UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class GREGORY F. PECK
United States Air Force

ACM S30553

9 December 2004

Sentence adjudged 13 January 2004 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Brandon A. Burnett, and Captain David P. Bennett.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Jin-Hwa L. Frazier.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The special court-martial, consisting of a military judge sitting alone, sentenced him to a bad-conduct discharge, confinement for 4 months, and reduction to E-1. The appellant has submitted one assignment of error, that the finding of guilty is ambiguous in that it is contrary to *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). Finding error, we order corrective action.

Background

Having charged the appellant with one specification of wrongful use of cocaine on divers occasions, the government presented evidence of two such uses. The military judge found the appellant guilty except to the words "on divers occasions." The military judge did not specify which of the two instances of cocaine use formed the basis of the conviction.

The appellant asserts that, consistent with *Walters*, this Court cannot perform a factual sufficiency review. The appellee concedes that issue, but urges us to set aside the action and return the case to the convening authority for a proceeding in revision.

Discussion

It goes without saying that this Court cannot affirm the factual sufficiency of the military judge's finding, because we do not know which of the two incidents formed the basis of the conviction. Although the evidence of one of the two incidents was detailed and credible, and the other less so, consistent with *Walters* and *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004), we are unable as a matter of law to perform our factual sufficiency review in accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c). The only remaining issue is whether we may return the case to the convening authority for a proceeding in revision.

A convening authority may order a proceeding in revision to correct "an apparent error or omission in the record or if the record shows improper or inconsistent action by a court martial . . . that can be rectified without material prejudice to the substantial rights of the accused." Article 60(e)(2), UCMJ, 10 U.S.C. § 860(e)(2). *See United States v. Roman*, 46 C.M.R. 78 (C.M.A. 1972). "[N]o proceeding in revision may be held when any part of the sentence has been ordered executed." Rule for Courts-Martial 1102(d).

A proceeding in revision is permissible, for example, to clarify the accused's understanding of his right to counsel (*United States v. Barnes*, 44 C.M.R. 223 (C.M.A. 1972)); to correct an inadvertent mistake in the announcement of sentence (*United States v. Liberator*, 34 C.M.R. 279 (C.M.A. 1964), *United States v. Robinson*, 15 C.M.R. 12 (C.M.A. 1954)); or to ensure that the accused understands that a plea of guilty waives his right against self-incrimination (*United States v. Berkley*, 47 C.M.R. 30 (N.C.M.R. 1973)).

On the other hand, a proceeding in revision may not be held under circumstances that would place the accused in double jeopardy. *Barnes*, 44 C.M.R. at 224. *See also United States v. Seay*, 38 C.M.R. 791 (A.F.B.R. 1967), in which the Air Force Board of

Review found a proceeding in revision improper when the desired corrective action would, in effect, constitute a reconsideration of a not guilty finding.

Turning to the case sub judice, we note, first of all, that at least part of the sentence has been ordered executed, that is, the confinement and the reduction. Therefore, we conclude that it is simply too late to hold a proceeding in revision. Additionally, we conclude that, in any event, this is not a case in which a proceeding in revision is appropriate. We recognize that we have at least left that possibility open in a recent case (*see United States v. Welsh*, ACM 34964 (A.F. Ct. Crim. App. 28 May 2004) (unpub. op.)); however, after considering the case law and paying particular attention to *Walters* and *Seider*, we conclude that the ambiguity at issue here is more than a mere inadequacy in the record. Certainly, our superior court has never even hinted that a proceeding in revision is a viable remedy for this type of error.

Indeed, our superior court has explicitly rejected the idea that a *Walters* violation can be rectified through a rehearing, which would violate the prohibition against double jeopardy because it would entail a reconsideration of a not guilty finding. *Walters*, 58 M.J. at 397. Although a revision is not a rehearing, we conclude that to permit a revision proceeding in this type of case would amount to the same thing.

Our superior court has provided only one remedy for a *Walters* error—dismissal with prejudice. The reasoning appears to be that, when found guilty of only one instance of malfeasance out of a divers number alleged, and when that one instance is not specified, (1) the appellant has been acquitted of the remaining allegations of wrongdoing and (2) it is impossible as a matter of law to identify the one instance found beyond a reasonable doubt from among the others. Therefore, the reviewing authorities have no choice but to dismiss the entire specification under circumstances which preclude retrial. The effect for the appellant in such a circumstance is no different than if he were acquitted outright.

Conclusion

We cannot conclude, therefore, that a *Walters* violation is merely an error in the record; to the contrary, it implicates the substantial rights of the appellant to be free from double jeopardy. For that reason, we conclude that a proceeding in revision is not a proper remedy.

The charge and its specification are dismissed.

OFFICIAL

ANGELA M. BRICE
Clerk of Court