UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY D. LEWIS
United States Air Force

ACM 34625

4 November 2003

Sentence adjudged 24 May 2001 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Thomas G. Crossan Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, forfeiture of $600.00 pay per month for 7 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, Major Kyle R. Jacobson, and Major Karen L. Hecker.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

PRATT, ORR, W.E., and GENT
Appellate Military Judges

OPINION OF THE COURT

GENT, Judge:

The appellant pled guilty to wrongfully using cocaine on one occasion and marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge accepted his plea. The appellant's adjudged and approved sentence includes a bad-conduct discharge, confinement for 7 months, forfeiture of $600.00 per month for 7 months, and reduction to E-1. The appellant assigns four errors: (1) The specifications constitute one offense; (2) *Apprendi v. New Jersey,* 530 U.S. 466 (2000), limits the maximum punishment for cocaine use to two years rather than five years; (3) The appellant's plea to cocaine use is improvident; and (4) The specifications are an

unreasonable multiplication of charges. Finding no error prejudicial to the appellant's substantial rights, we affirm.

I. Facts

On 3 December 2000, the appellant wrongfully smoked marijuana. On 4 December 2000, the appellant provided a urine sample during a unit inspection sweep. It tested positive for both marijuana and cocaine. When questioned by investigators, the appellant admitted smoking marijuana on four separate occasions, the last being 3 December 2000. He denied using cocaine. The appellant said, "[M]aybe the weed I was smoking was laced."

The appellant reiterated these facts in a statement that was attached to a stipulation of fact offered into evidence at his trial. During the providence inquiry, the appellant said that when he smoked marijuana he did not know it was laced with cocaine. The test results convinced him that he did, in fact, use cocaine. The appellant made no motions at his trial.

II. Multiplicity

The appellant asserts that he cannot be convicted of separate specifications for wrongfully using different drugs when they were used simultaneously because they constitute one offense. The appellant failed to raise the issue of multiplicity before the military judge.

"Ordinarily, an unconditional guilty plea waives a multiplicity issue. Furthermore, double jeopardy claims, including those founded in multiplicity, are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (citations omitted). The appellant has the burden of establishing plain error. *Id.* He may overcome his failure to raise multiplicity at trial by showing the specifications are "'facially duplicative,' that is, factually the same." *Id.* (quoting *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997) (quoting *United States v. Lloyd*, 46 M.J. 19, 24 (C.A.A.F. 1997))). The specifications in this case are not factually the same – each alleges use of a different prohibited substance. Moreover, the marijuana specification alleges use on divers occasions. The appellant pled guilty to using marijuana on three occasions that were not coincident with his use of cocaine. Therefore, the appellant failed to establish plain error.

III. Applicability of Apprendi v. New Jersey

The appellant asserts that *Apprendi* requires proof beyond a reasonable doubt that the appellant knew he was using cocaine before he could be subjected to the penalty for cocaine use. The appellant contends that since he only knowingly used marijuana, he

should only be subjected to the penalty for that offense. We find *Apprendi* inapposite to the facts before us.

In *Apprendi*, the United States Supreme Court struck down a New Jersey "hate crime" law that provided for an extended term of imprisonment if the trial judge found, by a preponderance of the evidence, that the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Article 112a, UCMJ, offenses contain two elements: (1) that the accused used a controlled substance; and (2) that the use by the accused was wrongful. In the instant case, the specification concerning cocaine notified the appellant he was accused of wrongfully using a controlled substance – cocaine – on 3 December 2000 within the continental United States. The military judge also correctly informed the appellant of the two elements of the offense. The military judge properly instructed the appellant that:

> It is not necessary that you be aware of the exact identity of the contraband substance. The knowledge requirement is satisfied if you knew the substance was prohibited. Similarly, if you believe the substance to be a contraband substance, such as marijuana, when in fact, it also includes cocaine or is cocaine, you had sufficient knowledge to satisfy that element of the offense.

See United States v. Stringfellow, 32 M.J. 335, 336 (C.M.A. 1991).

The military judge instructed the appellant that the burden was upon the government to prove each element beyond a reasonable doubt for each offense. The military judge properly informed the appellant that the maximum penalty to which he could be subjected was a dishonorable discharge, forfeiture of all pay and allowances, seven years confinement, reduction to E-1, and the possibility of a fine. Given these facts, we find that *Apprendi* is simply not relevant to the case before us. The government alleged the elements of wrongful use of cocaine in the specification. The appellant admitted he was guilty of each element. The military judge properly found the appellant guilty by applying the correct legal standards to all the elements of the offense before the court. Therefore, the appellant was sentenced based solely upon the elements of the offenses of which he was charged and found guilty.

IV. Providence of the Plea to Wrongful Cocaine Use

The appellant complains that his plea to wrongful use of cocaine was improvident because he informed the military judge that he did not know that he was also ingesting cocaine when he used marijuana. The fact that the appellant may have been unaware "of the exact pharmacological identity of the substance he ingested is of no legal consequence" because he knew the substance he was smoking was prohibited by law. *Stringfellow,* 32 M.J. at 336. In the instant case, the appellant admitted that he knew he was using marijuana and that using marijuana was unlawful. The plea was provident.

V. Unreasonable Multiplication of Charges

The appellant alleges the two separate specifications of drug use are an unreasonable multiplication of charges. The appellant asserts that the military judge must have concluded that the "law required him to sentence appellant separately for both drug offenses even when appellant could not providently plead guilty to knowledge of presence of one of the drugs." As we noted above, the military judge correctly instructed the appellant that he could plead guilty to wrongful use of cocaine so long as he knowingly used a contraband substance. Since the appellant admitted that he knew he used marijuana and that such use was illegal, we conclude that his pleas to both specifications were provident. The appellant's claim of unreasonable multiplication of charges is especially ill-founded since the marijuana specification represents the consolidation of several separate uses of marijuana.

Military courts are empowered to correct an unreasonable multiplication of charges for which an accused enters provident pleas. *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001). However, the military judge was never given the opportunity to rule on this issue because the appellant failed to raise it at trial.

Our superior court has discussed unreasonable multiplication of charges when raised for the first time on appeal:

> On appeal, the issue of unreasonable multiplication of charges involves the duty of the Courts 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." Art. 66(c), UCMJ, 10 USC § 866(c). This highly discretionary power includes the power to determine that a claim of unreasonable multiplication of charges has been waived or forfeited when not raised at trial.

United States v. Butcher, 56 M.J. 87, 93 (C.A.A.F. 2001).

Because the appellant failed to raise the issue at trial, it is deemed waived. *Id.* Even if we applied forfeiture and a plain error analysis, the results would be no different. Under the facts of this case, the appellant has not, and cannot, show prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a). The military judge imposed a sentence well below the maximum allowable punishment for a single use of marijuana alone.

The approved findings are correct in law and fact, and no error prejudicial to the appellant's substantial rights 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

HEATHER D. LABE
Clerk of Court