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

**BEFORE**

**C.A. PRICE** **E.B. HEALEY** **J.L. FALVEY**

**UNITED STATES**

**v.**

**Bryson R. ADAMS**
**Seaman Apprentice (E-2), U.S. Navy**

NMCCA 200300980 Decided 24 January 2005

Sentence adjudged 13 December 2002. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Submarine School, Groton, CT.

CDR MICHAEL J. WENTWORTH, JAGC, USNR, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel



FALVEY, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to distribute methamphetamine, fraudulent enlistment, and distribution and use of methamphetamine in violation of Articles 81, 83, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 883, and 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 60 days, forfeiture of $826.00 pay per month for 2 months, and reduction to pay grade E-1. The pretrial agreement had no effect on the sentence and the convening authority approved the sentence as adjudged.

In his assignments of error, the appellant alleges that the military judge erred in accepting the appellant's pleas of guilty to conspiracy to distribute methamphetamine and fraudulent enlistment and that the adjudged and approved sentence to forfeiture of pay exceeds the jurisdictional maximum of a special courts-martial.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response.

We conclude the appellant's plea of guilty to conspiracy to distribute methamphetamine was provident, excepting the words "on divers occasions," that the appellant's plea of guilty to fraudulent enlistment was improvident, and that the adjudged and approved forfeitures exceeded the jurisdictional maximum of a special courts-martial. These determinations require corrective action on the findings and sentence. Arts. 59(a) and 66(c), UCMJ.

## I. Plea Providence

### A. Conspiracy to Distribute Methamphetamine

The appellant was charged with conspiring "on divers occasions" between 1 August 2002 and 19 October 2002 to distribute methamphetamine. In his first three assignments of error, the appellant argues that the military judge erred in accepting his guilty plea to this charge because (1) the record reveals, at best, only a single agreement to distribute methamphetamine; (2) the record fails to disclose an adequate factual basis of an agreement to distribute methamphetamine; and (3) the charge of conspiracy is inappropriate under the facts of this case where the agreement, if any, existed only between the persons necessary to commit the object offense of distribution.

Regarding the appellant's first assignment of error that the military judge erred in accepting his plea to the conspiracy offense as charged, the Government acknowledges that the record establishes a factual basis for only a single agreement to distribute methamphetamine between the appellant and Seaman Recruit (SR) French. We agree that the record reveals only a single agreement between the appellant and his alleged co-conspirator. As such, the military judge erred in accepting the appellant's plea to conspiring "on divers occasions" to distribute methamphetamine. Rather, the military judge should have inquired about these words during the providence inquiry and, absent evidence of multiple agreements between the appellant and his alleged co-conspirator, the military judge should have excepted the words "on divers occasions" from the specification. We will correct this error in our decretal paragraph.

The appellant further contends, however, in his second assignment of error, that the military judge erred in accepting his guilty plea to the conspiracy charge because the record fails to disclose an adequate factual basis of even a single agreement to distribute methamphetamine. The essence of the appellant's contention is that the military judge failed to elicit adequate factual support to find that the appellant and SR French agreed to commit the offense of distribution of methamphetamine. Rather, the military judge only elicited facts detailing the appellant's agreement to have drugs mailed to his home. The appellant notes that he never admitted that the drugs were

intended to be delivered to the possession of another as required for the offense of distribution under Article 112a, UCMJ.

The appellant acknowledges, however, that a stipulation of fact introduced at trial for use during the providence inquiry admits that he and SR French "entered into an agreement . . . to wrongfully distribute methamphetamine." (Pros. Exh. 1.) However, the appellant claims this is nothing more than a conclusion of law that fails to provide a factual basis of an agreement to distribute methamphetamine because it fails to provide any detail as to whom the methamphetamine was to be distributed or how the mailing of methamphetamine to the appellant's home furthered the object of the conspiracy. Appellant's Brief of 28 Jul 2003 at 6.

Analysis of the providence of a guilty plea requires that the facts revealed by the accused objectively support the plea of guilty. *United States v. Bullman*, 56 M.J. 377, 380-81 (C.A.A.F. 2002). Before accepting a guilty plea, the military judge is required to inform the accused of the nature of the offenses to which the guilty plea is offered. RULE FOR COURTS-MARTIAL 910(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). The military judge must also "mak[e] such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea." R.C.M. 910(e); *see also United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996); *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); *United States v. Simmons*, 54 M.J. 883, 889 (N.M.Ct.Crim.App. 2001). A guilty plea should only be overturned on appeal if the record fails to objectively support the plea or there is "evidence in 'substantial conflict' with the pleas of guilty." *Bullman*, 56 M.J. at 381 (citing *United States v. Higgins,* 40 M.J. 67, 68 (C.M.A. 1994)). As such, the plea should not be found improvident unless, examining the totality of the record of trial, there exists a "'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

Contrary to the appellant's argument, review of the "totality of the circumstances" contained in the record of trial reveals an adequate factual basis to objectively support the appellant's plea of guilty to conspiracy to distribute methamphetamine.

