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.

Matthew R. WALTHER
Seaman Recruit (E-1), U.S. Navy

NMCCA 200201526 Decided 26 August 2004

Sentence adjudged 25 January 2002. Military Judge: C.A. Porter. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Submarine Group 10, Kings Bay, GA.

LT REBECCA S. SNYDER, JAGC, USNR, Appellate Defense Counsel
LT LARS C. JOHNSON, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, consistent with his pleas, of failure to go to his appointed place of duty, violation of a general order (two specifications), wrongful use of marijuana (three specifications), wrongful possession of marijuana with the intent to distribute, wrongful introduction of marijuana with the intent to distribute, larceny of two blank checks, and larceny of $600.00 from the Navy Federal Credit Union. The appellant's offenses violated Articles 86, 92, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 912a, and 921. The military judge sentenced the appellant to confinement for 18 months, forfeiture of all pay and allowances, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended confinement in excess of 240 days.

The appellant has assigned the following two errors: (1) wrongful possession of marijuana with intent to introduce (Charge III, Specification 5) is multiplicious with wrongful introduction (Charge III, Specification 6); and, (2) the military judge committed prejudicial error by allowing a witness in aggravation to testify, over objection, that the appellant "has

no place in the military." Record at 93-94. We have carefully considered the record of trial, the assignments of error, and the Government's response. We conclude that both assignments of error have merit and will provide relief on the findings and the sentence. Otherwise, the findings and, as reassessed, the sentence, are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Multiplicity of Possession and Introduction of Marijuana

The appellant entered unconditional pleas of guilty to wrongful possession of five packets of marijuana with the intent to introduce and wrongful introduction of the same five packets, both on 2 November 2001. He admitted that each of these offenses was committed with the intent to distribute the marijuana to friends. He purchased the marijuana in the Jacksonville, Florida area and later brought it aboard Naval Submarine Base, Kings Bay, Georgia. We judicially note that the average driving time between Jacksonville and Kings Bay is one hour or less. Neither the providence inquiry nor the stipulation of fact revealed the times of day that the appellant took possession of the marijuana, introduced it aboard the base, or relinquished possession. We only know that both offenses occurred on 2 November 2001.

Normally, an unconditional guilty plea waives a multiplicity issue. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000); *United States v. Chambers*, 54 M.J. 834, 835 (N.M.Ct.Crim.App. 2001). However, when the specifications are facially duplicative, waiver does not occur. *United States v. Lloyd*, 46 M.J. 19, 20 (C.A.A.F. 1997); *Chambers*, 54 M.J. at 835. In determining whether two specifications are facially duplicative, we consider the language of the specifications and facts apparent on the face of the record to see if the charged offenses are "factually the same." *Heryford*, 52 M.J. at 266.

In *Heryford*, our superior court concluded that possession and introduction were not multiplicious because the record indicated that the appellant possessed the drug off base for two days before bringing it on board the base. The court then noted that during that period, the appellant "was at liberty to use it himself, destroy it, or distribute all or any part of it to anyone." *Id.* at 267. Based on those facts, the court found that possession occurred independent from the introduction. The court then held that Heryford's unconditional guilty pleas waived the issue of multiplicity.

We distinguish *Heryford* based on the facts of this case. So far as we can tell from the sparse factual record,[1] the appellant

[1] The stipulation of fact provides very few facts; it simply states the elements of the offenses. Such a stipulation of fact offers little assistance to military judges and appellate courts. The providence inquiry is best described as a "bare-bones" colloquy that provides few details.

bought the marijuana in Jacksonville and proceeded directly to Kings Bay. Based on the absence of contrary information, we presume that the possession ended thereafter on the same date. Thus, the two offenses were committed within hours of each other. We are not willing to rely on *Heryford's* two-day period of possession and conclude that the appellant's offenses were committed independent of each other on the same date.

The Government argues that the fact that the marijuana was obtained in Florida and introduced in Georgia is critical in concluding that the offenses are separate and distinct. Given the brief travel time involved, we disagree. Had the marijuana been purchased in Miami and introduced at Kings Bay, we might accept the Government's argument. The Government also argues that the appellant possessed the marijuana "for a substantial period of time" before introducing it onto the base. Government's Brief of 29 Jul 2003 at 4. Unfortunately, no basis for this argument is offered. Based on our review of the record, we find no reason to believe that the appellant possessed the marijuana for a substantial period of time either before or after the introduction.

