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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Aaron A. OESTMANN
Aviation Support Equipment Technician Airman (E-3), U.S. Navy

PUBLISH
NMCCA 200301443 Decided 30 June 2004

Sentence adjudged 10 December 2001. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, U.S. Naval Support Activity, Naples, Italy.

CDR MICHAEL WENTWORTH, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
Maj RAYMOND E. BEAL II, USMC, Appellate Government Counsel

HARRIS, Judge:

In our published decision of 29 April 2004, we rejected the appellant's two assigned errors. The first asserted that the appellant's conviction for conspiring to possess hashish with the intent to distribute (conspiracy specification)[1] and possessing that same hashish with the intent to distribute (possession specification)[2] represented an unreasonable multiplication of charges. The second requested relief for unreasonable and unexplained post-trial delay. We found, however, that certain language in the conspiracy and possession specifications must be set aside and dismissed, pointing to Wharton's Rule and an insufficient providence inquiry.

On 18 May 2004, the Government requested *en banc* reconsideration of our 29 April 2004 decision. The Government conceded the applicability of Wharton's rule to the conspiracy specification, but asserted that we inappropriately applied the doctrine to the substantive charge, the possession specification.

[1] The specification under Charge I.

[2] Specification 1 of Charge V.

The Government requested that this court reconsider and reverse its finding that Wharton's Rule applied to the possession specification, restore the original language of *intent to distribute* to the possession specification, and reassess the appellant's sentence.

The appellant filed a Motion for Leave to File Response Out-of-Time,[3] Response to Government Motion for *En Banc* Reconsideration, and Cross-Motion for Reconsideration on 28 May 2004. The appellant opposed the request for *en banc* reconsideration, but supported reconsideration by the original panel to clarify the basis for the original decision with respect to the possession specification, and requested panel reconsideration of the two assigned errors that we previously found to be without merit.

The Government filed an Opposition to Appellant's Cross-Motion for Reconsideration on 4 June 2004 and requested additional time to respond to what it viewed as a new assignment of error in the event we granted the appellant's motion.

Upon consideration of these pleadings and the record of trial, the court denies the Government's request for *en banc* reconsideration, but Panel I of the court grants the included request for panel reconsideration of that decision. *See* N.M.CT.CRIM.APP. RULE 6-1c. The court denies the appellant's cross-motion for reconsideration of our decision that the conspiracy and possession specifications represent an unreasonable multiplication of charges and that there was unreasonable and unexplained post-trial delay in the appellate review process, as we sufficiently addressed both assignments of error in our original decision. The court considers the portion of the appellant's cross-motion for reconsideration that the Government views as a new assignment of error to actually be responsive to the Government's motion for *en banc* reconsideration and denies the Government's request for an enlargement of time to file an additional response.

Wharton's Rule

The Government is correct that under Wharton's Rule, when two parties agree to commit an offense requiring concerted criminal activity, and those two parties are the only parties who commit the ultimate (substantive) offense, conspiracy should not be separately charged. *United States v. Johnson*, 58 M.J. 509, 512 (N.M.Ct.Crim.App. 2003). Likewise, the Government is also correct in that Wharton's Rule is a judicial presumption that operates to limit the use of a charge of conspiracy in appropriate cases. *Id*. at 512 n.2. To the extent that our previous decision can be read to hold that Wharton's Rule was the

[3] The appellant's Motion to File Response Out-of-Time is hereby granted.

basis for our decision to set aside and dismiss language from the possession specification, it is misleading. Wharton's Rule was and remains the basis for our decision to set aside and dismiss the language "with the intent to distribute" and "with the intent of distributing said hashish" from the conspiracy specification.

Providence Inquiry

As we stated in the second paragraph of our original decision, "we conclude that the providence inquiry was not sufficient as it pertains to the appellant's intent to distribute hashish." The appellant is correct in recognizing that the providence inquiry only established that, as a result of the agreement between the appellant and his co-conspirator, the appellant only intended their joint purchase, joint possession, and joint use of the hashish. Appellant's Response to Government Motion for *En Banc* Reconsideration of 28 May 2004. By virtue of their agreement to share the hashish before they procured it, once the appellant and his co-conspirator procured the hashish, they both exercised a joint and continuous possessory interest in the hashish throughout the period when the appellant is alleged to have had the intent to distribute. As further recognized by the appellant, constructive possession of contraband involves the right to exercise dominion and control over it, either directly or through others. *United States v. Wilson*, 7 M.J. 290, 293 (C.M.A. 1979). Thus, as this court found in the second paragraph of our decision in the appellant's case, the providence inquiry did not provide sufficient facts to support the plea as it pertains to the appellant's intent to distribute hashish.[4]

Additionally, although it is not abundantly clear from our previous decision, we found that the providence inquiry did not support a finding of guilty with respect to the phrase "rent a car aboard U.S. Naval Support Activity, Naples, Italy from EuropCar car Rental" as contained in the conspiracy specification.

Conclusion

[4] Although not cited in our original decision, *United States v. Swiderski*, 548 F.2d 445, 450 (2d Cir. 1977) provides additional support for our decision, holding that "where two individuals simultaneously and jointly acquire possession of a drug for their own use, intending only to share it together, their only crime is personal drug abuse--simple joint possession, without any intent to distribute the drug further." The *Swiderski* Court made clear that its holding, as is this court's holding, is limited to "the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use." *Id.* at 450-51; *see also United States v. Hill*, 25 M.J. 411, 412-14 (C.M.A. 1988).

The Government's petition for panel reconsideration is granted. On reconsideration, we supplement the previous decision as set forth in this opinion. We reaffirm the holdings of our previous decision: 1) setting aside and dismissing from the specification under Charge I the words and punctuation "with the intent to distribute" and "rent a car aboard U.S. Naval Support Activity, Naples, Italy from EuropCar car Rental" and "with the intent of distributing said hashish;" 2) setting aside and dismissing from Specification 1 under Charge V the words and punctuation "with the intent to distribute the said controlled substance;" 3) affirming the remaining findings as modified above; and 4) affirming only so much of the sentence as extends to confinement for 9 months, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge.

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court