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

BEFORE

C.L. CARVER **D.A. WAGNER** **R.W. REDCLIFF**

UNITED STATES

v.

Jason A. KRUEGER
Steelworker Constructionman Apprentice (E-2), U.S. Navy

NMCCA 200301601 Decided 16 May 2005

Sentence adjudged 10 January 2002. Military Judge: J.A. Goddard. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commander, Thirty-First Naval Construction Regiment, Port Hueneme, CA.

Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CAPT MARK PEDERSEN, JAGC, USNR, Appellate Defense Counsel
Maj RAYMOND BEAL, USMC, Appellate Government Counsel
LCDR R.W. SARDEGNA, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to distribute ecstasy, wrongful use of methamphetamine and marijuana, wrongful distribution of ecstasy (two specifications), and wrongful introduction of ecstasy with intent to distribute, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to confinement for 180 days, reduction to pay grade E-1, forfeiture of $826.00 pay per month for 6 months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 150 days pursuant to the pretrial agreement.

The appellant contends that the court-martial promulgating order is inaccurate. He also contends that he is entitled to relief because of excessive post-trial processing delay.

We have carefully considered the record of trial, the appellant's two assignments of error, and the Government's response. We agree that the court-martial promulgating order is defective and will take corrective action in our decretal paragraph. Although we likewise agree that the post-trial processing time for this case was excessive, it was partly explained and we find no specific prejudice to the appellant or other basis to afford the requested relief. However, we have identified two other errors, not raised by the appellant, that merit discussion and remedy. After taking corrective action, 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 remains. Arts. 59(a) and 66(c), UCMJ.

Promulgating Order

The appellant correctly contends that the court-martial promulgating order is defective because it fails to list the dates of the offenses of which he stands convicted. We agree.

The promulgating order fails to comply with RULE FOR COURTS-MARTIAL 1114(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). In this case, the appellant is entitled to a promulgating order that sets out the charges and specifications, or accurately summarizes the offenses of which he was convicted. We find that the promulgating order did not meet this requirement and will direct corrective action in our decretal paragraph. *United States v. Glover,* 57 M.J. 696, 698 (N.M.Ct.Crim.App. 2002).

Post-Trial Processing Delay

The appellant contends that the post-trial processing delay in his case was excessive and requests that this court set aside his bad-conduct discharge. Specifically, he complains that it took more than 16 months to transcribe his record of trial consisting of 106 pages, and nearly nineteen months from the date of trial to deliver the record to this court. While we agree that the time required to process this case post-trial was excessive, it was partly explained by the staff judge advocate (SJA). Specifically, portions of the delay were attributed to a gap in the SJA's billet and other personnel turnover. Much of the delay was due to the loss of the original record of trial during the relocation of the SJA's and prosecutor's offices. Once the oversight was discovered, a duplicate copy of the record of trial was authenticated by the presiding military judge and forwarded to the convening authority for appropriate action. Staff Judge Advocate's Recommendation dated 7 Jul 03 at 4.

While we do not condone the Government's neglect in tracking the record in this case, and the processing delays arising therefrom, we find speculative the appellant's purported claim of prejudice, namely, that he was denied educational benefits because he lacked a discharge certificate (DD-214). Appellant's Post-Trial Affidavit of 12 Nov 2004. As outlined by the standard

instruction concerning court-martial punishments, substantially all veteran's benefits are cut-off by a punitive discharge. *See* Military Judge's Benchbook, DA-PAM 27-9 of 1 Apr 2001, Section 8-3-24, at 937. The appellant has not convinced us otherwise.

We are cognizant of this court's power under Article 66(c), UCMJ, to grant sentence relief for excessive post-trial delay even in the absence of actual prejudice. *See United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Although the post-trial delay in this case was excessive, it was partly explained. Moreover, we have not found any specific prejudice or other harm to the appellant resulting from it, nor have we concluded that the delay affects the "findings and sentence [that] *'should be approved,'* based on all the facts and circumstances reflected in the record." *Id*. (emphasis added). Thus, we decline to grant the requested relief.