We hold that it was plain error for the military judge to find the appellant guilty of both offenses. *See United States v. Savage,* 50 M.J. 244, 245 (C.A.A.F. 1999); *United States v. Harwood*, 46 M.J. 26, 28-29 (C.A.A.F. 1997). In combination with the other assignment of error, we will reassess the sentence. However, we must also provide relief as to findings to remove the stigma of an unwarranted conviction. *Id.* We will dismiss Specification 5 of Charge III and merge that offense of possession with the offense of introduction under Specification 6 of Charge III.

Improper Testimony in Aggravation

The appellant next contends that the military judge abused his discretion in allowing the Government to offer improper opinion testimony of lack of rehabilitative potential. We agree.

During the Government's case in aggravation, Senior Chief Missile Technician (MTCS) Gary F. Aston testified. He was the leading chief petty officer for the appellant during his training at the Trident Training Facility in Kings Bay, Georgia. MTCS Aston described the appellant's numerous minor disciplinary infractions and related counseling sessions, as well as administrative sanctions taken, including loss of privileges and extra military instruction. He also explained that the appellant was eventually taken to Captain's Mast and sent to the correctional custody unit to try to salvage him. Then followed this exchange between the trial counsel and MTCS Aston:

> TC: Based on the efforts that you've made in the past, do you have an opinion whether, through some other

rehabilitative mechanism, Seaman Recruit Walther could be restored?
WIT: Restored to what?

TC: Well, be -- through -- either training, or through some other corrective measures, he would be brought back to be a good Sailor?

TDC: Objection, Your Honor. Proper testimony regarding rehabilitative potential relates to rehabilitative potential in society, not the military. There is no foundation that this witness can testify as to Seaman Recruit Walther's rehabilitative potential in society, vice the military, sir.
MJ: Overruled.

TC: Could you state your opinion?
WIT: In my professional opinion, *he has no place in the military*. He was given numerous chances, more than most students ever get, and he continued to promise and promise that he would straighten up, do what he needed to do, and he never did it. His actions were a lot louder than his words, and *I see no place for him in the military at all*.

Record at 93-94 (emphasis added.).

To put it simply, the trial defense counsel was right. The military judge was wrong. RULE FOR COURTS-MARTIAL 1001(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) defines "rehabilitative potential" as the accused's potential to be restored to a "useful and constructive place in society." *See United States v. Horner*, 22 M.J. 294, 295-96 (C.M.A. 1986). Such testimony as given by MTCS Aston amounts to a euphemism for a recommendation to impose a punitive discharge and has been condemned as an invasion of the sentencing province of the court-martial. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989). We conclude that the military judge erred in admitting this testimony over objection.

In testing for prejudice, we note that MTCS Aston was the primary witness in aggravation, and that through him, much evidence of other uncharged offenses was paraded before the court, evidence that was arguably inadmissible. In addition, the trial counsel relied on MTCS Aston's testimony in his argument on sentencing. Finally, the military judge sentenced the appellant to nearly twice as much confinement (18 months) as the trial counsel argued for (300 days). Based on our review of the entire record, we cannot presume that the military judge ignored the improper testimony in adjudging the sentence. Therefore, we conclude that the admission of MTCS Aston's improper testimony of lack of rehabilitative potential was prejudicial error.

Conclusion

We modify Specification 6 of Charge III to read as follows:

> In that Seaman Recruit Matthew R. Walther, U.S. Navy, TRIDENT Training Facility, Naval Submarine Base, Kings Bay, Georgia, on active duty, did, at Naval Submarine Base, Kings Bay, Georgia, on or about 02 November 2001, wrongfully possess, and introduce, five yellow envelopes containing Marijuana, onto a vessel, aircraft, vehicle, or installation used by the armed forces or under control of the armed forces, to wit: Naval Submarine Base, Kings Bay, Georgia, with the intent to distribute the said controlled substance.

The finding of guilty of Specification 5 of Charge III is set aside and that specification is dismissed. The remaining findings are affirmed.

We have reassessed the sentence in accordance with *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998). Having done so, we affirm only so much of the sentence extending to confinement for 16 months, forfeiture of all pay and allowances and a bad-conduct discharge.

Judge HEALEY and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court