First, review of the record reveals that the military judge explained to the appellant the elements of conspiracy tailored to the specification and correctly informed him of the pertinent definitions, including an explanation of the requisite agreement. Subsequently, the appellant acknowledged understanding these elements and definitions, and he admitted that these elements correctly described his conduct.

Second, in discussing the details of the conspiracy charge with the appellant, the military judge ascertained that the appellant and his alleged co-conspirator had verbally agreed to

commit a violation of the UCMJ, that this agreement was entered into in early September 2002 in base housing, and that the agreement included having methamphetamine mailed and delivered to the appellant's house. The appellant further admitted that he entered into this agreement voluntarily with no legal justification or excuse and that he remained a party to this agreement and never abandoned or withdrew from the agreement. Moreover, the appellant admitted that his alleged co-conspirator had methamphetamine sent to the appellant's home to achieve the objectives of their agreement.

Finally, the appellant voluntarily agreed to enter into a stipulation of fact concerning his misconduct, acknowledged under oath the truth of its contents, and agreed to permit the military judge to use the stipulation in determining his guilt. In this stipulation, the appellant admitted that he and his alleged co-conspirator agreed to wrongfully distribute methamphetamine and that the appellant allowed methamphetamine to be mailed to his home to further the object of the conspiracy.

The appellant places significance on the fact that he never stated in open court that the agreement involved distributing methamphetamine. However, he acknowledged this fact in the stipulation and by his admission that the elements as explained by the military judge correctly described his conduct, including admitting to the element that he entered into an agreement to commit distribution of methamphetamine.

Examining the totality of the record of trial, we find no "'substantial basis' in law and fact for questioning the guilty plea." *Prater*, 32 M.J. at 436. To the contrary, we find an adequate factual basis to objectively support the appellant's plea of guilty to conspiracy to distribute methamphetamine.

The appellant's final argument with respect to his guilty plea to conspiracy to distribute methamphetamine, raised in his third assignment of error, is that *Wharton's Rule* as applied to the military in *United States v. Crocker*, 18 M.J. 33 (C.M.A. 1984) precludes a conspiracy charge.

Under *Wharton's Rule,* a conspiracy charge cannot be maintained where the agreement of two persons is necessary for the completion of the object crime. *Id.* at 37. Although, not "every routine transfer of a drug should lead to preferring a charge of conspiracy to [distribute] that drug," *id.* at 40, the accused pled guilty to more that the routine transfer of a drug from his co-conspirator to him. This transfer was only the pled and admitted overt act committed in furtherance of the ultimate object of the conspiracy—the distribution of methamphetamine. Under our reading of the record, the conspiracy to which the appellant pled involved the distribution of methamphetamine to some third-person or persons. Accordingly, we find this assignment of error to be without merit.

## B. Fraudulent Enlistment

In his fourth assignment of error, the appellant alleges that the military judge erred in accepting his guilty plea to fraudulent enlistment. As noted above, a guilty plea should only be overturned on appeal if the record fails to objectively support the plea or there is "evidence in 'substantial conflict' with the pleas of guilty." *Bullman,* 56 M.J. at 381. In this case, we find evidence in "substantial conflict" with the appellant's guilty plea to fraudulent enlistment. We note that the appellant pled guilty to fraudulent enlistment on 19 December 2001. However, the stipulation of fact and the amended charge sheet both indicate that his enlistment began on 22 October 2001. This inconsistency raises significant issues of fact that were left unresolved on the record. We also note that the cursory providence inquiry elicited mere conclusions of law. For example, based on our review of the record, we have no idea what health or law enforcement issues were concealed and have no ability to measure their materiality. For these reasons, we find the appellant's plea of guilty to fraudulent enlistment to be improvident.

## II. Excessive Forfeiture

In his final assignment of error, the appellant claims that the adjudged and approved forfeitures of $826.00 pay per month for 2 months exceeds the jurisdictional maximum of a special courts-martial. The maximum forfeitures that may be adjudged by special courts-martial may not exceed two-thirds pay per month for one year. Art. 19, UCMJ. If the sentence includes a reduction in grade, the maximum forfeiture is based on the grade to which reduced. R.C.M. 1003(b)(2). Accordingly, the appellant's forfeitures should have been computed based on the grade of E-1 to which he was reduced. The Government concedes that this was not the case and that the maximum amount of forfeitures that could have been adjudged and approved was $737.00 pay per month. We will correct this error in our decretal paragraph.

## Conclusion

In view of the above, we find the appellant's guilty plea to Charge I and its specification, conspiracy to distribute methamphetamine, to be provident. However, we set aside the findings of guilty to the words "on divers occasions." That language is dismissed. Regarding appellant's guilty plea to Charge II and its specification, fraudulent enlistment, we find this plea to be improvident and we set aside the finding of guilty. Accordingly, Charge II and its specification are dismissed. The remaining findings of guilty are affirmed.

Applying the principles of *United States v. Peoples,* 29 M.J. 426 (C.M.A. 1990) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we reassess and affirm the sentence as adjudged and approved below except for that portion of the punishment extending to forfeitures in excess of $737.00 pay per month for 2 months.

Senior Judge PRICE and Judge HEALEY concur.

For the Court

R.H. TROIDL
Clerk of Court