UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CODY L. DEVILLE
United States Air Force

ACM S31210

26 September 2007

Sentence adjudged 4 October 2006 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gary M. Jackson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeitures of $849.00 pay per month for 5 months, and a reprimand.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jefferson E. McBride.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant was convicted, after mixed pleas, of attempting to use ecstasy, attempting to distribute ecstasy, possession of ecstasy, use of ecstasy, and distribution of ecstasy in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. A military judge, sitting as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 5 months, forfeiture of $849 pay per month for 5 months, and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends that it is not clear whether the military judge took into consideration that the use and possession specifications of the charge were an

unreasonable multiplication of charges for purposes of sentencing. Finding no error, we affirm.

Background

The appellant arranged to purchase ecstasy from a civilian friend, agreeing to pay $300 for the pills. On 11 March, 2006, the appellant and his roommate, Airman Basic (AB) D, went to a local shopping mall near Sheppard Air Force Base (AFB), Texas, where the appellant made the purchase of approximately 12 ecstasy pills. The appellant gave all the pills to AB D, who took them onto Sheppard AFB. Later that night, the appellant returned to his room on base where he ingested three of the pills. AB D and another airman also ingested some of the ecstasy pills. The appellant testified that on 12 March 2006, he had two remaining ecstasy pills, which he placed in a pants pocket in his closet. The pills remained there until 14 March 2006, when the appellant removed the pills from his closet and placed them in a jar of peanut butter. Shortly thereafter agents from the Air Force Office of Special Investigations searched the appellant's room and found the ecstasy pills in the jar of peanut butter. The appellant told the military judge that after having taken three of the ecstasy pills on 11 March 2006, he could have destroyed or disposed of the remaining pills, but that he chose not to do so, and thus they remained in his possession until they were seized.

At trial the military judge considered whether the specifications of use and possession of the ecstasy were multiplicious. The trial defense counsel asserted that the specifications were at least "multiplicious" for sentencing purposes, and asked that the military judge take that into account in determining a sentence. The military judge ultimately concluded that the specifications were not multiplicious for findings. He left open the possibility that the specifications might be an unreasonable multiplication of charges for sentencing, stating that he would entertain thoughts from counsel if he did find the appellant guilty of both the use and possession specifications. After the military judge did enter findings of guilt on those specifications, however, neither he nor counsel addressed the issue any further.

Analysis

In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), the Court of Appeals for the Armed Forces endorsed the Navy Court's proposed non-exclusive list of factors to consider in weighing a claim of unreasonable multiplication of charges. Those factors include: (1) Whether the accused objected at trial; (2) Whether "each charge and specification is aimed at [a] distinctly separate criminal act[];" (3) Whether the number of charges and specifications misrepresents or exaggerates the appellant's criminality; (4) Whether the number of charges and specifications unreasonably increase the appellant's "punitive exposure;" and (5) "Whether there is any evidence of prosecutorial overreaching or abuse in drafting of the charges." *Id.* at 338.

The appellant contends that the record is ambiguous regarding whether the military judge "adjusted his sentence downward" to account for unreasonable multiplication of charges. While we agree that the military judge should have clarified this matter, his failure to do so does not amount to error. Applying the *Quiroz* factors to this case, we find that the appellant's use of ecstasy on 11 March 2006, and his possession of ecstasy on 14 March 2006, are not an unreasonable multiplication of charges. We find that the government acted reasonably in charging these offenses, and therefore the appellant's claim is without merit.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court