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

BEFORE

Charles Wm. DORMAN **C.L. SCOVEL** **R.C. HARRIS**

UNITED STATES

v.

Robert J. CAMPBELL
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200300818 Decided 14 July 2005

Sentence adjudged 20 June 2002. Military Judge: T.A. Daly. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d FSSG, U.S. Marine Corps Forces, Atlantic, Camp Lejeune, NC.

Capt PETER GRIESCH, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A military judge, sitting alone as a general court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to wrongfully distribute 3, 4 methylenedioxymethamphetamine (ecstasy), wrongfully distributing ecstasy on divers occasions, wrongfully using ecstasy on divers occasions, and wrongfully using marijuana on divers occasions. The appellant's crimes violated Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to confinement for 7 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed. A pretrial agreement had no effect on the adjudged sentence, but caused the convening authority to defer and then waive automatic forfeitures of pay and allowances for 6 months.

We initially reviewed the appellant's record of trial, submitted without assignment of error, in accordance with Article 66(c), UCMJ. After conducting our review, we specified the following three issues for briefing by appellate counsel:

> I. WHETHER THE APPELLANT'S PLEAS OF GUILTY TO CONSPIRING TO DISTRIBUTE A CONTROLLED SUBSTANCE UNDER CHARGE I WERE PROVIDENT, WHERE THERE IS NO INDICATION OF AN INTENT TO TRANSFER POSSESSION OF THE CONTROLLED SUBSTANCE TO ANY PERSON OUTSIDE OF THE MEMBERS OF THE CONSPIRACY?
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> II. IF THE APPELLANT CANNOT BE FOUND GUILTY OF CONSPIRING TO DISTRIBUTE A CONTROLLED SUBSTANCE TO ANY PERSON OUTSIDE OF THE MEMBERS OF THE CONSPIRACY, CAN HE, NONETHELESS, STILL BE FOUND GUILTY OF CONSPIRING TO POSSESS AND USE A CONTROLLED SUBSTANCE WITH THE MEMBERS OF THE CONSPIRACY UNDER CHARGE I?
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> III. IF THE APPELLANT CANNOT BE FOUND GUILTY OF CONSPIRING TO DISTRIBUTE A CONTROLLED SUBSTANCE TO ANY PERSON OUTSIDE OF THE MEMBERS OF THE CONSPIRACY UNDER CHARGE I, BUT STILL CAN BE FOUND GUILTY OF CONSPIRING TO POSSESS AND USE A CONTROLLED SUBSTANCE WITH THE MEMBERS OF THE CONSPIRACY, WOULD THE APPELLANT'S PLEAS OF GUILTY TO DISTRIBUTING A CONTROLLED SUBSTANCE UNDER SPECIFICATION 2 OF CHARGE II, NONETHELESS, STILL BE PROVIDENT, OR WOULD THEY REPRESENT AN UNREASONABLE MULTIPLICATION OF CHARGES?

Having reviewed the record of trial, the appellant's brief on this court's specified issues, 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.

Providence Inquiry, "Wharton's Rule" and Unreasonable Multiplication of Charges

Before accepting an appellant's guilty plea, the military judge must explain the elements of each offense and ensure that a factual basis for each guilty plea exists to satisfy every element of each offense. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Care*, 40 C.M.R. 247, 251-53 (C.M.A. 1969); *see* RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); *see also* Art. 45(a), UCMJ. Mere conclusions of law recited by the accused are insufficient to provide a factual basis for a guilty plea. *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996). An accused "must be convinced of, and able to describe all the facts necessary to establish guilt." R.C.M. 910(e), Discussion.

The military judge has broad discretion in determining that an appellant's guilty plea has a factual basis. *United States v. Roane*, 43 M.J. 93, 94 (C.A.A.F. 1995). A military judge may not, however, "arbitrarily reject a guilty plea." *United States v. Pennister*, 25 M.J. 148, 152 (C.M.A. 1987). Any rejection of such a guilty plea on appellate review requires that the record of trial show a substantial basis in law and fact for questioning the guilty plea. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, and the only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j).

The military judge's decision to accept a guilty plea is generally reviewed for abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). So long as the factual circumstances disclosed by the accused objectively support the plea, a military court of criminal appeals will not reject it. *See Faircloth*, 45 M.J. at 174. Only when we find a substantial conflict, not the mere possibility of conflict, between the plea and the appellant's statement or the evidence of record will we take remedial action. *Id.*

This court has previously recognized that "conspiracy can be separately charged and punished along with any crime which may be the object of that conspiracy." *United States v. Johnson*, 58 M.J. 509, 511 (N.M.Ct.Crim.App. 2003)(citing *Iannelli v. United States*, 420 U.S. 770, 777 (1975)); *see also United States v. Crocker,* 18 M.J. 33, 36 (C.M.A. 1984). "The rationale for this principle is that '(a) conspiracy, (which) is a partnership in crime . . . has ingredients, as well as implications, distinct from the completion of the unlawful project.'" *Johnson*, 58 M.J. at 511 (quoting *Pinkerton v. United States,* 328 U.S. 640, 644 (1946)).

Under the doctrine known as Wharton's Rule, "where two parties agree to commit an offense requiring concerted criminal activity and those two parties are the only parties who commit the ultimate offense, conspiracy should not be separately charged." *Johnson*, 58 M.J. at 512 (footnote omitted)(listing for example: adultery, dueling, bribery, etc.). Wharton's Rule, in effect, is "a judicial presumption that Congress did not intend certain criminal conduct to be separately charged as a conspiracy." *Id*., n.2 (citing *Iannelli*, 420 U.S. at 782; *United States v. Jiles,* 51 M.J. 583, 589 (N.M.Ct.Crim.App. 1999)). Further, Wharton's Rule does not apply where the offense underlying the conspiracy charge does not require concerted criminal activity. *Id*., n.3 (citing *Crocker,* 18 M.J. at 39) (holding Wharton's Rule does not apply where an alleged conspiracy involves an agreement to possess since possession "patently requires only one person for its commission.").

To determine whether there is an unreasonable multiplication of charges (UMC), we consider 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 deciding an issue of UMC, trial courts should consider R.C.M. 307(c)(4), Discussion, which provides the following guidance: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."

Based on the specific facts in the appellant's case, we conclude that Wharton's Rule is inapposite. Therefore, we find the appellant's pleas to conspiracy to distribute ecstasy and distribution of ecstasy on divers occasions are provident. Therefore, we decline to grant relief.

Assuming, without deciding, that Wharton's Rule was applicable to the appellant's case, we would still, nonetheless, affirm findings of guilty to conspiracy to procure, possess and use ecstasy and use of ecstasy on divers occasions. (See specified issue II above.) Further assuming, without deciding, that we only affirmed findings of guilty to conspiracy to procure, possess and use ecstasy, we would also affirm findings of guilty to both use and distribution of ecstasy on divers occasions. Nor would we find that these charges represent an unreasonable multiplication of charges. (See specified issue III above.)

Conclusion

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

Chief Judge DORMAN and Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court