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

BEFORE

C.L. CARVER **W.L. RITTER** **R.W. REDCLIFF**

UNITED STATES

v.

Fidel MACHADO, Jr.
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200201112 Decided 27 May 2004

Sentence adjudged 8 May 2001. Military Judge: R.H. Kohlmann. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Division, Camp Lejeune, NC.

Capt JAMES VALENTINE, USMC, Appellate Defense Counsel
Capt WILBUR LEE, USMC, Appellate Government Counsel
LT JASON LIEN, JAGC, USNR, Appellate Government Counsel

REDCLIFF, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of possession and introduction of ecstasy with intent to distribute, wrongful solicitation of another Marine to possess ecstasy, and breaking restriction, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to confinement for 3 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. The pretrial agreement had no effect on the approved sentence.

We have carefully examined the record of trial and the appellant's three assignments of error alleging that the offenses of possession of ecstasy with intent to distribute and solicitation of another to possess ecstasy were multiplicious or an unreasonable multiplication of charges, that the promulgating order and convening authority's (CA) action are defective, and that his sentence is too severe. We have also considered the

Government's response. We have concluded 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. However, we will direct correction to the promulgating order as reflected in our decretal paragraph.

Multiplicity & Unreasonable Multiplication of Charges

In his first assignment of error, the appellant alleges that the offense of possession of ecstasy with intent to distribute is multiplicious with the offense of solicitation of another to possess the substance. In the alternative, he argues that the two constitute an unreasonable multiplication of charges. We disagree.

Around Christmas of 2000, the appellant purchased 65 ecstasy pills in New York City, intending to bring them with him on deployment to Marine Corps Base, Twenty-Nine Palms (29 Palms) to share with other Marines. He repackaged the pills from a plastic bag into a "Motrin" bottle. On 12 January 2001, he deployed with his unit to 29 Palms for a combined arms exercise (CAX) and brought the ecstasy with him onto the base. Six days later, on 18 January 2001, the appellant approached another Marine (Lance Corporal "M") in the mess hall and told him that he (the appellant) had some "X" (slang for ecstasy). The appellant then asked Lance Corporal (LCpl) "M" if he knew anyone who wanted to "trip" with him, which was intended as an invitation to use ecstasy with the appellant. Record at 35. Lance Corporal "M" told the appellant, "Sure. Sure. I'll get back to you." *Id*. at 28. Instead, LCpl "M" reported this offer to appropriate authorities. Shortly thereafter, the appellant was confronted by his first sergeant, who asked if the appellant tried to sell ecstasy. The appellant denied the accusation but consented to a search of his person. When the pills were discovered in the Motrin bottle by the first sergeant, the appellant stated that they were ecstasy, which was later confirmed by laboratory tests. *Id*. at 22-23.

The appellant entered unconditional guilty pleas, which normally result in a forfeiture of any claims of multiplicity. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). The only recognized exception is that charges may not be "facially duplicative." *Id*. In *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999), our superior court held that possession of marijuana with intent to distribute is a recognized lesser included offense of distribution of that substance and that prosecution for both offenses was prohibited when both offenses occurred on the same day. The CAAF reasoned that distribution of a controlled substance necessarily includes possession with intent to distribute it. *Id*. at 245. As to the case at bar, we find that the offense of possession with intent to distribute a controlled substance is not necessarily included with the

subsequent offense of solicitation of another person to possess that controlled substance. Nor do we believe that solicitation is a lesser included offense of possession with intent to distribute or that these two offenses are facially duplicative. We hold, therefore, that the appellant forfeited the issue of multiplicity by failing to raise it at trial.

Even if we did not apply forfeiture, we would still rule against the appellant. In short, the elements of these offenses are different, and each offense proscribes different criminal conduct. *United States v. Weymouth*, 43 M.J. 329 (C.A.A.F. 1995); *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993). The acts in this case involve the appellant's possession and introduction of ecstasy with the intent to distribute it. These two offenses were completed by the time the appellant arrived on board 29 Palms, although the appellant continued to possess the ecstasy for six days after its introduction. While his solicitation of another Marine to take possession of some of the illicit substance several days after the ecstasy was introduced is related to the purported purpose for the appellant's possession, it was the next logical step in furtherance of that intent and not necessary to it.

Though the charges may not be multiplicious, they may nevertheless constitute an unreasonable multiplication of charges. *United States v. Quiroz*, 53 M.J. 600, 605 (N.M.Ct.Crim.App. 2000). We evaluate five factors in determining the issue of unreasonable multiplication of charges: (1) Did the appellant object at trial; (2) Is each specification aimed at distinctly separate criminal acts; (3) Does the number of specifications misrepresent or exaggerate the appellant's criminality; (4) Does the number of specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition).

