in nature. If Congress intended the punishment to be civil, we then consider *Kennedy's* seven factors in determining whether this case presents the "clearest proof" that the failure-to-declare penalty was so punitive in form and effect as to render it criminal despite Congress's contrary intent. *Hudson*, 522 U.S. at 104.

First, as to the legislative intent regarding the civil or criminal nature of the statute, we note that Congress included the applicable provision, 19 U.S.C. § 1497, in Chapter 4 of Title 19, entitled "Administrative Provisions: Ascertainment, Collection, and Recovery of [Customs] Duties." The authority to assess and collect a failure-to-declare penalty is conferred upon the Customs Service, an agency whose primary duty is the

[1] (1) "[w]hether the sanction involves an affirmative disability or restraint;" (2) "whether it has historically been regarded as a punishment;" (3) "whether it comes into play only on a finding of *scienter*;" (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence;" (5) "whether the behavior to which it applies is already a crime;" (6) "whether an alternative purpose to which it may rationally be connected is assignable to it;" and (7) "whether it appears excessive in relation to the alternative purpose assigned." *Kennedy*, 372 U.S. at 168-169.

collection of revenue due the Government, not law enforcement. These facts establish that Congress intended this provision to be civil in nature, a conclusion reached by the Supreme Court itself when it considered an earlier version of the statute. *One Lot Emerald Cut Stones*, 409 U.S. at 232.

Because we conclude that Congress intended this statute to be civil in nature, we turn to the seven-factor analysis of *Kennedy*. First, we note that this sanction entails payment of a money penalty only, not an affirmative disability or restraint. Second, money penalties have not historically been viewed as punishment. As the Supreme Court has noted, "the payment of fixed or variable sums of money [is a] sanction[] which [has] been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Helvering v. Mitchell*, 303 U.S. 391, 400 (1938). Third, *scienter* is not a factor in the determination of whether a penalty is to be imposed. No particular intent or state of mind is required "by the statute on its face," *Kennedy*, 372 U.S. at 169, but simply a failure to include an article in the customs declaration or to mention it before examination of baggage begins. Fourth, assessment of a monetary penalty under these circumstances may deter others from engaging in similar conduct, a long-recognized goal of criminal punishment. This effect, however, is not sufficient to render the sanction criminal, because in this case deterrence also serves the civil goal of encouraging persons entering this country to declare imported articles when required.

Fifth, the conduct for which a failure-to-declare penalty may be assessed may also be criminal, as in this case where the appellant was tried by court-martial for possessing and importing a controlled substance. This fact alone will not render a money penalty criminally punitive in the double-jeopardy context. *See United States v. Dixon*, 509 U.S. 688, 704 (1993)(rejecting "same conduct" test as determinative for double-jeopardy considerations). Sixth, the Supreme Court in *One Lot Emerald Cut Stones* recognized that this statute's purpose, as an alternative to punishment, is to aid in the enforcement of tariff regulations and to reimburse the Government for its investigation and enforcement expenses. Seventh, we do not view the punitive aspect of this penalty to be excessive in comparison to the statute's alternative purpose. Even if it were excessive, the Supreme Court has cautioned that no one factor is controlling and rejected the "elevat[ion of] a single *Kennedy* factor—whether the sanction appeared excessive in relation to its nonpunitive purposes—to dispositive status." *Hudson*, 522 U.S. at 101-02. Accordingly, we do not find the

"clearest proof" that the failure-to-declare penalty in this case constitutes a criminal punishment.

Regardless whether the customs penalty were deemed to be civil or criminal in nature, we find the appellant did not pay the penalty. Although he testified that he mailed two money orders totaling $700.00 to the Customs Service as payment of the penalty, he produced no receipts from his bank account, the Seven-Eleven store where he said he bought the money orders or, significantly, the Customs Service. Record at 209-19. The parties stipulated that an official from the Customs Service Fines, Penalties, and Forfeitures Office in San Diego, where the appellant's case file was maintained, would have testified that his office's records indicated that no payment had been received from the appellant as of the date of trial. Appellate Exhibit VIII. The military judge found that the appellant had not properly paid the penalty and that it remained unpaid seven months after it was first assessed. Record at 227-28. Apart from the appellant's testimony at trial, we find no evidence in the record that the penalty was ever paid.

