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

BEFORE

C.L. CARVER **D.A. WAGNER** **J.F. FELTHAM**

UNITED STATES

v.

Michael M. GLAZEBROOK
Aviation Machinist's Mate Airman (E-3), U.S. Navy

NMCCA 200500701 Decided 29 September 2005

Sentence adjudged 17 December 2004. Military Judge: R.C. Klant. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Strike Fighter Squadron ONE FIVE ONE, Lemoore, CA.

LCDR RICARDO BERRY, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY S. YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT R. W. WEILAND, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use and distribution of cocaine, marijuana, and psilocybin mushrooms, all in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, reduction to pay grade E-1, and confinement for 80 days. The convening authority (CA) approved the sentence as adjudged. A pretrial agreement had no effect.

The appellant asserts four assignments of error. The appellant claims that the military judge erred in accepting his guilty pleas to the words "on divers occasions" in the specification involving distribution of cocaine. He also alleges error by the military judge in accepting his plea of guilty to distribution of marijuana. The appellant further claims that the court-martial order (CMO) incorrectly lists forfeitures as part of the adjudged sentence and that the convening authority's

action (CAA) purports to order the bad-conduct discharge executed.

Improvident Plea

In order to be provident, a plea of guilty must be " knowingly, intelligently and consciously entered and is factually accurate and legally consistent." *United States v. Watkins*, 35 M.J. 709, 712 (N.M.C.M.R. 1992)(citing *United States v. Sanders,* 33 M.J. 1026 (N.M.C.M.R. 1991)). Not only must the accused be convinced of his guilt, he must be "able to describe all the facts necessary to establish guilt." RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Discussion. The military judge is required to question the accused in order to establish a factual basis for his pleas. *United States v. Chambers*, 12 M.J. 443, 444 (C.M.A. 1982); *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969); *United States v. Williamson*, 42 M.J. 613, 615 (N.M.Ct.Crim.App. 1995).

In reviewing a guilty plea, we must determine 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). In the absence of an error prejudicial to the substantial rights of the appellant, we will require the appellant to "overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty." *United States v. Dawson,* 50 M.J. 599 (N.M.Ct.Crim.App. 1999).

In the case before us, the appellant entered into a stipulation of fact, Prosecution Exhibit (PE) 1, that was used by the military judge to determine the factual basis for the guilty pleas. Once accepted into evidence, a stipulation of fact cannot be contradicted by either party. PE 1 reveals that the appellant distributed cocaine to two friends, Airman (AN) B and AN M, on one occasion. During the military judge's inquiry into the providence of his pleas, the appellant also stated that he had distributed cocaine to AN B and AN M. In response to the military judge's question "So that was on two different occasions?" the appellant then responded "Yes, sir." Record at 41. This cursory response, without additional facts, is insufficient to call into question the clear statement contained in PE 1 that the distribution to AN B and AN M was on just this one occasion. The military judge, however, found the appellant guilty of distribution of cocaine on divers occasions, as alleged in the specification. We do not find the language "on divers occasions" to be factually supported in the record. We will take corrective action in our decretal paragraph.

The providence inquiry also revealed that the appellant was sitting with a group of friends at a party when someone pulled out a marijuana cigarette, lit it, and then passed it around the group. When the cigarette came to the appellant, he took two "hits" from it and then passed the cigarette on to the next person. From this set of facts, the military judge found the

appellant guilty of separate specifications of use and distribution of marijuana. The appellant now claims that the plea was improvident because the group of drug users "jointly" took possession of the marijuana and, therefore, the use and distribution by the appellant are not distinctly separate crimes. We disagree.

The appellant urges us to apply the rationale used by the United States Court of Appeals, Second Circuit, in *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977):

> Similarly, where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse - simple joint possession, without any intent to distribute the drug further. Since both acquire possession from the outset and neither intends to distribute the drug to a third person, neither serves as a link in the chain of distribution. For purposes of the Act they must therefore be treated as possessors for personal use rather than for further distribution. Their simple joint possession does not pose any of the evils which Congress sought to deter and punish through the more severe penalties provided for those engaged in a "continuing criminal enterprise" or in drug distribution.

We are not persuaded that the holding in *Swiderski* should be applied to the facts of the case before us. The precise issue resolved in their favor by the United States Court of Appeals for the Second Circuit was "whether a statutory 'transfer' may occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." *Swiderski*, 548 F.2d at 449.

This court has followed the lead of our superior court in rejecting similar arguments based on the *Swiderski* rationale as it pertains to similar offenses under Article 112a, UCMJ. *United States v. Manley*, 52 M.J. 748, 750 (N.M.Ct.Crim.App. 2000)(citing *United States v. Ratleff,* 34 M.J. 80, 82 (C.M.A. 1992). The holding in *Swiderski* is limited to "the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use." *Swiderski*, 548 F.2d at 450-51.; *see also United States v. Oestmann*, 60 M.J. 660, 666 (N.M.Ct.Crim.App. 2004); *United States v. Hill*, 25 M.J. 411, 412-14 (C.M.A. 1988).

Whereas Swiderski and his fiancee had earlier purchased the cocaine together and, thereby, acquired joint possession, there is no evidence in the appellant's case that the individual he passed the marijuana cigarette to had previously acquired any possessory interest in the marijuana. In short, there is no evidence of any "joint" possession of the joint prior to the

distribution. In any case where *Swiderski* is applied, there must be some evidence of such joint possession prior to the distribution. Where the possessory interest predates the distribution, we will apply the *Swiderski* analysis. In a case such as the one at bar, where the evidence indicates only that the possessory interest resulted from the distribution, that analysis is inapplicable.

Here, there is no evidence that the group of party-goers who used marijuana with the appellant ever formed a venture to jointly take possession of the marijuana. On the contrary, the appellant's statements to the military judge and the stipulation of fact, PE 1, clearly support a factual predicate for both marijuana use and distribution. The appellant admitted to taking two "hits" from the marijuana cigarette, factually supporting his plea of guilty to use of marijuana. The appellant also states that he passed the marijuana cigarette on to another person, thereby providing a factual basis for his plea of guilty to distributing the marijuana. There is simply no evidence pointing to "joint" possession of the marijuana among the party-goers as the appellant now claims on appeal. We conclude that the appellant's guilty plea to distribution of marijuana was provident.

CMO and CAA Error

The appellant accurately points out that the CMO lists forfeitures as part of the adjudged sentence. This is in error in that no forfeitures were in fact awarded by the military judge in this case. The appellant also correctly points out that the CAA purports to execute the bad-conduct discharge. This, also, is in error. A convening authority is without power to order a bad-conduct discharge executed. That portion of the convening authority's action is a nullity. *United States v. McGee*, 30 M.J. 1086, 1088 (N.M.C.M.R. 1989); *see also United States v. Olinger*, 45 M.J. 644, 647 (N.M.Ct.Crim.App. 1997).

Conclusion

We affirm the findings, as approved by the convening authority, except for the language "on divers occasions" in Specification 4 of Charge II. Upon reassessment, we find that the sentence would have been no different even in the absence of the excepted language. The sentence, as approved by the convening authority, is affirmed. We direct that the

supplemental court-martial order accurately reflect the appellant's sentence.

Senior Judge CARVER and Judge Feltham concur.

For the Court

R.H. TROIDL
Clerk of Court