UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet JOHN-PAUL DOOLIN
United States Air Force

ACM 35825

14 December 2005

Sentence adjudged 24 November 2003 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Dismissal and confinement for 6 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Tracey L. Printer.

Before

MOODY, SMITH, and PETROW
Appellate Military Judges

OPINION OF THE COURT

<u>This opinion is subject to editorial correction before final release</u>.

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of wrongfully using ecstasy, ketamine, and mushrooms containing psilocybin and/or psilocin, and conduct unbecoming an officer and gentleman for using and distributing 1-(3-triflouromethylphenyl)piperazine (TFMPP), in violation of Articles 112a and 133, UCMJ, 10 U.S.C. §§ 912a, 933. The military judge sitting alone sentenced the appellant to a dismissal and confinement for 6 months. The convening authority approved the sentence adjudged. On appeal, the appellant asserts that the facts elicited during his

Care[1] inquiry, and recited in the stipulation of fact, were inconsistent with a plea of guilty to the Article 133, UCMJ, offenses, contained in Specifications 1 and 2 of Charge II, and that the plea was, therefore, improvident. We agree.

Background

Problems began to develop during the *Care* inquiry when the discussion between the military judge and the appellant turned to the Article 133, UCMJ, offenses, the basis for which consisted of the appellant's use and distribution of TFMPP:

> MJ: When you did [use TFMPP], did you know what you were doing was wrong?
>
> ACC: Yes, Ma'am.
>
> MJ: Did you know it was illegal?
>
> ACC: No, Ma'am.
>
> The military judge than attempted to frame the issue in a different light.
>
> MJ: All right, did you know it was a crime to be messing up your body when you're an Academy Cadet here?
>
> ACC: Yes, Ma'am.
>
> MJ: Any doubt in your mind that you knew that that was wrong and illegal?
>
> ACC: No, Ma'am.
>
> . . . .
>
> MJ: And, as a matter of fact, this drug actually is a controlled substance, isn't it?
>
> ACC: Yes, Ma'am.
>
> MJ: And it's illegal to use?

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

ACC: Yes, Ma'am.

MJ: You understand that using a controlled substance is illegal unless it's been prescribed for you?

ACC: Yes, Ma'am, I do.

MJ: Was this prescribed to you?

ACC: No Ma'am, it wasn't.

MJ: I want you to tell me in your own words one more time why this was a crime.

ACC: Ma'am, I believe it was a crime because I purchased a substance that would harm my body or alter my state of reality from the Internet.

The same type of conversation persisted throughout the inquiry with regard to the appellant's distribution of TFMPP.

MJ: All right, you purchased these pills on the internet. When did you purchase them?

ACC: In late September. Late September, Ma'am.

MJ: Late September of 02?

ACC: Yes, Ma'am.

MJ: And, at the time you did not know they were a controlled substance?

ACC: No, Ma'am.

MJ: But you knew they were being called Ecstasy and you were supposed to get the same effect as Ecstasy.

ACC: They were being called legal Ecstasy, and at the time I believe they were not a controlled substance.

MJ: Ok, but they were being called legal Ecstasy, but were they supposed to give you the same feeling as Ecstasy? I mean, what were they being advertised as?

ACC: Just as—um--

MJ: As Ecstasy, legal Ecstasy?

ACC: Yes, Ma'am. As a mood-altering substance.

The trial counsel then evidenced a degree of clairvoyance with the following:

> I just want to be clear on one thing. Hearing the discussion for the second time, basically, and what I'm worried about is that I just want to make sure that when this goes up on appeal that the court will look at this and say "yeah." And the discussion back and forth has been sort-of the, okay, this is a chemical. It alters your mood, that kind of exchange you had. And the one question I keep asking myself is what's the difference between, say this, and a Budweiser? . . . All the responses I'm getting are sort-of the same thing. They alter your mood and they change your chemical balance.

In response, the military judge made another attempt at clarifying the "wrongfulness" of the offenses:

MJ: Now, Ecstasy is an illegal drug, right?

ACC: Yes, Ma'am.

