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

BEFORE

Charles Wm. DORMAN **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Antoine M. THOMAS
Seaman (E-3), U.S. Navy

PUBLISH
NMCCA 200401690 Decided 19 December 2005

Sentence adjudged 22 July 2004. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Transient Personnel Unit, Naval Submarine Base, Silverdale, WA.

CDR BRENT FILBERT, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
LT JESSICA HUDSON, JAGC, USNR, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of physically controlling a vehicle while impaired by marijuana, and wrongfully introducing marijuana onto an installation used by the armed forces, in violation of Articles 111 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 911 and 912a. The appellant was sentenced to a bad-conduct discharge, confinement for five months, and forfeiture of $750.00 pay per month for five months. Pursuant to a pretrial agreement, the convening authority approved the sentence as adjudged, but suspended all confinement over 90 days.

We have carefully considered the record of trial, the appellant's assignment of error that the military judge erred in accepting his guilty plea to the offense of wrongful introduction of a controlled substance because the appellant did not know he had entered a military installation, and the Government's response. We conclude that the appellant's guilty pleas are provident, 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.

Background

At 0027 hours on 10 June 2004, the appellant drove his Honda Accord on Military Road, Fort Lewis, Washington, about 45 minutes to an hour after he smoked a marijuana cigarette. The appellant prepared the cigarette from a stash of marijuana he had previously stored in a bag. The bag, containing a trace amount of marijuana, was in the appellant's car. A military police officer stopped the car after observing it execute an illegal U-turn, and the marijuana was discovered during a subsequent search of the vehicle. The appellant admitted during the providence inquiry and in a stipulation of fact, Prosecution Exhibit 1, that at the time he drove on Military Road on 10 June 2004, he was driving on a military installation, but was then unaware that he had entered onto military property.

Providence of the Appellant's Guilty Plea

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 ordinarily explain the elements of the offense, and must ensure that a factual basis for the plea exists. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002); *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); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. Acceptance of a guilty plea requires an appellant to substantiate the facts that objectively support the guilty plea. *United States v. Schwabauer*, 37 M.J. 338, 341 (C.M.A. 1993); R.C.M. 910(e).

> The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law or 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. The only exception to the general rule of waiver arises when an error prejudicial to the substantial rights of the appellant occurs. R.C.M. 910(j); Art. 59(a), UCMJ.

United States v. Dawson, 50 M.J. 599, 601 (N.M.Ct.Crim.App. 1999).

If, after entering a plea of guilty, an accused sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently, a plea of not guilty shall be entered in the record, and the court shall proceed as if the accused had pleaded not guilty. Article 45(a),

UCMJ. "Under the express language of Article 45, a military judge cannot allow a guilty plea to stand if the defense offers 'inconsistent' matter, even though clearly the accused and his counsel have made a sound tactical judgment that, in light of the evidence available to the prosecution, such a plea would be in the accused's best interest." *United States v. Clark*, 28 M.J. 401, 406 (C.M.A. 1989). "The fact that a stipulation of fact or other evidence would convince the factfinder of appellant's guilt beyond a reasonable doubt is not an adequate substitute when the accused interjects matter patently inconsistent with his plea." *United States v. Garcia*, 43 M.J. 686, 689 (A.F.Ct.Crim.App. 1995), *rev'd on other grounds*, 44 M.J. 496 (C.A.A.F. 1996).

Article 112a provides that "Any person . . . who wrongfully . . . introduces into an installation . . . used by or under the control of the armed forces a substance described in subsection (b) [marijuana] shall be punished as a court-martial may direct." *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37a(b)(1). The elements of this offense are "[t]hat the accused introduced onto a[n] . . . installation used by the armed forces a certain amount of a controlled substance; and . . . [t]hat the introduction was wrongful." *Id*. at ¶ 37b(4).

Introduction of a controlled substance is wrongful if it is without legal justification or authorization. *Id*. at ¶ 37c(5). Introduction of a controlled substance is not wrongful if it is done without knowledge of the contraband nature of the substance. *Id*. Introduction of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. *Id*. If the evidence raises an issue concerning the wrongfulness of the introduction of a controlled substance, the burden of proof is upon the Government to establish that the introduction was wrongful. *Id*.