We find that none of the five factors support the appellant's contention of UMC in this case. The appellant did not object to the charges as being unreasonably multiplied at trial; each offense is aimed at distinctly separate criminal acts; the number of specifications do not misrepresent or exaggerate the appellant's criminality; the number of specifications do not unreasonably increase the appellant's punitive exposure; and there is no evidence of prosecutorial overreaching. We hold that the charges in question are neither multiplicious nor unreasonably multiplied. This assignment of error is without merit.

Convening Authority's Action and Promulgating Order

The appellant asserts in his second assignment of error that the convening authority's action and promulgating order are

defective because they were based on erroneous information reflected in the staff judge advocate's recommendation (SJAR). Specifically, the SJAR reported that the appellant pled "not guilty" to the wrongful solicitation offense. Although the appellant originally pled "not guilty" to this offense, he changed his plea to "guilty" after arraignment. Record at 29-30. The appellant now requests that we disapprove his punitive discharge and return the record for a new SJAR and convening authority's action. We decline to grant the relief requested.

Ordinarily, a trial defense counsel's failure to comment on errors or omissions in the SJAR forfeits the issue, absent plain error. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Lugo*, 54 M.J. 558, 560 (N.M.Ct.Crim.App. 2000*).* "To succeed under a plain error analysis, appellant has the burden of establishing that there was plain or obvious error that 'materially prejudiced' his 'substantial rights.'" *United States v. Reist*, 50 M.J. 108, 110 (C.A.A.F. 1999)(quoting Art. 59(a), UCMJ). Moreover, when raising error in the post-trial review process, in addition to alleging error, the appellant must allege prejudice as a result of the error, and must show what he would do to resolve the error if given such an opportunity. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

Assuming that the incorrect plea reflected in the SJAR was error, we do not find plain error because the appellant has not shown that he was prejudiced. *See United States v. Ortiz,* 52 M.J. 739, 740 (N.M.Ct.Crim.App. 2000). The trial defense counsel acknowledged receipt of a copy of the SJAR. In a post-trial submission requesting clemency, the trial defense counsel did not challenge or object to the SJAR, thereby supporting an inference that any error committed was of minimal consequence. *See United States v. Grandy*, 11 M.J. 270, 275 (C.M.A. 1981) (holding defense failure to challenge prosecution comments supports inference that comments were of little consequence even if erroneous).

Considering his military background, the serious nature of his offenses, and the pretrial agreement in this case (that would have suspended confinement in excess of five years), we find no possibility that the appellant would have received a more favorable action from the convening authority had the SJAR correctly reflected the changed plea to the offense charged. Furthermore, in taking action on the case, the convening authority expressly considered the record of trial and the results of trial, both of which correctly report the appellant's pleas and the findings. While the appellant suffered no prejudice from the SJAR's misstatement of his plea, he is nonetheless entitled to have his official records correctly reflect the results of his court-martial proceedings. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Although not raised as error, we also note that the promulgating order fails to comply with RULE FOR COURTS-MARTIAL 1114(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). The appellant is entitled to a promulgating order that sets out the charges and specifications, or accurately summarizes the offenses of which he was convicted. We find that the promulgating order did not meet this requirement and will direct corrective action in our decretal paragraph. *United States v. Glover,* 57 M.J. 696, 698 (N.M.Ct.Crim.App. 2002).

Sentence Appropriateness

In his third and final assignment of error, the appellant contends that his sentence was inappropriately severe and that his dishonorable discharge should be disapproved or his sentence reassessed. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The offenses committed by the appellant were indeed serious and deserving of severe punishment--he introduced and possessed a large quantity of ecstasy on board Marine Corps Base, Twenty-Nine Palms, with the intent to distribute the illicit substance to other Marines participating in combined arms, live-fire exercises. In addition to the aggravating factors presented at trial, including the appellant's prior nonjudicial punishment, we have also carefully considered the mitigating factors raised during trial and during post-trial review to include the appellant's purported lack of a profit motive in procuring ecstasy with the intent to provide it to others "to trip" with him. Record at 22. After careful reflection, we find that the adjudged and approved sentence, well below the maximum allowable by law,[1] was not inappropriately severe under the circumstances of the appellant's case. We decline to grant relief.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority. We order that the supplemental promulgating order accurately summarize the pleas

[1] The maximum authorized sentence included dishonorable discharge, confinement for 35 years and one month, reduction to pay grade E-1, and total forfeiture of pay and allowances.

and findings of the offenses of which the appellant was convicted.

Senior Judge CARVER and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court