UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL P. PARROTTE
United States Air Force

ACM 37184

15 December 2008

Sentence adjudged 08 January 2008 by GCM convened at Edwards Air Force Base, California. Military Judge: Steven J. Ehlenbeck.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Timothy M. Cox, and Captain Jennifer Raab.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Donna S. Rueppell.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a general court-martial convicted him of one charge and one specification of violating a lawful general order by possessing Salvia Divinorum[1] while on base, in violation of Article 92, UCMJ, 10 U.S.C. § 892; one charge and one specification of operating a vehicle while impaired

[1] Salvia Divinorum is a psychoactive herb which can induce strong dissociative effects. It is chewed, smoked, or ingested and can produce experiences ranging from uncontrollable laughter to profoundly altered states. Although not listed as a controlled substance, the installation commander issued a lawful general order prohibiting all members assigned to the installation from possessing Salvia Divinorum or any derivative thereof.

by marijuana and oxycodone, in violation of Article 111, UCMJ, 10 U.S.C. § 911; one charge and one specification each of possession of marijuana, divers wrongful uses of marijuana, divers wrongful introduction of marijuana onto a military installation, wrongful introduction of oxycodone onto a military installation, and wrongful use of oxycodone, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one charge and one specification of larceny in violation of Article 121, UCMJ, 10 U.S.C. § 921; and one charge and one specification of divers wrongful uses of Dextromethorphan Hydrobromide and Chlorpheniramine Maleate, sold commercially as "Coricidin Cough and Cold" (CCC), with the intent to become intoxicated, in violation of Article 134, UCMJ, 10 U.S.C. § 934. A panel of officers sentenced the appellant to a bad-conduct discharge, confinement for twelve months, forfeiture of all pay and allowances for twelve months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant raises one issue on appeal. He asserts the specification for possession of marijuana constitutes an unreasonable multiplication of charges. Finding no error, we affirm.

Background

The appellant was assigned to the Mission Support and Services Squadron at Edwards Air Force Base (AFB), California and worked at the on-base fitness center. On 2 October 2007, during an investigation into the loss of money from the fitness center safe, the appellant was interviewed and confessed to stealing $70.00 from the safe. Additionally, when confronted with information from a confidential police informant, DB, the appellant confessed to using an over-the-counter cough medicine to get high. He took fifteen CCC pills at one time, which resulted in intoxication. He used the CCC pills with other airmen. Two days after his interview, the appellant was selected for a random urinalysis, which tested positive for marijuana.

On 9 October 2007, DB told security forces investigators that she saw the appellant in an impaired state, found out he was using marijuana, and saw drug paraphernalia in the appellant's dorm room by his bed. That afternoon, the investigators, armed with a probable cause search warrant, entered the appellant's dorm room, where they found two glass smoking pipes with residue that tested positive for marijuana, two boxes of CCC pills, and one box of Salvia Divinorum. The appellant was off-base at the time, and upon entry onto the installation, he consented to a search of his vehicle. During the search, the officers found a bag containing 1.49 grams of marijuana. The appellant admitted he bought marijuana a few times from a woman off-base and that he would "smoke a little each night after work." On 10 October 2007, the appellant consented to a urinalysis test, which came back positive for marijuana.

On 22 October 2007, security forces guards posted at the entrance gate to Edwards AFB noticed the appellant's vehicle swerving as he drove onto the installation and away from the gate. Security forces followed the appellant and noticed his vehicle crossing the center line of the road. When stopped, the appellant slurred his speech and had watery eyes. He failed a field sobriety test. During a search of the vehicle, security forces found one cellophane bundle of 1.85 grams of marijuana, one plastic container with 2.56 grams of marijuana, sixteen CCC pills, half of one oxycodone pill, and thirteen glass or stainless steel smoking pipes. The appellant admitted that he ran into a civilian male off-base who sold him some marijuana and an oxycodone pill. He and the civilian smoked some marijuana in his car before the appellant drove back to base. Following this latest incident, the appellant was placed in pretrial confinement. He consented to another urinalysis test which tested positive for both marijuana and oxycodone. On 24 October 2007, pursuant to his consent, the appellant's dorm room was searched. The investigators found one broken glass pipe, two soda cans which were modified to be used as pipes, five empty CCC pill packs, one partially empty CCC pill pack, five glass pipes, and a water smoking pipe.

During the *Care*[2] inquiry, the military judge asked the appellant about his possession of the marijuana. The possession specification was based on the residue found in the two glass pipes during the 9 October 2007 search of the appellant's dorm room. The appellant told the military judge that the residue was the result of his smoking marijuana in his dorm room. The appellant admitted that he knew he had the pipes and that there was residue in them. The appellant told the military judge that he kept the pipes in his closet. At the conclusion of the inquiry related to the possession of marijuana, the military judge asked the trial counsel if the possession was for the same time period as the charged divers uses of marijuana. The trial counsel confirmed it to be true. The military judge then opined that, "it certainly appears that the residue was solely the result of the uses for which the accused was charged, and that he didn't intend to retain it to use later. Based on that . . . it may be multiplicious for sentencing purposes." Despite trial counsel's arguments to the contrary, the military judge found the specification for possession of the marijuana multiplicious for sentencing.