MJ: And when you take illegal drugs, they do things to your body that shouldn't happen. Is that correct?

ACC: That's correct, Ma'am.

MJ: So, would you agree that trying to find a runaround, a substitute for an illegal drug is conduct unbecoming?

ACC: Yes, Ma'am.

MJ: And is that what you did in both these situations, when you used the drug and when you distributed it to your friends?

ACC: Yes, Ma'am.

MJ: Now, I think I asked you this, but when you did this, did you know what you were doing was wrong?

ACC: Ma'am, I knew it wasn't right. I didn't know it was a criminal activity at the time.

Eventually, the military judge acknowledged what was lacking with regards to the "wrongfulness" element when she stated: "But you – I think that part of the question in this case is that [TFMPP] *may* have become a controlled substance during this period of time. It's just recently been added to the controlled substances." However, she then failed to address that very issue which is central to the issue of providency in this case.

Discussion

If an accused, after entering a guilty plea, sets up matter inconsistent with the plea, the court shall proceed as though he had pleaded not guilty. Article 45(a), UCMJ, 10 U.S.C. § 845(a). On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). "A providence inquiry into a guilty plea must establish, *inter alia*, 'not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea.'" *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). *See also United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000). "Mere conclusions of law recited by an accused are insufficient to provide a factual basis for a guilty plea." *United States v. Outhier*, 45 M.J. 326, 331 (C.A.A.F. 1996) (citing *United States v. Terry*, 45 C.M.R. 216, 217 (C.M.A. 1972)).

Pursuant to *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 59c(2) (2002 ed.), "[w]henever the offense charged [under Article 133] is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats the specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman." The use and distribution of TFMPP were clearly treated by the military judge during the *Care* inquiry as acts made punishable by Article 112a, UCMJ. For prosecution to be successful under Article 112a, UCMJ, it would be necessary for the evidence to establish that the use and distribution was "wrongful." *MCM*, Part IV, ¶ 37b(2)(b), b(3)(b). Such acts are not deemed wrongful if they are done "without the knowledge of the contraband nature of the substance." *MCM*, Part IV, ¶ 37c(5). Throughout the *Care* inquiry pertaining to the TFMPP specifications, the appellant consistently asserted that, at the time of the offenses, he was not aware that TFMPP was a controlled substance.

Accordingly, we find that there existed a substantial conflict between the appellant's guilty plea to an offense under Article 133, UCMJ, and the evidence adduced at trial. The military judge failed to obtain from the appellant information which was necessary to establish knowledge of the contraband nature of THMPP, an essential

element of the two specifications under Charge II. Accordingly, the military judge abused her discretion in accepting the plea of guilty to those specifications and to Charge II. The findings of guilty as to Specifications 1 and 2 of Charge II are, therefore, set aside and dismissed.

Sentence Reassessment

As a result of modifying the findings, we must determine whether we are able to reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court provided guidelines for such a reassessment:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id.* at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id*. at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id.* at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

The three specifications charged under Article 112a, UCMJ, each carried a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years. *MCM*, Part IV, ¶ 37e(1)(a). Inasmuch as Article 112a, UCMJ, is "the most analogous" to the facts alleged in the specifications under Charge II, the maximum punishment for each of those specifications would be a dismissal, confinement for 5 years, and forfeiture of all pay and allowances. *MCM*, Part IV, ¶ 59e. The maximum confinement, therefore, would be 25 years. In this case, the appellant was only sentenced to confinement for 6 months.

We have considered the facts and circumstances surrounding the offenses plead to under Article 133, UCMJ, as well as all other matters properly before the sentencing authority. We have paid particular attention to the nature of the illegal substances involved, the impact of the appellant's activities on other cadets, and the circumstances which reflect on their dishonorable nature. We conclude that, without the Article 133, UCMJ, offenses, the sentencing authority would have adjudged a sentence no less than the one which it originally imposed, a dismissal and confinement for 6 months.

Conclusion

The approved findings of Specifications 1 and 2 of Charge II are set aside and dismissed. The findings, as modified, and the sentence, as reassessed, 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 findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court