UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class RANDI L. HESS
United States Air Force

ACM 34810

26 August 2003

Sentence adjudged 7 June 2001 by GCM convened at Fort Meade, Maryland. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, forfeiture of all pay and allowances, and reduction to E-1.[*]

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutentant Colonel Lance B. Sigmon, and Lieutenant Colonel William B. Smith.

Before

VAN ORSDOL, STONE, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

ORR, V.A., Judge:

The appellant was charged with one specification of using 3,4 methylenedioxymethamphetamine (ecstasy) on divers occasions, one specification of possessing ecstasy with the intent to distribute, and one specification of distributing ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Pursuant to her pleas, the appellant was convicted of use and acquitted of distribution. She was found not guilty of possessing ecstasy with the intent to distribute. She was, however, found guilty of the lesser included offense of possession. The convening authority approved the adjudged

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[*] Pursuant to Rule for Courts-Martial (R.C.M.) 1107(d)(2), the convening authority could only approve forfeitures of two-thirds of the appellant's pay and allowances because her sentence did not include any confinement.

sentence of a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to E-1. The appellant asserts that for sentencing purposes her conviction for possession of ecstasy should have been dismissed as being multiplicious with her conviction for divers uses of ecstasy.

Background

The appellant completed technical school at Corry Station in Pensacola, Florida, and traveled to the 32nd Intelligence Squadron at Fort Meade, Maryland. When the appellant arrived at Fort Meade, an agent from the Air Force Office of Special Investigations called her in for questioning based upon information he had received through a federal investigative agency. She cooperated with the authorities and admitted to using ecstasy several times during technical school.

The distribution of ecstasy specification was based upon the government's theory that the appellant was guilty as a principal under Article 77, UCMJ, 10 U.S.C. § 877. Prior to entering pleas, the trial defense counsel made a motion to dismiss the possession with the intent to distribute specification as being multiplicious with the use specification for findings. In response, the government told the military judge that the factual basis for the two specifications had changed since the Article 32, UCMJ, 10 U.S.C. §832, investigation. The military judge accepted the government's offer of proof and deferred ruling on the motion until the court could hear more evidence. During the *Care* inquiry, the appellant testified that she used ecstasy about eight or nine times during a two-month period between 1 November 1999 and 30 April 2000. *See United States v. Care,* 40 C.M.R. 247 (C.M.A. 1969). The military judge accepted the appellant's explanation of her misconduct and found her guilty of using ecstasy on divers occasions. The government proceeded to prove the remaining specifications of possession with the intent to distribute and distribution.

The government called Lance Corporal Alejandro Cadena to testify on the possession with the intent to distribute offense. Lance Corporal Cadena testified that he had seen the appellant at Bedlams, a "rave" club in Pensacola, Florida, about ten times. He further testified that while he was seated at the club's bar one evening, the appellant came up and asked him "if he would hold on to something real quick." He agreed and the appellant handed him two pills bearing an "X" stamp. Lance Corporal Cadena testified that the appellant returned about five to ten minutes later, retrieved the pills, and thanked him for holding her "E," another term for ecstasy. After presentation of all the evidence in findings, the members found the appellant not guilty of possessing ecstasy with the intent to distribute, but guilty of the lesser included offense of possession. They acquitted the appellant of distributing ecstasy.

During an ensuing Article 39a, UCMJ, 10 U.S.C. § 839a, session this colloquy between the defense counsel and the military judge occurred:

> DC: [C]ould I address the court at this time? I don't know when we want to bring this up, but the defense would have a multiplicity motion for sentencing with respect to the findings of the court panel. What I'm thinking is—and this is the reason why. I'm not sure this is why they decided this way but I think it is. We had this evidence that she used Ecstasy during the period that is charged. Now they also found possession. Well use and possession, if they're saying that those possessions occurred when she was using, she can't use drugs without possessing drugs. Am I confusing you?
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> MJ: No, I see exactly what you're stating, counsel. However, I don't think that's a matter in consideration here, in all honesty. I think you've adequately preserved on the record for stating that it is multiplicious for sentencing aspects. It is also noted and is therefore preserved on the record for appellate review, but I would deny your motion.

Discussion

Multiplicity is a concept derived from the Double Jeopardy Clause of the Constitution, prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *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 (1998). Of course, the legislature is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court in such cases is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one punishment for the same offense." *Brown*, 432 U.S. at 165. It is well established that a conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989).

R.C.M. 907(b)(3) provides, in part, "A specification may be dismissed upon timely motion by the accused if: . . . (B) The specification is multiplicious with another specification . . . ." The non-binding Discussion to the rule explains, "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other." "Neither the Constitution nor the UCMJ precludes a person from being convicted for multiple offenses growing out of the same transaction, so long as the offenses are not multiplicious." *United States v. Bracey,* 56 M.J. 387, 389 (2002).