The appellant entered into a pretrial agreement (PTA) with the convening authority in which he agreed to waive all waivable motions. The military judge thoroughly examined this provision of the agreement with the appellant, and advised him that it "precludes this court or any appellate court from having the chance to determine if you are entitled to any relief based upon these potential motions." At trial, the appellant did not make a motion for relief from unreasonable multiplication of charges. In fact, the military judge, when determining the specification for possession of marijuana would be considered multiplicious for sentencing purposes, specifically stated he did not find the specification for possession of marijuana multiplicious for findings purposes.

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[2] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Discussion

The appellant contends, for the first time on appeal, that the specification for wrongful possession of marijuana is an unreasonable multiplication of charges, arguing that the possession stems directly from the uses to which he pleaded guilty. The appellant based his arguments in part on comments made by the military judge during the *Care* inquiry. The appellant requests the conviction for possession of marijuana be set aside.

"What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." Rule for Courts-Martial 307(c)(4). As emphasized by our superior court, the issue of unreasonable multiplication of charges requires a court 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." *United States v. Butcher*, 56 M.J. 87, 93 (C.A.A.F. 2001) (quoting Article 66(c), UCMJ, 10 U.S.C. § 866(c)).

This Court has recently held that an affirmative waiver of motions by the appellant pursuant to a PTA provision freely and voluntarily agreed to by the appellant eliminates the need for this Court to consider the claim of unreasonable multiplication of charges unless there is an extreme or unreasonable "piling on" of charges. *United States v. Gladue*, 65 M.J. 903, 905 (A.F. Ct. Crim. App. 2008); *see also United States v. Butcher*, 53 M.J. 711, 714 (A.F. Ct. Crim. App. 2000), *aff'd*, 56 M.J. 87 (C.A.A.F. 2001) (failure to raise a claim of unreasonable multiplication of charges at trial constitutes waiver).

One element of wrongful possession of marijuana is "[t]hat the accused possessed a certain amount of a controlled substance." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37.b.(1) (2008 ed.). The term "certain amount" is defined as follows:

> When a specific amount of a controlled substance is believed to be possessed . . . the specific amount should ordinarily be alleged in the specification. It is not necessary to allege a specific amount, however, and a specification is sufficient if it alleges that an accused possessed . . . 'some,' 'traces of,' or 'an unknown quantity of' a controlled substance.

Id. at ¶ 37.c.(7).

First, in the case at hand, we find the appellant's plea to all the charges and specifications were properly established pursuant to *Care*. Second, we find the military judge ensured the appellant freely and voluntarily agreed to the terms of the PTA.[3]

[3] Without the protection of the pretrial agreement, the appellant was facing a maximum period of confinement of 20 years, even after the military judge concluded the possession of marijuana charge was multiplicious for sentencing

Therefore, we find the appellant waived the issue of unreasonable multiplication of charges.

Finally, even if there was no waiver, we find no extreme or unreasonable piling on of charges. The government was judicious in its charging decisions. For example, rather than charge both possession and introduction onto a military installation of the marijuana and the oxycontin, the appellant was only charged with the wrongful introduction. The government limited the possession charge to the residue left in the two glass pipes, which were seized on 9 October 2007. The appellant's divers uses of marijuana occurred over a period from on or about 1 September 2007 to on or about 23 October 2007. While the military judge opined the appellant did not intend to use the residue, this does not impact the wrongful possession of the residue. It is clear the appellant's marijuana use did not end on 9 October 2007 when the two pipes with marijuana residue were seized. From review of the entire record, it is reasonable to conclude the appellant was saving the pipes in his closet for future use. Between the time military investigators seized the two pipes with marijuana residue from the appellant's dorm and the time the appellant was placed in pretrial confinement, he amassed a bountiful collection of replacement pipes and brought onto the installation roughly 5.80 grams of marijuana for his personal use.[4] Finally, as noted above, the military judge found the specification for possession multiplicious for sentencing, thereby reducing the potential punishment by two years confinement. Therefore, we find the appellant was not prejudiced.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

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purposes, reducing the maximum period of confinement by two years. The PTA limited the confinement to 15 months.

[4] On 22 October 2007, almost 2 weeks after his dorm room was searched on 9 October 2007, a search yielded 13 stainless steel smoking pipes from the appellant's vehicle and an additional 9 smoking pipes (including the 2 cans fashioned into pipes) from his dorm room.

Accordingly, the approved findings and sentence are

AFFIRMED.

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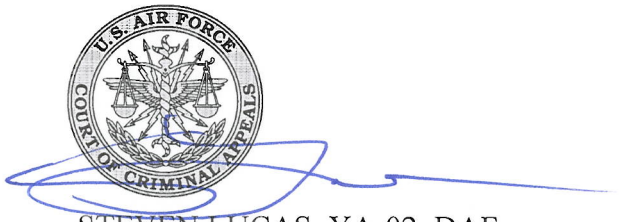

STEVEN LUCAS, YA-02, DAF
Clerk of the Court