After ruling that an accused need not actually know he entered an installation used by or under the control of the armed forces in order to be guilty of wrongful introduction of a controlled substance, the military judge accepted the appellant's guilty plea to this offense. Record at 38-39, 49. The issue of whether a person who knowingly possesses a controlled substance must have actual knowledge that he or she has entered an installation used by the armed forces or under the control of the armed forces in order to be guilty of the offense of wrongful introduction is one of first impression for our court. Our superior court does not appear to have addressed this issue either. It has, however, ruled that knowledge is an element of wrongful use and wrongful possession in *United States v. Mance*, 26 M.J. 244, 253 (C.M.A. 1988). Addressing the duty of a military judge to instruct court members in prosecutions for violations of Article 112a, the court wrote:

> In light of the earlier ambiguity in Manual provisions and in this Court's opinions concerning the treatment of knowledge, it is appropriate to state

> that, henceforth, in prosecutions for wrongful use or wrongful possession, the military judge should instruct the court members that, in order to convict, the accused must have known that he had custody of or was ingesting the relevant substance and also must have known that the substance was of a contraband nature -- regardless whether he knew its particular identity.

Id., at 256.

Although *Mance* involved use, not wrongful introduction, of a controlled substance, its holding appears to have influenced the wording of the model instruction for the offense of wrongful introduction in the Military Judges' Benchbook. The model instruction states that the second element of wrongful introduction is "[t]hat the accused actually knew (he)(she) introduced the substance." *See* Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at ¶ 3-74-4 (15 Sep 2002). The model instruction also states that the accused must be aware of the presence of the substance at the time of the introduction. *Id*.

If we were to treat the Military Judges' Benchbook model instruction for wrongful introduction as persuasive, the facts before us would lead us to hold that the appellant's plea to this offense was improvident. The Benchbook, however, is not legal authority. For that, we must examine other sources. Finding no military case law on point, we turn to interpretive decisions pertaining to a drug offense statute in the Federal Criminal Code that is analogous to Article 112a.

Section 860(a) of Title 21, U.S.C., enhances the penalty for "any person who violates section [841(a)(1) or section 856 of Title 21] by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility . . . ." 21 U.S.C. § 860(a).

In October 2002, the United States Court of Appeals for the Tenth Circuit affirmed a conviction in the United States District Court for the District of New Mexico for possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a). *United States v. Harris*, 313 F.3d 1228 (10th Cir. 2002), *cert. denied*, 537 U.S. 1244 (2003). In *Harris*, the appellant argued, *inter alia,* that his conviction was supported by insufficient evidence because the Government was not required to prove that he intended to distribute the cocaine base within 1,000 feet of a school. *Id*. at 1231.

In upholding the conviction in *Harris*, the Tenth Circuit reviewed other circuits' interpretations of 21 U.S.C. § 860(a). "Five of our sister circuits have previously addressed the precise issue before us today, and each has adopted a broad ruling of § 860(a) by holding that the government need only prove that the defendant possessed illegal drugs within 1,000 feet of a school and intended to distribute them *somewhere*. [emphasis in original]" *Id.* at 1238 (citing *United States v. Ortiz*, 146 F.3d 25, 28-30 (1st Cir. 1998); *United States v. Lloyd*, 10 F.3d 1197, 1218 (6th Cir. 1993); *United States v. Hohn*, 8 F.3d 1301, 1307 (8th Cir. 1993)); *United States v. McDonald* 991 F.2d 866, 868-71 (D.C. Cir. 1993); *United States v. Rodriguez*, 961 F.2d 1089, 1090-95 (3d Cir. 1992); *United States v. Wake*, 948 F.2d 1422, 1429-34 (5th Cir. 1991).

