**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class TRISTAN P. JOSEPH**
**United States Air Force**

**ACM 37855**

**23 August 2012**

Sentence adjudged 18 November 2010 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Donald R. Eller (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 13 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges



PER CURIAM:

On 18 November 2010, a general court-martial composed of a military judge sitting alone convicted the appellant in accordance with his pleas of one charge and one specification of wrongful possession of cocaine on divers occasions; one specification of wrongful distribution of cocaine on divers occasions; and one specification of wrongful use of marijuana, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority disapproved the forfeiture of all pay and allowances and approved the remainder of the

sentence as adjudged.[1] Before this Court, the appellant argues that the military judge erred by characterizing each day the appellant possessed cocaine as a separate act of possession. We disagree.

*Background*

On 1 July 2009, the appellant acquired some amount of cocaine and possessed it near his home in Goldsboro, North Carolina. On 12 July 2009, the appellant sold one gram of the cocaine to another Airman for $50.00; he sold another gram to the same Airman for $50.00 on 23 July 2009. The appellant did not distribute all the cocaine in his possession and continued to possess some amount of cocaine. On 1 August 2009, the appellant bought another 14 grams of cocaine from "Shawn" for $400.00. On six occasions between 1 August 2009 and 28 September 2009, the appellant distributed 11 of the 14 grams of cocaine he purchased from "Shawn." He continued to possess the remaining three grams of cocaine.

During the *Care*[2] inquiry on the specification for possession of cocaine, the military judge voiced his concern about separating the possession specification from the distribution specification. The military judge explained to the appellant that:

> . . . normally under the law it would be considered a piling on of charges sometimes if we tried to convict you of two crimes for the exact same actions. . . . For us to say that you possessed it at one second and distributed it the second [sic] some people could look at that and say, "Well, that's not right, the government shouldn't be piling on charges like that." Help me out with understanding why you think you are guilty of a separate act.

The military judge then questioned the appellant to discern whether the possession specification was separate from the distribution specification. The relevant portions of the *Care* inquiry are as follows:

> MJ: Now, I know from paragraph 2 of the stipulation of fact that you acquired some amount of cocaine and you possessed this. Then, on 12 July you sold a gram to Sergeant [W] for 50 bucks. But it--was that the entire amount you did you have some left over after that transaction with Sergeant [W]?
>
> ACC: I had some left.

[1] Pursuant to the terms of a pretrial agreement, the convening authority agreed to approve no more than 14 months of confinement, with no further limitations on punishment.
[2] *United States v. Care*, 40 M.J. 247 (C.M.A. 1969).

MJ: Okay. But then later on you bought 14 more grams of cocaine from Shawn, right?

ACC: Yes, sir.

MJ: And then ultimately you distributed about 11 of that 14. You said you had 3 grams of cocaine left over?

ACC: Yes, sir.

MJ: Now over the course of time between one July and whatever terminated your possession on 7 October 2009--and I'll ask you about that in just a moment--but at any time along the way whether it was the 1st of July, the 2nd of July, the 3rd of July, the 4th of July, look through, flip through your calendar up until 7 October 2009, you could've gotten rid of the cocaine. Is that right?

ACC: Yes, sir.

MJ: You could have just flushed away, thrown away, done whatever you wanted to besides possess it. Right?

ACC: Yes, sir.

MJ: So each day that you had the cocaine available to you in your house would you agree that that's actually a separate act of possession?

ACC: Yes, sir.

MJ: Even though it's a continuing course of conduct, each day you had the ability to consciously and deliberately get rid of it if you wanted to. Is that fair?

ACC: Yes, sir.

MJ: And the fact that you continued to hold on to--and I don't know how we want to describe it whether it's cash or supply that you are able to distribute then after that--was an ongoing or separate acts of possession day after day after day. Correct?

ACC: Yes, sir.

*Discussion*

The appellant argues that his sentence must be set aside because the military judge erroneously found 99 separate instances of possessing cocaine between 1 July 2009 and 7 October 2009. The appellant avers that the military judge's "exaggerated" view of the cocaine possessions prejudiced him because the military judge would have imposed a greater sentence for 99 separate acts of possession versus two continuous acts. The appellant argues that the military judge abused his discretion and asks this Court to reassess his sentence to no more than nine months of confinement and a bad-conduct discharge.

We review a military judge's sentencing determination for an abuse of discretion. *United States v. Beaty*, 70 M.J. 39, 41 (C.A.A.F. 2011) (citing *United States v. Leonard*, 64 M.J. 381, 383-84 (C.A.A.F. 2007)). Where a military judge's decision is influenced by an erroneous view of the law, that decision constitutes an abuse of discretion. *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010) (quoting *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006)). After a thorough review of the record, we find that the military judge did not abuse his discretion.

The military judge properly discerned through his questioning with the appellant whether the distribution and possession specifications were distinct from each other. The appellant admitted, both to the military judge and in the stipulation of fact, that he: (1) "acquired some amount of cocaine," which he possessed; (2) sold a gram of that cocaine to another Airman; and (3) had some of the cocaine left over. The appellant also admitted to the military judge that he: (1) "bought 14 more grams of cocaine from "Shawn," (2) distributed 11 of the 14 grams on discrete occasions, and (3) possessed the remaining 3 grams. Although the military judge referred to separate acts of possession, the context clearly shows that he was carefully ensuring that the divers possession offense was not a lesser included offense of distribution: "You had cocaine and you held it for a little bit and then you sold it." Indeed, the language used by the military judge in trying to determine whether the offenses are separate is very similar to that used in *United States v. Heryford*, 52 M.J. 265 (C.A.A.F. 2000), where the Court held that possession and distribution were separate crimes where each day the appellant possessed the drug at issue "he was at liberty to use it himself, destroy it, or distribute all or any part of it." *Id*. at 267. Here, the military judge's inquiry was aimed not at multiplying the possession offense but at distinguishing it from the distribution offense. Having reviewed the guilty plea inquiry in its entirety we are satisfied that, contrary to the appellant's assertion, the context shows that the military judge did not erroneously consider each day of possession as a separate crime but only ensured that the possession was a separate offense from the distribution.

The sentence in this case also fails to support the appellant's argument. The maximum punishment in this case was a dishonorable discharge, confinement for 22

years, forfeiture of all pay and allowances, and reduction to E-1. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 13 months, forfeiture of all pay and allowances, and reduction to E-l. Moreover, the pretrial agreement that the appellant voluntarily entered into with the convening authority capped the confinement at 14 months. The appellant's adjudged confinement of 13 months was well below the maximum and the terms of the pretrial agreement. As such, we decline to find that the military judge abused his discretion.

*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, 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


Angela E. Dixon

ANGELA E. DIXON, MSgt, USAF
Deputy Clerk of the Court