UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DARIEN E. MUNOZ
United States Air Force

ACM S30252

29 September 2004

Sentence adjudged 6 November 2002 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 5 months.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Captain Michael J. Mulbarger.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto. Trial defense counsel did not object to the separate charging of wrongful use of marijuana and wrongful use of cocaine, violations of Article 112a, UCMJ, 10 U.S.C. § 912a. Furthermore, the appellant entered an unconditional plea of guilty to both specifications. Therefore, we hold that the issue has been waived. *See United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000) (citing *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997)); Rule for Courts-Martial (R.C.M.) 910(j). Even if not waived, however, we find that each of these specifications requires the proof of facts which the other does not. *See United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993). Therefore, we hold that these specifications are not facially duplicative and, therefore, may be separately charged.

Furthermore, we hold that the trial defense counsel's failure to object to the alleged unreasonable multiplication of charges waived the issue. *See* R.C.M. 905(e). Even if not waived, the marijuana and cocaine specifications do not misrepresent or exaggerate the appellant's criminality, nor do we find evidence of prosecutorial overreaching in the charges. Considering all the factors set forth in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), we hold that these specifications do not constitute an unreasonable multiplication of charges.

During the providence inquiry, the appellant stated to the military judge that, at the time and place alleged, he smoked a cigarette that he knew contained marijuana. He stated that he did not know the cigarette contained cocaine as well. He agreed with the military judge that he intended to use a contraband substance and that this intent was sufficient to establish the requisite criminal intent of the offense of wrongful use of cocaine. We conclude that the military judge elicited from the appellant factual circumstances that objectively support his plea of guilty to the offense of wrongful use of cocaine. *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996); *United States v. Stringfellow*, 32 M.J. 335 (C.M.A. 1991). We find no "substantial basis in law and fact for questioning the guilty plea." *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). Therefore, we hold that the military judge did not abuse his discretion in accepting the plea. *See United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

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 M. BRICE
Clerk of Court