The appellant executed, but never paid, a promissory note, and was never actually deprived of life, liberty, or property. We find that he did not actually suffer a penalty or punishment or any kind, civil or criminal, for his failure to make a customs declaration, and conclude that the military judge did not err in denying the appellant's motion to dismiss, at least in part, on this basis. *See United States v. Sanchez-Escareno*, 950 F.2d 193 (5th Cir. 1991)(execution of promissory notes for payment of penalty assessed for failing to list on vehicle manifest marijuana intended for import, in the absence of judgment or payment by the accused, does not constitute punishment under Double Jeopardy Clause); *Doyle v. Johnson*, 235 F.3d 956 (5th Cir. 2000)(criminal conviction for possession of methamphetamine with intent to deliver not barred by subsequent confiscation by State Comptroller of defendant's bank account in partial satisfaction of "tax" assessed on methamphetamine before the criminal trial).

Denial of Request for Production of Customs Service Documents

At trial, the appellant moved to compel discovery of "training materials" issued by the Customs Service, which purportedly addressed the issue of criminal prosecution and the imposition of a penalty under 19 U.S.C. § 1497 for the same conduct. Some of these materials had been made available when a Customs Service supervisor testified at the Article 32, UCMJ,

pretrial investigation. The appellant argued, however, that other documents, not provided at the Article 32 investigation, were relevant to his motion to dismiss Specification 2 (wrongfully importing ketamine) under the Charge on double jeopardy grounds and also to a possible violation of his equal protection rights. Record at 191-92. The military judge denied the motion, stating that, in light of his denial of the appellant's double-jeopardy motion based on the applicable law, he believed nothing in the training materials would have affected that decision. *Id*. at 233-34.

Upon request by the accused, after service of charges, the Government must permit the defense to inspect documents, tangible objects, buildings, etc., "which are within the possession, custody, or control of military authorities, which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused." RULE FOR COURTS-MARTIAL 701(a)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.).

We agree with the military judge that what was variously referred to in the record as training materials, standard operating procedure, policy, or internal guidance, produced by the Customs Service for use by its employees in the field, would have had no effect on his resolution of the double jeopardy issue. His consideration was properly guided by legal authorities, not by the Customs Service's internal guidance and practice.

Even if this evidence were discoverable and the Government failed to disclose it, the error would be tested on appeal for prejudice, assessed "in light of the evidence in the entire record." *United States v. Santos*, 59 M.J. 317, 321 (C.A.A.F. 2004)(quoting *United States v. Stone*, 40 M.J. 420, 423 (C.M.A. 1994)). An appellant who demonstrates error with respect to nondisclosure will be entitled to relief only if there is a reasonable probability that there would have been a different result at trial if the evidence had been disclosed. *Id*. When an appellant has demonstrated that the Government failed to disclose discoverable evidence upon specific request, the appellant will be entitled to relief unless the Government can show that the nondisclosure was harmless beyond a reasonable doubt. *Id*.

In this case, the record reveals a thoroughly researched and litigated motion to dismiss on double jeopardy grounds,

fairly considered by the military judge. We too have examined this issue and, after reviewing the authorities cited by the parties and considered by the military judge, we conclude that they were fully sufficient for his decision on this matter. Assuming, arguendo, that the military judge erred in refusing to order production of the requested Customs Service training materials, we find no reasonable probability of a different result at trial if these materials had been disclosed. Notwithstanding internal Customs Service policy or guidance, the military judge's decision was based substantially on his analysis of factors set forth by the Supreme Court. The error, if any, was harmless beyond a reasonable doubt.

