UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEFFREY R. DILLON
United States Air Force

ACM 34933

11 February 2004

Sentence adjudged 13 December 2001 by GCM convened at Travis Air Force Base, California. Military Judge: Timothy D. Wilson.

Approved sentence: Bad-conduct discharge, confinement for 10 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Maria A. Fried, and Major Teresa L. Davis.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

PRATT, Chief Judge:

Consistent with his pleas of guilty, the appellant was convicted at a general court-martial of two specifications of using marijuana, two specifications of using methamphetamine, and one specification of using ecstasy, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Officer members sentenced the appellant to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances, reduction to airman basic, and a reprimand. The convening authority approved the sentence but, pursuant to a pretrial agreement, only 10 months of confinement.

I. Background

Each of the five specifications of drug use was a distinctly separate event, with the exception of the appellant's use of ecstasy and one of his uses of methamphetamine. As regards those uses, the appellant related during his providence inquiry that he ingested three pills at a San Francisco club, believing them to be ecstasy. A subsequent urinalysis, however, tested positive for both ecstasy and methamphetamine. The appellant pled guilty on his belief that the ecstasy pills he ingested must have also contained methamphetamine.[1] On appeal, the appellant reaffirms that these two specifications represent a simultaneous use of controlled substances—a knowing use of ecstasy and an unknowing use of methamphetamine. He asserts that this situation undermines the providence of his guilty plea to the unknowing use of methamphetamine, and constitutes an unreasonable multiplication of charges and impermissible multiplicity. We find these assertions to be without merit, and affirm.

II. Providence of the Plea

When the providence of a guilty plea is challenged on appeal, we must determine whether the record of trial discloses a substantial basis in law and fact for questioning the guilty plea. *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991). Before accepting a guilty plea, the military judge must inform the accused of the nature of the offense and ensure that the plea is voluntary and accurate. Rule for Courts-Martial 910(d) and (e). The facts the military judge elicits from the accused must "objectively" support the plea. If an accused enters a plea of guilty to an offense but then "sets up matter inconsistent with the plea," the military judge must set it aside and enter a plea of not guilty in its stead. Article 45(a), UCMJ, 10 U.S.C. § 845(a); *United States v. Care*, 40 C.M.R. 247, 250 (C.M.A. 1969).

In this case, the appellant contends that the military judge erred by accepting his guilty plea to the use of methamphetamine in Specification 2 because the appellant made it known that he did not know that he was ingesting methamphetamine. He cites our superior court's holding in *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988), *cert. denied*, 488 U.S. 942 (1988), for the proposition that "knowledge of the presence of the substance is a component of 'possession' and of 'use.'" *Id.* at 253. He acknowledges that an accused who knowingly ingests a controlled substance is legally accountable for the offense even if he is mistaken about which controlled substance he is using.[2] *See United States v. Stringfellow*, 32 M.J. 335, 336 (C.M.A. 1991) (The fact that the appellant may have been unaware "of the exact pharmacological identity of the substance he ingested is

[1] The prosecution seems to accept this hypothesis and acknowledges it during their sentencing argument before the court members. See footnote 3.

[2] Indeed, appellant does not challenge the providence of his plea to Specification 5, which involves a similar mistake as to the precise nature of the controlled substance ingested (thought it was ecstasy, but test results reflected only methamphetamine).

of no legal consequence" because he knew the substance ingested was prohibited by law.) However, he argues that the holding in *Stringfellow* cannot be applied to a single ingestion that turns out to contain more than one controlled substance unless the use of the substances is consolidated in one specification.

Although the trial judge in *Stringfellow* did consolidate two specifications into one, our superior court did not explicitly limit its holding to that circumstance. *Id*. at 336. Nor shall we. As the lower *Stringfellow* Court so aptly stated: "The fact that he got more than he bargained for is a consequence he must bear for being part of the drug culture." *United States v. Stringfellow*, 31 M.J. 697, 700 (N.M.C.M.R. 1990). The appellant's admission that he knowingly used a substance that was prohibited by Article 112(a), UCMJ, satisfies the requirement that the plea conform to the facts. We find appellant's plea of guilty provident.

III. Unreasonable Multiplication of Charges

The appellant asserts that it was an unreasonable multiplication of charges to have two separate specifications of drug use arising out of a single ingestion of pills—one specification for a drug knowingly ingested, and a second specification for a drug unknowingly ingested. He claims that the military judge should have consolidated the specifications, thereby avoiding an inflated maximum punishment.

Unfortunately for the appellant, it is reasonably well settled that this Court will not entertain claims of unreasonable multiplication of charges when the claim is not raised at trial. *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997), *aff'd in part and modified in part*, 49 M.J. 134 (C.A.A.F. 1998). In this case, the appellant made no mention of this issue before the trial judge; instead, in keeping with the terms of a pretrial agreement, he entered provident pleas of guilty to both specifications. In an attempt to avoid waiver of this issue on appeal, the appellant now argues that his claim of unknowing ingestion served as an "implied" claim of unreasonable multiplication of charges and that the military judge's erroneous reliance on *Stringfellow* foreclosed the appellant from raising the issue more directly. As noted earlier, we find nothing wrong with the military judge's application of *Stringfellow* and we are not persuaded by the appellant's imaginative attempt to avoid waiver. We deem the issue waived.[3] *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001). *See United States v. Denton*, 50 M.J.

[3] We hasten to note that, even if we did not apply waiver, the results would be the same, as we would find that the appellant was not prejudiced. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The circumstances of the appellant's simultaneous knowing and unknowing ingestion were clearly before the members during sentencing. Consolidation of the specifications would have reduced the maximum confinement from 19 years to 14 years, not a significant reduction in a case in which the appellant was sentenced to 12 months confinement (reduced to 10 months pursuant to a pretrial agreement). During sentencing argument, in detailing a formula to explain his 20-month confinement recommendation, the trial counsel verbally consolidated the specifications at issue, recommending 5 months confinement in turn for each of the other three drug use specifications and 5 months confinement for the "methamphetamine-ecstasy use."

189 (C.A.A.F. 1998) (unreasonable multiplication of charges "was neither raised nor litigated at trial and is therefore deemed waived").

IV. Multiplicity

The appellant asserts that he cannot be convicted of separate specifications for knowing use of one drug and simultaneous unknowing use of a different drug because they constitute the same offense. He believes that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits separate punishment under these circumstances. Again, however, the appellant entered an unconditional guilty plea to each offense and failed to raise this issue before the military judge.

"Ordinarily, an unconditional guilty plea waives a multiplicity issue. Furthermore, double jeopardy claims, including those founded in multiplicity, are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (citations omitted). The appellant has the burden of establishing plain error. *Id.* He may overcome his failure to raise multiplicity at trial by showing the specifications are "'facially duplicative,' that is, factually the same." *Id.* (quoting *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997) (quoting *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997))). The specifications in this case are not factually the same—each alleges use of a different prohibited substance. Therefore, the appellant failed to establish plain error.

V. 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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator