UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RYAN P. HOGAN
United States Air Force

ACM S31220

28 October 2008

Sentence adjudged 03 October 2006 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Vicki A. Belleau, Captain Chadwick A. Conn, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one charge and specification of absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886, and one charge and one specification of wrongful use of cocaine on divers occasions and one specification of wrongful distribution of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge sentenced him to a bad-conduct discharge and

confinement for four months.[1] The convening authority approved the sentence as adjudged.

The appellant asserts two errors. First, he argues the specification charging divers distributions of cocaine is an unreasonable multiplication of charges and should instead be charged as one single act of distribution.[2] Second, he notes the court-martial order should be corrected to reflect the convening authority's action, which noted the confinement credit awarded by the military judge for pretrial restriction tantamount to confinement. Finding no error with respect to the first assignment of error, we affirm, but direct preparation of a new court-martial order.

Unreasonable Multiplication of Charges

The appellant contends for the first time on appeal that the specification for wrongful distribution of cocaine on divers occasions is an unreasonable multiplication of charges. The appellant argues that when he brought cocaine into a hotel room and put the cocaine on the bathroom countertop for three other airmen to use, it constituted a single distribution. The appellant, therefore, requests the portion of the specification alleging "on divers occasions" be set aside.

During the guilty plea inquiry, the military judge asked the appellant to describe the facts surrounding his offenses. When describing the facts surrounding the offense of divers distributions of cocaine, the appellant told the military judge that he bought the cocaine from a man he met in the parking lot outside his hotel room. When he came back into the hotel room, he put the cocaine on the bathroom countertop, where another airman, Amn H, cut it up into lines. He and Amn H ingested the cocaine by snorting it up their noses. He told the military judge that by putting the cocaine on the bathroom counter and using it with Amn H, he distributed the cocaine to Amn H. After the appellant and Amn H used the cocaine, the other two airmen in the room asked the appellant if they could use some cocaine. The appellant agreed. The appellant left the cocaine on the bathroom countertop and Amn H cut up some additional lines of cocaine, which the other two airmen then ingested. The appellant told the military judge that by leaving the cocaine on the countertop and allowing Amn H to cut up the cocaine into additional lines, which the other two airmen used, he distributed to the other two airmen. He told the military judge that each of the three airmen asked the appellant if they could

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[1] The military judge ruled the appellant should receive confinement credit of 57 days, finding the appellant was subjected to 30 days of pretrial restriction tantamount to confinement, with another 27 days of pretrial confinement ordered and served pursuant to Rule for Courts-Martial 305. He also held the restriction tantamount to confinement was not illegal pretrial confinement pursuant to Article 13, UCMJ, 10 U.S.C. § 813.

[2] The appellant's assignment of errors states: "Where a servicemember leaves a controlled substance on a counter to be used by himself and three other servicemembers, has he committed a single act of distribution or multiple acts of distribution?" The appellant's arguments and legal citations assert the issue of unreasonable multiplication of charges. Not articulated, but implied by this assignment of error, is the issue of whether the guilty plea is provident with respect to the specification for divers distributions of cocaine.

use the cocaine, and the appellant gave them permission. After going over the definition of distribution, the military judge asked the appellant if he intended to deliver possession of the cocaine to each of the three airmen, and the appellant said he did.

As stated above, the appellant raises for the first time on appeal the issue of unreasonable multiplication of charges.[3] "[W]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4), Discussion. As emphasized by our superior court in *United States v. Butcher*, 56 M.J. 87 (C.A.A.F. 2001), the issue of unreasonable multiplication of charges requires a court of criminal appeals to "affirm only such findings of guilty, and the sentence . . . as it . . . determines, on the basis of the entire record, should be approved." *Butcher*, 56 M.J. at 93 (quoting Article 66(c), UCMJ, 10 U.S.C. § 866(c)). Our superior court held "[t]his highly discretionary power" given to the courts of criminal appeals "includes the power to determine that a claim of unreasonable multiplication of charges has been waived or forfeited when not raised at trial." *Id.*

