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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

Steven R. ADAMCZYK, Jr.
Private First Class (E-2), U.S. Marine Corps

NMCCA 200100020 Decided 12 October 2004

Sentence adjudged 7 September 1999. Military Judge: R.K. Fricke. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base Hawaii, Kaneohe Bay, HI.

LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

Pursuant to his pleas, the appellant was convicted of conspiracy to distribute methamphetamine (two specifications), unauthorized absence, wrongful use of cocaine, methamphetamine, and marijuana, wrongful distribution of methamphetamine (two specifications), and wrongful distribution of cocaine, in violation of Articles 81, 86, 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, and 912a. A military judge sitting as a general court-martial sentenced the appellant to confinement for six years, reduction to pay grade E-1, total forfeiture of pay and allowances, and a dishonorable discharge. The convening authority approved the sentence as adjudged, but in accordance with a pretrial agreement suspended confinement in excess of 18 months for a period of 12 months from the date of sentencing.

The appellant has asserted that the two specifications of conspiracy fail to state an offense as to one of the co-conspirators who is listed as a "cooperating witness." Charge Sheet. Focusing on the same cooperating witness in the same

specifications, the appellant also contends that his guilty pleas were improvident concerning any criminal agreement with that person. Finally, the appellant argues that the sentence is inappropriately severe.

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

Conspiracy with Government Agents

As to Additional Charge I, Specification 1, the appellant pleaded guilty to conspiring with Phillip Walls, Justin Haley and Helen Yunko to wrongfully distribute methamphetamine. As to Specification 3 of that Charge, he pleaded guilty to the same offense on a different day, except that Helen Yunko was not part of that conspiracy. As explained by the appellant during the providence inquiry, Phillip Walls was the "cooperating witness" in both incidents. The military judge alertly addressed the involvement of Walls during the providence inquiry. He correctly explained to the appellant that there could be no conspiracy with a Government agent. However, in entering guilty findings, the military judge neglected to except the cooperating witness from the specifications.

It is now well-settled 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), a decision released one week before the military judge conducted the providence inquiry in this case. Therefore, absent some information that Walls was not acting as a Government agent at the time of the criminal agreements, the appellant could not, as a matter of law, enter provident pleas of guilty to conspiracy with Walls. Finding no such information in the record, we concur with this assignment of error. However, as conceded by the appellant in his briefs, the guilty pleas are provident as to the remaining co-conspirator(s). We will provide relief in our decretal paragraph.

Conclusion

We have considered the remaining assignments of error and find them lacking in merit. We specifically conclude that the sentence is appropriate for this offender and his offenses. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

We except the words "the cooperating witness," from Specification 1 of Additional Charge I, and do likewise for the

words “the cooperating witness and” from Specification 3 of the same Charge. The excepted language is set aside and dismissed. Otherwise, the findings 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). As reassessed, we conclude that the sentence is both appropriate and free of all prejudice by the trial error. As approved by the convening authority, the sentence is affirmed.

Judge HEALEY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court