Unreasonable Multiplication of Charges

The appellant asserts that the specifications alleging wrongful possession of ketamine with intent to distribute and importation of ketamine into the customs territory of the United States are not aimed at distinctly separate criminal acts and, therefore, constitute unreasonable multiplication of charges. We disagree.

What is substantially one transaction should not be made into the basis for an unreasonable multiplication of charges. R.C.M. 307(c)(4), Discussion. 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). In considering these factors, we will grant appropriate relief if we find "the 'piling on' of charges so extreme or unreasonable as to necessitate the invocation of our Article 66(c), UCMJ, authority (to affirm only such findings of guilty and so much of the sentence as we find correct in law and fact and determine, on the basis of the entire record, should be approved)." *Id*. at 585 (quoting *United States v. Quiroz*, 53 M.J. 600, 607 (N.M.Ct.Crim.App. 2000), set aside and remanded on other grounds, 55 M.J. 334 (C.A.A.F. 2001); *see also United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994).

Applying the *Quiroz* criteria, we note that the appellant did not raise this issue at trial. "[T]he failure to raise the issue at trial suggests that the appellant did not view the multiplication of charges as unreasonable . . . [and] [t]he lack of objection at trial will significantly weaken the appellant's argument on appeal." *Quiroz*, 53 M.J. at 607.

After considering the charges of possession of ketamine with intent to distribute and importation of ketamine, we find that they are aimed at distinct criminal conduct, i.e., separate acts. Here the appellant traveled to Mexico and acquired a controlled substance, possessing it for some period of time, with the stated intent of passing it to an acquaintance, before attempting to return with it to the United States. His interception at a border checkpoint with the ketamine in his possession gave rise to the charge of importing the substance into the United States. The overall course of his conduct encompassed different acts. We also recognize a distinct Government interest in regulating the importation of many types of articles. It sought to protect this legitimate interest by charging the appellant with importing a controlled substance, a course of action that we find did not misrepresent or exaggerate the appellant's criminal activity. His punitive exposure was not unreasonably increased, and we find no evidence of prosecutorial overreaching or abuse in preferring and referring these separate charges.

Sufficiency of the Evidence

The appellant contends that the evidence is legally and factually insufficient to sustain his conviction of possession of ketamine with intent to distribute. We disagree.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. In

resolving these issues, this court may believe one part of a witness's testimony and disbelieve other aspects of his or her testimony. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

In this case, contrary to the appellant's assertions, we find the testimony of Customs Service and NCIS officials on the subject of what quantity of ketamine indicates an intent to distribute both credible and consistent with the other evidence offered at trial. We have no doubt that a reasonable fact finder could have found all the essential elements of this offense beyond a reasonable doubt. In addition, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

Post-Trial Delay

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is "facially unreasonable," we must balance the length of the delay with the other factors. *Id*. Moreover, in extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Id*. (quoting *Toohey*, 60 M.J. at 102).

With regard to the first *Jones* factor, length of the delay, we find the delay of approximately one and a half years between the conclusion of the trial and the receipt of the record of trial by this court to be facially unreasonable. Regarding the second *Jones* factor, reasons for the delay, we find no adequate explanation. With regard to the third *Jones* factor, the appellant's assertion of the right to a timely appeal, we find no assertion of the right to a timely appeal until the filing of the appellant's brief at this court. Regarding the fourth prong, prejudice, we first find no "extreme circumstances" that give rise to a strong presumption of evidentiary prejudice. With no presumption of prejudice applicable to this case, we next search for actual prejudice. The record does not reveal, nor do we find, any claim or evidence of actual prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay in this case.

We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Id.*; *United States v. Oestmann*, 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

We have carefully considered the remaining assignments of error and find them without merit. Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge RITTER and Judge GEISER concur.

For the Court

R.H. TROIDL
Clerk of Court