If the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one

is whether each provision requires proof of an additional fact which the other does not. *Teters,* 37 M.J. at 377 (citing *Blockburger v. United States,* 284 U.S. 299 (1932)). Thus, in order for the appellant to prevail in her argument, she must satisfy both prongs of the multiplicity test. We begin our analysis by comparing the elements of wrongful use and wrongful possession of a controlled substance. Article 112a, UCMJ.

The link between the elements of offenses of which the appellant stands convicted is undeniable. Indeed, wrongful possession is specifically listed as a lesser included offense of wrongful use of a controlled substance. *Manual for Courts-Martial, United States*, Part IV, ¶ 37.d.(2)(a) (2000 ed.). In the case before us, the appellant admitted that she used ecstasy on divers occasions; and that she knew that her use of ecstasy was wrongful each time. By contrast, the appellant pled not guilty to possession with the intent to distribute and, while the members acquitted her of that specification, they nevertheless found that she possessed ecstasy and that her possession of ecstasy was wrongful. But for the word "use" in the greater offense and the word "possess" in the lesser included offense, the elements of the two specifications are virtually identical. We therefore find that the appellant meets the elements prong of the multiplicity test. We must now look to see if the transaction prong has been satisfied as well.

In *United States v. Savage,* 50 M.J. 244 (1999), the Court of Appeals for the Armed Forces (CAAF) found the appellant's convictions for possessing and distributing the same amount of marijuana in the same day to be multiplicious. The Court set aside the finding of guilt for possession with the intent to distribute and dismissed the underlying charge to resolve the multiplicity issue. The CAAF reached a different result in *United States v. Heryford,* 52 M.J. 265 (2000), where the appellant was convicted for wrongful possession with the intent to distribute, distribution, and wrongful introduction of a controlled substance onto a military installation. In *Heryford,* a confidential informant asked the appellant to obtain some lysergic acid diethylamide (LSD) for him. The appellant agreed and acquired about 12 doses of LSD, which he kept at home for two days before delivering them to the informant on base. The court held that the appellant's convictions were not multiplicious for findings or sentencing because he was at liberty to use, destroy, or distribute the LSD while it was in his possession at home. The results in these two cases are a clear indication that the circumstances of the offenses are critical to a multiplicity determination. Accordingly, we must analyze the appellant's conduct and decide if she was engaged in multiple acts or only one transaction.

Before the sentencing phase began, the trial defense counsel told the court he believed the appellant's convictions for possession and use of ecstasy were multiplicious for sentencing. He speculated that the members had convicted the appellant of possessing ecstasy because she had pled guilty to using it. This summation of the facts, however, is inconsistent with the evidence presented at trial. According to Lance Corporal Cadena, the appellant approached him at the rave club and asked if he would hold something for her. He agreed. The appellant returned five to ten minutes later,

retrieved the pills that she had handed to Lance Corporal Cadena and thanked him for holding her "E." We can understand how the members could conclude that the exchange between the appellant and Lance Corporal Cadena was an entirely separate transaction under this scenario. It was the appellant who made contact with Lance Corporal Cadena, handed him the ecstasy pills, and took them back again. Thus, we no longer have a single, uninterrupted, chain of events from the appellant's initial possession of the pills through the moment she presumably consumed them. The appellant began phase one of her misconduct when she accepted the ecstasy. Handing those same pills to Lance Corporal Cadena was a completely different enterprise. We agree with the military judge's ruling that under these circumstances the appellant's convictions for using and possessing ecstasy were not multiplicious for sentencing.

Although it was not raised on appeal, there is an error in the appellant's approved sentence that must be corrected. The convening authority approved the adjudged sentence of a bad-conduct discharge, forfeitures of all pay and allowances, and reduction to E-1. The appellant should not have been deprived of more than two-thirds pay per month because her sentence did not include any confinement. R.C.M. 1107(d)(2), Discussion. Accordingly, the appellant's adjudged forfeitures are hereby reduced by one-third to comply with the maximum allowable forfeitures set forth in R.C.M 1107(d)(2). Correctly stated, the appellant's sentence includes a bad-conduct discharge, forfeiture of two-thirds pay per month until the punitive discharge is executed, and reduction to E-1.

The findings, as approved, and the sentence, as modified, 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 (2000). Accordingly, the findings and sentence, as modified, are

AFFIRMED.

Judge ORR, V.A., participated in this decision prior to her retirement.

OFFICIAL

HEATHER D. LABE
Clerk of Court