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.

Corey A. SPANN
Storekeeper Seaman Apprentice (E-2), U.S. Navy

NMCCA 200300968 Decided 29 November 2004

Sentence adjudged 15 April 2002. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Southeast, Naval Air Station, Jacksonville, FL.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
LT GUILLERMO J. ROJAS, JAGC, USNR, Appellate Government Counsel

HEALEY, Judge:

Pursuant to his pleas, the appellant was convicted of conspiracy to distribute marijuana, making a false official statement, wrongful introduction of marijuana with the intent to distribute, wrongful distribution of marijuana, wrongful use of marijuana, in violation of Articles 81, 107, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, and 912a. A general court-martial consisting of a military judge sitting alone sentenced the appellant to 16 months confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered it executed. Pursuant to the pretrial agreement, the convening authority suspended all confinement in excess of 6 months from the date of trial.

The appellant has assigned the following errors: (1) the specification of distribution aboard a military installation and the specification of introduction with intent to distribute are multiplicious, and (2) the same two specifications constitute an unreasonable multiplication of charges.

We have carefully considered the record of trial, the assignments of error, and the Government's response. We hold that the specifications are not multiplicious, however, the aggravating language in the introduction specification amounts to an unreasonable multiplication of charges. Therefore, the aggravating language, "with intent to distribute," in Specification 1 of Charge II, should be dismissed. We will provide relief in our decretal paragraph. We conclude that the remaining 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.

Multiplicity

In the appellant's first assignment of error, he asserts Specification 1 of Charge II, alleging wrongful introduction of marijuana with the intent to distribute, is multiplicious with Specification 2 of Charge II, alleging wrongful distribution of marijuana, where the distribution involved the exact same amounts of marijuana. We disagree.

An unconditional guilty plea waives a multiplicity issue unless the offenses are, "'facially duplicative,' that is factually the same." *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). Whether two offenses are facially duplicative is a question of law that we will review *de novo*. *United States v. Palagar,* 56 M.J. 294, 296 (C.A.A.F. 2002). Two offenses are not facially duplicative if each "requires proof of a fact which the other does not." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004)(quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). Our review of this issue focuses on the "factual conduct alleged in each specification" and the providence inquiry. *Id*. (quoting *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997)).

In this case, the appellant entered unconditional pleas of guilty. Accordingly, we will find multiplicity only if the specification of introduction with the intent to distribute facially duplicates the specification of distribution. Based upon the providence inquiry and the stipulation of fact, the appellant was asked if he could obtain marijuana. He then, in conjunction with co-actors, left base, made contact with a drug dealer, obtained the marijuana, drove back onto base, met at a pre-arranged location, and delivered the marijuana. The delivery occurred about 15 minutes after returning to the base.

Specification 1 of Charge II alleges introduction with the aggravating factor of intent to distribute. This offense was complete when the appellant passed through the gate with marijuana, which he intended to distribute, but which he had not yet distributed. Though closely related in time, that course of conduct did not complete the distribution offense. Distribution, as correctly explained by the military judge, means, "to deliver to the possession of another." Record at 51. The appellant's

final action of delivering the marijuana to the intended recipient at a location other than the gate completed the offense of distribution and was separate from his former conduct.

Accordingly, after analyzing both the conduct alleged and the facts elicited during the providence inquiry, we conclude that the two specifications were not facially duplicative. *United States v. Schiftic*, 36 M.J. 1193, 1197 (N.M.C.M.R. 1993) (citing *United States v. Decker,* 19 M.J. 351 (C.M.A. 1985)).

Unreasonable Multiplication of Charges
Introduction and Distribution

The appellant next contends that the same two specifications are an unreasonable multiplication of charges. The appellant requests that we set aside the finding of guilty to Specification 1 of Charge I, alleging wrongful introduction of marijuana with the intent to distribute and reassess the sentence.

Despite the lack of objection at trial, we agree that the aggravating language "with the intent to distribute" in Specification 1 (introduction) of Charge II is an unreasonable multiplication of Specification 2 (distribution) of Charge II and should be dismissed. See *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 reach this conclusion based on the facts of this case, particularly the close proximity in time of the introduction and the distribution.

Upon reassessment, in light of our dismissal of the aggravating language in Specification 1, we find that the adjudged sentence would not have been less even if he had not been charged with the dismissed language. We further find that the sentence is appropriate for this offender and the remaining offenses. *See United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998).

Conclusion

The language "with the intent to distribute" is dismissed from Specification 1 of Charge II. The remaining findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge PRICE and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court