The Tenth Circuit found "the reasoning of [its] sister circuits persuasive and adopt[ed] it as the law of [its] circuit." *Harris*, 313 F.3d at 1239. The court then explained the legal analyses of its sister circuits that it found particularly compelling:

> First, we agree with the rationale espoused by the Sixth Circuit in *Lloyd*. There, the court held that because § 860(a) does not have a *mens rea* requirement, a jury need not find intent on the part of a defendant to distribute illegal drugs within 1,000 feet of a school. *Lloyd*, 10 F.3d at 1218; *see also Wake*, 948 F.2d at 1432 (citing *United States v. Falu*, 776 F.2d 46, 50 (2d Cir. 1985)("Our reading is consistent with a *strict liability* approach to the statute that recognizes Congress' intent to create a drug-free zone." (emphasis added)). We have likewise held that § 860(a) contains no knowledge requirement. *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993)(citation omitted). Given this, we believe that a defendant need not intend to distribute drugs within 1,000 feet of a school to be convicted under § 860(a).

Id.

In addition to the Tenth Circuit, we note that one of our sister service courts has previously found this same line of reasoning persuasive in its review of a conviction for wrongful introduction with intent to distribute. *See United States v. Dinzy,* 39 M.J. 604, 605-06 (A.C.M.R. 1994)(holding that a guilty plea to wrongful introduction with intent to distribute was provident, and that the actual location of the intended distribution was not critical because the intent to distribute was satisfied by proving an intent to distribute at some time in the future)(citing *United States v. Pitt*, 35 M.J. 478 (C.M.A. 1992)).

In *Dinzy*, the Army Court of Military Review consulted the Circuit Courts' interpretation of § 860(a) because neither the

UCMJ nor the Manual for Courts-Martial address where the actual distribution of a controlled substance is to take place in a case where introduction of the drugs onto a military installation with the intent to distribute is alleged. *Dinzy*, 39 M.J. at 605. We now find ourselves facing a similar dilemma, as neither the UCMJ nor the Manual for Courts-Martial address whether or not an individual who wrongfully possesses a controlled substance must have actual knowledge that he or she has crossed the boundary line of an armed forces installation in order to be guilty of the offense of wrongful introduction.

The court in *Dinzy* noted that "[t]here are obvious dangers arising out of the presence of drugs on a military installation, even when the possessor intends to distribute the drugs elsewhere. The gravamen of the offense of introduction with the intent to distribute is twofold: violating the integrity of a military installation's drug-free environment, and the presence on the installation of an individual who trafficks [sic] in illegal drugs for profit." *Dinzy*, 39 M.J. at 605.

Our view of the offense of wrongful introduction is similar to that of the Army court's view of the offense of wrongful introduction with intent to distribute. In the case before us, the appellant violated the integrity of a military installation's drug-free environment. Although he did not enter Fort Lewis to traffic in illegal drugs for profit, his offense nonetheless involved the presence on Fort Lewis of an individual who carried illegal drugs in his vehicle for a wrongful purpose. Although the appellant did not know at the time of the offense that he had crossed the boundary line of Fort Lewis, we do not view ignorance of an installation boundary's exact location as creating an exception to the proscription against wrongful introduction in Article 112a.

The United States Court of Appeals for the Fifth Circuit expressed a similar view in its analysis of §860(a). "[O]ur reading is consistent with a strict liability approach to the statute that recognizes Congress' intent to create a drug-free zone." *Wake*, 948 F.2d at 1432 (citing *Falu*, 776 F.2d at 50). "Further, Congress chose not to include exceptions in the statute for conduct that some might argue presented no direct danger to schoolchildren. Rather, it placed the burden on drug dealers to ascertain their proximity to schools. It adopted enhanced penalties to deter persons from bringing drugs within the prohibited zone in a sufficient quantity to evidence an intent to distribute. We will not, indeed cannot, second-guess Congress' decision not to exempt certain conduct related to the evil it sought to prevent." *Id*. at 1433.

In the absence of specific guidance in the UCMJ and Manual for Courts-Martial, as well as a lack of case law on the issue before us, we adopt a similar strict liability approach to the offense of wrongful introduction. Therefore, we conclude that

appellant’s guilty plea to the offense of wrongful introduction was provident.

Conclusion

We therefore affirm the findings and the sentence, as approved by the convening authority.

Chief Judge DORMAN and Senior Judge WAGNER concur.

For the Court

R.H. TROIDL
Clerk of Court