UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant BILLY R. JAWORSKI
United States Air Force

ACM 35530

19 September 2005

Sentence adjudged 5 March 2003 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 33 months, reduction to E-1, and a fine of $2,500.00.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Captain David P. Bennett, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

FINCHER, Judge:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant argues that the military judge's denial of the defense motion to consider Specifications 1 and 3 of Charge I as one offense for sentencing purposes resulted in an unreasonable multiplication of charges.[1] Likewise, he asserts the military judge should have considered Specification 4 of Charge I and Specification 3 of the Additional Charge as one offense for sentencing. We disagree and affirm.

[1] This assignment of error was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

In reaching this conclusion, we analyze the appellant's arguments using the following framework developed in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) and applied in *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004):

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

The appellant met the first prong of the test by objecting at trial, but has failed to satisfy the other four.

Specification 1 of Charge I alleges that the appellant wrongfully possessed 100 ecstasy pills with the intent to distribute them on or about 4 October 2002. Specification 3 of Charge I alleges that he wrongfully distributed ecstasy on divers occasions between on or about 2 April 1991 to on or about 4 October 2002. The facts show the appellant distributed ecstasy pills over 30 times during the time period alleged in Specification 3. On 4 October 2002, when police apprehended the appellant, he had 100 ecstasy pills in his possession. He intended to distribute these pills to his friend, but the apprehension foiled his plans.

These two specifications were clearly aimed at distinctly separate criminal acts. The absence of an actual transfer separates distribution of illegal drugs from possession with the intent to distribute them. In the appellant's case, the 100 ecstasy pills were a separate batch of drugs that he never distributed. At trial, defense counsel argued that because the dates of the specifications overlapped, the court should consider them one offense for sentencing purposes. We disagree. Charging separate crimes neither exaggerated his criminality, nor unreasonably increased his exposure to punishment. Likewise, the record shows no evidence of prosecutorial overreaching or abuse. *See Quiroz*, 55 M.J. at 338.

Similarly, Specification 4 of Charge I and Specification 3 of the Additional Charge fail to satisfy the remaining *Quiroz* criteria for relief. Specification 4 alleges

wrongful distribution of anabolic steroids. Specification 3 of the Additional Charge alleges a violation of 21 U.S.C. § 843(b) by using a communication facility to distribute, and to possess with intent to distribute, anabolic steroids. "Communication facility" includes mail facilities and the statute states that each use shall be a separate offense.[2]

In this case, the appellant admitted to ordering his steroids over the Internet and receiving the drugs through the mail. He then distributed them to his customers. If he had received the steroids in person from his supplier he would not have violated the statute. By choosing to use the mail, however, he committed the very evil the statute proscribes.

Under the *Quiroz* criteria, we must consider whether these offenses are distinctly separate criminal acts. We find they are. The punishment associated with a violation of 21 U.S.C. § 843(b) focuses on using the communication facility for felonious purposes. In the appellant's case, distribution of the steroids was not required to complete this offense. Distributing the steroids was a separate offense and separately punishable. We find no indication of exaggeration, unreasonableness, or prosecutorial abuse. *See Quiroz*, 55 M.J. at 338.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

[2] 21 U.S.C. § 843(b) states: Communication facility. It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.