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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Jason L. DANLEY
Machinist's Mate Third Class (E-4), U.S. Navy

NMCCA 200200979 Decided 22 January 2004

Sentence adjudged 8 November 2001. Military Judge: R.C. Adamson. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, USS ABRAHAM LINCOLN (CVN 72).

Capt RICHARD A. VICZOREK, USMCR, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Pursuant to his pleas, the appellant was convicted of attempted distribution of methamphetamine, conspiracy to distribute a controlled substance, false official statement, and wrongful use of methamphetamine, in violation of Articles 80, 81, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 907, and 912a. A military judge sitting as a special court-martial sentenced the appellant to confinement for 90 days and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant contends that: (1) his guilty plea to conspiracy was improvident because the parties did not agree on the object of the conspiracy; (2) his guilty pleas to conspiracy and attempted distribution of methamphetamine were improvident because the military judge failed to explain the elements of the underlying offense of wrongful distribution; and (3) the military judge erred in accepting the guilty plea to conspiracy because of an unresolved factual discrepancy between one of the charged overt acts and the providence inquiry colloquy.

We have carefully considered the record of trial, the assignments of error, and the Government's response. With one minor exception, 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.

Background

After the appellant was sworn, the military judge ascertained that there was no stipulation of fact to assist him in conducting the providence inquiry.[1] The military judge then explained the two elements for the crime of conspiracy (Charge I) and specifically advised the appellant that the object of the charged conspiracy was wrongful distribution of methamphetamine. After brief questioning of the appellant about those elements, the military judge explained the elements of false official statement and wrongful use of methamphetamine. Finally, he explained the elements of the offense of attempt (Charge III, Specification 2), and specifically stated that the intended offense was distribution of methamphetamine. Of note, the military judge never explained the elements of wrongful distribution of methamphetamine, the underlying offense of the charged conspiracy and attempt.

The military judge then questioned the appellant about the facts of the offenses. We note that the majority of the judge's questions were non-leading, open-ended questions which the appellant answered freely, without difficulty. In doing so, the appellant explained, in pertinent part, that Fireman Apprentice (FA) Joseph Kamely, U.S. Navy, approached him and proposed that they sell methamphetamine to Dentalman (DN) Rob Creighton, U.S. Navy. FA Kamely asked the appellant to drive him to a distant location so that they could sell the drug and split the proceeds from the sale. The appellant agreed to do so, and the two Sailors drove to meet with DN Creighton. The appellant saw a small quantity of white powder in a small Ziploc plastic bag in FA Kamely's possession, which he believed to be methamphetamine. When they arrived at the appointed location, FA Kamely got out of the appellant's car and stepped into DN Creighton's car, where the transaction occurred. FA Kamely returned to the appellant's car and gave the appellant his share of the money. Later, laboratory testing revealed that the white powder was not methamphetamine, but caffeine.

[1] While not required in a guilty plea case, a stipulation of fact can be most helpful in verifying the factual basis during the providence inquiry.

During the providence inquiry colloquy, the military judge defined the term "distribution" as delivering to the possession of another, and the term "deliver" as the actual, constructive, or attempted transfer of an item. The record indicates that the appellant understood those key terms.

After the military judge accepted the appellant's pleas, the appellant gave an unsworn statement in which he said, "I realize what I did was wrong," and expressed remorse for his offenses. Record at 45.

Agreement on Object of Conspiracy

The appellant asserts that facts raised during the providence inquiry support a conclusion that FA Kamely did not intend to distribute methamphetamine to DN Creighton, but rather intended to deceive DN Creighton by passing off caffeine as methamphetamine and thereby steal the purchase money from him (apparently inferring that caffeine is worth far less than methamphetamine). Since the appellant told the military judge that he thought the substance was methamphetamine and that their agreement was to sell that methamphetamine, he now contends that there was a factual conflict with his pleas to the conspiracy charge.

Based on our review of the record, this argument fails because the factual premise is not supported by the providence inquiry. The argument that FA Kamely really intended to commit larceny by trick rests upon his willingness to split the monetary proceeds 50-50 with the appellant. This is asserted to be a "great profit" for the appellant under the circumstances, and indicative of deception on FA Kamely's part. Appellant's Brief of 14 Oct 2003 at 7. We conclude that this assertion is nothing more than speculation. The military judge had no obligation to conduct a fishing expedition where the facts reasonably indicated that FA Kamely thought he had methamphetamine and intended to make some money by selling it. "We must again decline the invitation of the defense to speculate post-trial as to the existence of facts which might invalidate an appellant's guilty pleas." *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). This assignment of error has no merit.

Failure to Explain Elements of Underlying Offense

Because the military judge failed to explain the elements of the offense of wrongful distribution of methamphetamine, the appellant argues that his pleas to the offenses of conspiracy and attempt were improvident. We disagree.

In conducting a providence inquiry under the Uniform Code of Military Justice, the military judge must explain the elements of the offense, including any underlying offenses for inchoate offenses such as conspiracies and attempts. If the military judge fails to do so, he commits reversible error unless the entire record clearly shows that the appellant knew the elements, freely admitted that those elements were true, and pleaded guilty because he was, in fact, guilty. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003). "Rather than focusing on a technical listing of the elements of an offense, this Court looks at the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially." *Id.*

In this case, the military judge erred by failing to explain the elements of wrongful distribution of methamphetamine, the underlying offense in both Charge I and Charge III, Specification 2. Under the Manual for Courts-Martial, there are two elements for this offense: (1) that the accused distributed a certain amount of a controlled substance; and (2) that the distribution by the accused was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) Part IV, ¶ 37b(3). This is not a complex offense. The only concept that could be confusing under the facts of this case is that of "distribution," a word that may not be part of the vocabulary of an average drug dealer. However, the military judge provided a complete definition of that concept to the appellant. Moreover, when viewing the record as a whole, we find that the appellant understood the concept of distribution, as well as the other concepts and elements of the offense of wrongful distribution.

While we find no reversible error due to the failure to explain the elements, this providence inquiry is not a model for emulation in the field. We decline to speculate as to how and why the military judge got off track in this case, but based upon our collective experience on the trial bench, we recommend that military judges read the elements for all offenses, including underlying offenses such as we have in this case, *before* engaging the appellant in any colloquy. If necessary, the elements for an offense could later be repeated for the benefit of the accused.

Discrepancy Between Pleas and Providence Inquiry

Finally, the appellant contends that the military judge erred by accepting the appellant's pleas to that part of Charge I alleging an overt act of distribution of methamphetamine because the substance was, in reality, caffeine. We agree, but find no material prejudice to the appellant.

In pertinent part, the Specification of Charge I states, "[FA Kamely] wrongfully distributed to the said [DN Creighton] approximately one-tenth of an ounce of methamphetamine." Charge Sheet. In fact, based on the providence inquiry, the specification should read "one-tenth of an ounce of *purported* methamphetamine." We will take corrective action in our decretal paragraph. The appellant has not requested sentence relief, and we conclude that none is warranted given the lenient sentence in this case tried before a military judge.

Conclusion

In Charge I, the Specification, the word "methamphetamine" is excepted, and the words "purported methamphetamine" are substituted therefore. With that caveat, the findings are affirmed. Out of an abundance of caution, we have reassessed the sentence in accordance with the principles set forth in *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998) and conclude that the sentence as approved by the convening authority is both appropriate and free of any potential prejudice caused by the trial error. Thus, the sentence is affirmed.

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court