UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant FREDA S. KELLY
United States Air Force

ACM 36620

31 July 2007

Sentence adjudged 13 December 2005 by GCM convened at Hurlburt Field, Florida. Military Judge: Donald A. Plude (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

A military judge sitting as a general court-martial convicted the appellant, consistent with her pleas, of one specification each of divers wrongful use and possession of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 8 months, and reduction to E-1.

The appellant raises one allegation of error, asserting that the two specifications to which she pled guilty represent an unreasonable multiplication of charges. Finding no error, we affirm.

Through a stipulation of fact and her testimony during the *Care* inquiry,[1] the appellant admitted using cocaine between five and eight times within the time period alleged in the specifications. Most of the time, she got the cocaine from her brother, then took it to a local bar before using it. However, on one occasion, she used it with her brother at his apartment before going to the bar. On all but one of the occasions when she took the cocaine to the bar, the appellant consumed all of it in a single use. The one time she did not do so, she threw the remainder away. In addition, on one occasion she got the cocaine from a friend after she was already at a bar, consuming all of it on the spot.

Based on the above, the military judge, at the urging of the trial defense counsel and with the concurrence of the government counsel, considered the use and possession specifications "as a single offense" for sentencing purposes, reducing the maximum possible confinement period from ten years down to five. The defense made no assertion at trial that the specifications were also an unreasonable multiplication of charges, but raises it for the first time on appeal.

"Failure to raise the issue at trial waives an argument based on unreasonable multiplication of charges" for appellate purposes. *United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000); Rule for Courts-Martial 307(c)(4). We find no basis in the circumstances of this case to disregard that waiver, particularly in light of the appellant's affirmative decision, as part of a pre-trial agreement, to "waive all waiveable motions" in exchange for a limitation on the maximum sentence which could be approved by the convening authority.

Moreover, applying the criteria established by our superior court for determining whether the specifications represent an unreasonable multiplication of charges, we find no error. *United States v. Paxton,* 64 M.J. 484 (C.A.A.F. 2007); *United States v. Pauling,* 60 M.J 91 (C.A.A.F. 2004); *United States v. Quiroz,* 55 M.J. 334 (C.A.A.F. 2001). As indicated above, the appellant did not object at trial. Further, we are satisfied the two specifications are aimed at distinctly separate criminal acts and do not misrepresent or exaggerate the appellant's criminality.

The appellant's testimony during the *Care* inquiry indicates her use and possession of the cocaine she received from her brother were on most occasions not simultaneous, but were separated by time and distance. When her brother gave her the cocaine, she on several occasions did not use it immediately, but placed it in the pocket of her jeans, then carried it with her to a local bar for later use. Given this separation of time and distance, she had ample opportunity to

[1] Conducted pursuant to the guidance set forth in *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

reflect on and desist from her conduct, either by throwing the cocaine away or otherwise getting rid of it. Indeed, on at least one occasion, she chose not to consume all he gave her, but did throw some of it away. Under these circumstances, the challenged specifications did not unreasonably increase the appellant's punitive exposure. Nor is there any evidence of prosecutorial overreaching or abuse in drafting the charges.

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

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator