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

BEFORE

C.L. SCOVEL **M.J. SUSZAN** **J.L. FALVEY**

UNITED STATES

v.

Brian W. FOMBY
Midshipman Second Class (MIDN 2/C), U.S. Navy

NMCCA 200301912 Decided 15 September 2005

Sentence adjudged 4 June 2003. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commandant, Naval District Washington, Washington, DC.

LCDR THOMAS BELSKY, JAGC, USNR, Appellate Defense Counsel
Maj J.ED CHRISTIANSEN, USMC, Appellate Defense Counsel
Maj RAYMOND BEAL II, USMC, Appellate Government Counsel
LCDR TIMOTHY CURLEY, 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 marijuana, wrongful distribution of marijuana, wrongful possession of marijuana with the intent to distribute, wrongful possession of lysergic acid diethylamide (LSD), and fleeing apprehension, in violation of Articles 81, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The appellant was sentenced to a dismissal, total forfeiture of all pay and allowances, confinement for five years, and a fine of $20,000.00. The convening authority (CA) approved the sentence as adjudged, but suspended the fine for 12 months from the date of trial.

In three assignments of error, the appellant alleges (1) that the CA's action failed to suspend confinement in excess of 21 months as required by the pretrial agreement; (2) that the wrongful distribution of marijuana and the wrongful possession of

marijuana with intent to distribute charges are multiplicious; and (3) that his sentence is 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. Arts. 59(a) and 66(c), UCMJ.

Failure to Suspend Confinement

In his first assignment of error, the appellant correctly contends that the CA failed to suspend confinement in excess of 21 months, as required by the pretrial agreement. Instead, he approved the sentence as adjudged, suspending only the fine. The Government concedes the error, but argues that the appellant was not prejudiced. The appellant has neither alleged, nor proved, that he was actually required to serve the confinement in excess of that called for in the pretrial agreement. Our review of the record similarly reveals no prejudice.

An accused who pleads guilty pursuant to a pretrial agreement is entitled to fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). Thus, the CA erred by failing to comply with the terms of the pretrial agreement.

Although the appellant claims no prejudice arising from this error and we find that the CA's error did not prejudice the appellant, he is entitled to an accurate court-martial order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim. App. 1998). We shall order corrective action in our decretal paragraph.

Multiplicity

In his second assignment of error, the appellant argues that Specifications 1 and 2 under Charge III (distribution of marijuana and possession of marijuana with intent to distribute) are multiplicious. Although the appellant did not object to the specifications at trial, he now claims that this constitutes plain error materially prejudicing a substantial right. We disagree.

First, the appellant waived his right to object because he failed to raise the issue at trial. *United States v. Lloyd*, 46 M.J. 19, 22-23 (C.A.A.F. 1997). Instead, the appellant unconditionally pled guilty at trial to the specifications in question. Record at 11-14; *Lloyd,* 46 M.J. at 23.

Second, although the appellant's waiver may be overcome by a showing of plain error, no such error occurred in this case.

United States v. Heryford, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Giles*, 58 M.J. 634, 642 (N.M.Ct.Crim.App. 2003), *rev'd on other grounds,* 59 M.J. 374 (C.A.A.F. 2004). To constitute plain error, an error must have "actually occurred," be "plain or obvious," and "materially prejudice[] the substantial rights of the accused." *Giles*, 58 M.J. at 642 (*citing United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)). For the failure to dismiss charges as multiplicious to constitute error it is necessary to show "that the charged offenses could be seen as 'facially duplicative,' that is, factually the same." *Lloyd,* 46 M.J. at 23. Consequently, the "facts apparent on the face of the record," may be used to determine a facially duplicative charge. *Id*. at 24.

The appellant premises his plain error argument on *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999), where our superior court found multiplicious convictions of distribution of marijuana and possession with intent to distribute the same marijuana on the same day. However, the appellant's case is distinguishable from *Savage*. In *Savage,* the accused was charged not only with possession and distribution on the same day, but also with possession and distribution of the same marijuana. *Savage*, 50 M.J. at 245.

In this case, although the appellant distributed "some amount of marijuana in a plastine baggie" prior to his apprehension, many additional baggies, separate and distinct from the distributed baggie of marijuana, remained in his possession. Prosecution Exhibit 1 at 3, 4. These additional baggies were not part of the substance that the appellant distributed. Rather, the appellant separately possessed them with the intent to distribute them.

We conclude that the appellant waived his right to object on multiplicity grounds because he unconditionally pled guilty without raising the issue at trial. RULE FOR COURTS-MARTIAL 905(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Moreover, we conclude that his present assignment of error does not overcome this waiver as plain error because, factually, there was no error and the charges were not multiplicious. The appellant possessed with intent to distribute a substantial quantity of marijuana separate from the small quantity distributed. Accordingly, we conclude that Specifications 1 and 2 of Charge III were independent of one another and not factually the same incident. There is no plain error necessary to overcome the appellant's waiver.

Sentence Severity

In his remaining assignment of error, the appellant asserts that that portion of his sentence adjudging confinement of five years and approving a sentence of twenty-one months confinement 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 no prior misconduct, he freely entered into a criminal conspiracy to distribute marijuana. The appellant's decision was not rash and uncalculated. Rather, he remained determined to carry out the object of the conspiracy for approximately one week, making substantial preparation toward commission of the crime by purchasing a substantial quantity of marijuana, subdividing it, packaging it, and transporting it. He then distributed a baggie of this marijuana and stood ready to continue doing so, possessing additional bags of marijuana. There is no evidence that, absent his apprehension, he was prepared to abandon his concerted effort to distribute marijuana. Moreover, at the time of his apprehension, which he attempted to avoid, he was found to be in possession of LSD, a dangerous hallucinogen. Considering all these circumstances and this offender, we do not find the sentence inappropriately severe and, therefore, decline to grant relief.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the CA. We direct that the supplemental court-martial order indicate that confinement in excess of 21 months was suspended for 12 months from the date of the CA's action.

Judge SCOVEL and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court