Conspiracy with Government Agent

As to Charge I and its Specification, the appellant pled guilty to conspiring with a "controlled witness" to wrongfully distribute ecstasy on divers occasions. The Government did not charge other co-conspirators nor did the military judge inquire as to the existence of other conspirators beside the "controlled witness." Based upon our review, and for the reasons outlined below, we find that the providence inquiry, supplemented by the stipulation of fact, supports only finding that the appellant attempted to conspire with the Government's agent to wrongfully distribute ecstasy. Thus, we will take corrective action in our decretal paragraph.

We begin by noting that a military judge may not accept a guilty plea to an offense without inquiring into its factual basis. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969). Before accepting a guilty plea, the military judge must explain the elements of the offense and ensure that a factual basis for the plea exists. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980). 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)(citing *United States v. Terry*, 45 C.M.R. 216 (C.M.A. 1972)). The accused "must be convinced of, and able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Discussion. Acceptance of a guilty plea requires the accused to substantiate the facts that objectively support his plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

A military judge, however, may not "arbitrarily reject a guilty plea." *United States v. Penister*, 25 M.J. 148, 152 (C.M.A. 1987). 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. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). 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 materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ; R.C.M. 910(j). Additionally, we note that a military judge has wide discretion in determining that there is a factual basis for the plea. *United States v. Roane*, 43 M.J. 93, 94-95 (C.A.A.F. 1995).

It is now well-settled in military jurisprudence that "if one person is only feigning a criminal purpose and does not intend to achieve the purported purpose, there is no conspiracy." *United States v. Valigura*, 54 M.J. 187, 188 (C.A.A.F. 2000). This Court had previously reached the same conclusion in *United States v. Jiles*, 51 M.J. 583, 586 (N.M.Ct.Crim.App. 1999). Therefore, absent some information that the "controlled witness" was not acting as a Government agent at the time of the purported criminal agreements, the appellant could not, as a matter of law, enter provident pleas of guilty to conspiracy. Nevertheless, the record clearly shows the appellant's intent to enter into a series of criminal agreements to distribute ecstasy, and we, therefore, affirm a finding of guilty to the lesser included offense of attempted conspiracy in violation of Article 80, UCMJ. We will provide relief in our decretal paragraph.

Excessive Forfeitures

Although not raised as error, we find that the military judge erred by adjudging a sentence that included reduction to the lowest enlisted pay grade, E-1, coupled with forfeitures of $826.00 pay per month for a period of 6 months. The maximum authorized forfeitures at a special court-martial are two-thirds pay per month for a period of 6 months. Although the appellant was an E-2 at the time of his court-martial and received $1,239.30 basic pay per month, his adjudged sentence included reduction to E-1, effectively reducing the maximum authorized forfeitures from $826.00 per month to $766.00 per month, for a period of 6 months.

The appellant did not raise this computational mistake as error, so we are not convinced that an improper amount of pay was actually withheld. Nevertheless, we will eliminate any prejudice in our decretal paragraph.

Conclusion

Accordingly, as to Charge I and its specification, we affirm only a finding of guilty to a lesser included offense, a violation of Article 80, UCMJ, in that the appellant did, "... at or near Camp Covington, Guam, on divers occasions between 20 December 2000 and 21 December 2000, attempt to conspire with a controlled witness to commit an offense under the Uniform Code of

Military Justice, to wit: the wrongful distribution of Methylenedioxymethamphetamine (Ecstasy), a Schedule I controlled substance." The remaining findings of guilty, as approved by the convening authority, are affirmed.

We have reassessed the sentence in accordance with the principles articulated in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). In reassessing the sentence, and in consideration of our corrective action on the findings, we affirm only so much of the sentence as provides for reduction to pay grade E-1, confinement for 180 days, forfeiture of $500.00 pay per month for 6 months, and a bad-conduct discharge.

We order that the supplemental promulgating order accurately summarize the pleas and findings of the offenses of which the appellant was convicted, as modified hereby.

Senior Judge CARVER and Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court