We hold that by not raising the issue at trial, the appellant forfeited his right to challenge the issue on appeal. The appellant argues that *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004), controls, and that the appellant's right for appellate review cannot be forfeited or waived. The appellant asserts this Court must therefore apply the five factors outlined in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), when dealing with an issue of unreasonable multiplication of charges. We disagree. Unlike the case at hand, the appellant in *Pauling* attempted to raise the issue of unreasonable multiplication of charges during trial. *Pauling*, 60 M.J. at 93, 95. Moreover, even in *Quiroz*, our superior court noted that Congress, in Article 66(c), UCMJ, provided each of the courts of criminal appeals with the authority "to determine the circumstances, if any, under which it would apply waiver or forfeiture" to the issue of unreasonable multiplication of charges. *Quiroz*, 55 M.J. at 338. Therefore, absent plain error, we hold that the appellant's failure to raise the issue of unreasonable multiplication of charges at trial constitutes forfeiture and precludes consideration on appeal. *See United States v. Spears*, 39 M.J. 823, 823-24 (A.F.C.M.R. 1994) (holding multiplicity claim forfeited if not raised at trial).

Plain error occurs when there is error, the error is plain or obvious, and the error results in material prejudice to a substantial right of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). We find no error here, plain or otherwise. The government could have charged each distribution as a separate specification. It did not. Rather, the acts of distribution were lumped together under one broad specification, thereby greatly reducing the appellant's exposure to conviction of multiple charges or specifications, and thus theoretically significantly

[3] This assertion by the appellant is novel. The Rules for Courts-Martial and case law apply the issue of unreasonable multiplication of charges as it relates to multiple charges and specifications, not to divers acts within a single specification.

reducing the maximum potential punishment that might otherwise apply.[4] Additionally, the appellant's court-martial was before a military judge alone. Even assuming, *arguendo*, there was plain error, there is no evidence that a substantial right of the appellant was materially prejudiced.

Guilty Plea

Not articulated, but implied by the appellant's assignment of error, is the issue of whether his guilty plea is provident with respect to the specification alleging distribution of cocaine on divers occasions. We will not set aside a guilty plea on appeal unless there is "a 'substantial basis' in law and fact for questioning the guilty plea." *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). If "the factual circumstances as revealed by the accused himself objectively support that plea," the factual predicate is established. *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). We consider the entire record in conducting our review. *United States v. Johnson*, 42 M.J. 443, 445 (C.A.A.F. 1995). The term "distribute" is defined as "to deliver to the possession of another." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37.c.(3) (2005 ed.). The term "deliver" "means the actual, constructive, or attempted transfer of an item." *Id.*

Upon review of the entire record, we find no basis in law or fact for questioning the guilty plea. The appellant brought the cocaine into the hotel room and Amn H cut the cocaine into lines, which the appellant and Amn H ingested. After their use, the other two airmen in the room asked if they too could use some of the cocaine. After the appellant agreed, Amn H cut the cocaine into lines for these other two airmen to ingest. The appellant was clearly involved in multiple distributions. There is a break in time and transaction between the distribution to Amn H and the distribution to the other two airmen. *See United States v. Staples*, 19 M.J. 741 (A.F.C.M.R. 1984); *cf. United States v. Johnson*, 26 M.J. 686 (A.C.M.R. 1988) (holding giving control of cocaine over to three others in one indivisible sequence is a single distribution). Further, we find the military judge did not abuse his discretion in finding the appellant guilty of distribution of cocaine on divers occasions. Finally, we find the facts as revealed by the appellant himself objectively support the plea.

Defective Court-Martial Order

Both the appellant and the appellee urge the Court to order preparation of a corrected court-martial order. The convening authority's Action contained the following

[4] This limitation on maximum potential punishment is only theoretical because the charge was ultimately referred to a special court-martial, so the punishment was limited by the forum rather than the number of specifications.

sentence, which was omitted from the court-martial order: "The accused will be credited with 30 days additional pretrial confinement for restriction tantamount to confinement."[5] In addition, we note the court-martial order fails to reflect the plea and finding for the specification of Charge I and fails to correctly identify the military judge. This Court orders the preparation of a corrected court-martial order to rectify these errors.

Moreno Consideration

In this case, the overall delay of 687 days between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved 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; *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, YA-02, DAF
Clerk of the Court

[5] The appellant notes in the assignment of error that he did in fact receive the confinement credit ordered by the military judge. This is purely an administrative error.