UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER W. RANDAZZO
United States Air Force

ACM 35445

15 June 2005

Sentence adjudged 22 June 2002 by GCM convened at Peterson Air Force Base, Colorado. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge and confinement for 8 months.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major John C. Johnson.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

STONE, Chief Judge:

At a general court-martial convened at Peterson Air Force Base, Colorado, the appellant pled not guilty to two specifications involving wrongful use and distribution of ecstasy on divers occasions. Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officer members found the appellant guilty of both specifications, but only as to lesser offenses. Specification 1 alleged he wrongfully "used" ecstasy on divers occasions, but the court members found him guilty of the lesser-included offense of wrongful "possession" on divers occasions. As to Specification 2, the court members found him guilty of a single instance of wrongful distribution by excepting out the words "on divers occasions." Thus, their verdict reflects findings of guilty to a single instance of distribution and

multiple instances of possession. The court members sentenced him to a bad-conduct discharge and confinement for 12 months. The convening authority reduced the confinement to 8 months, but otherwise approved the sentence as adjudged.

The appellant identified the following issues for our consideration:

I.

WHETHER THE FINDINGS OF THE COURT-MARTIAL AS TO SPECIFICATION 2 OF THE CHARGE ARE THE EQUIVALENT OF NO FINDINGS BECAUSE THEY ARE VAGUE AND AMBIGUOUS IN THAT THEY FAIL TO REFLECT WHAT FACTS CONSTITUTE THE OFFENSE.

II.

WHETHER THE FINDINGS OF THE COURT-MARTIAL AS TO SPECIFICATION 1 OF THE CHARGE (POSSESSION OF ECSTASY) SHOULD BE DISMISSED AS A LESSER-INCLUDED OFFENSE OF SPECIFICATION 2 OF THE CHARGE (DISTRIBUTION OF ECSTASY) BECAUSE THE VAGUENESS OF THE FINDINGS AS TO SPECIFICATION 2 ALLOWS THE POSSIBILITY THAT IT ENCOMPASSES THE SAME FINDINGS AS TO SPECIFICATION 1, THUS ILLEGALLY PLACING APPELLANT IN DOUBLE JEOPARDY.

III.

THE APPELLANT ARGUES ALTERNATIVELY THAT THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT SPECIFICATION 1 (POSSESSION ON DIVERS OCCASIONS) IN LIGHT OF THE VAGUE AND AMBIGUOUS FINDINGS IN SPECIFICATION 2 (DISTRIBUTION ON A SINGLE OCCASION).[1]

As to Issue I, we hold that the military judge plainly erred in not seeking clarification of the findings on Specification 2, which were rendered ambiguous when the

[1] The appellant raises this issue in a footnote to his assignment of errors. Indeed, the appellant takes a multi-pronged approach to this issue. We caution counsel that failure to set forth each assignment of error separately violates the Joint Courts of Criminal Appeals Rules of Practice and Procedure, Rule 15(a) (1 Sep 2000, as amended through 1 Aug 2004). Additionally, Rule 15.1 of the Air Force Court of Criminal Appeals Rules of Practice and Procedure states, "Prior to the Summary of Proceedings, appellate counsel shall insert a Statement of Issues and state seriatim *all* errors assigned in the case." (Emphasis added.) Strict compliance with these rules avoids unnecessary confusion on the part of all participants as to the exact basis of an appellant's appeal and assures a timely and accurate review of the case. This is particularly important for a court of mandatory review.

court members found the appellant guilty of a single distribution of ecstasy by excepting the words "on divers occasions." The ambiguity created by the exception of these words—without some clarification at trial as to the factual basis of the verdict—renders it impossible for this Court to conduct a factual sufficiency review in accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c). *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003); *United States v. King*, 50 M.J. 686 (A.F. Ct. Crim. App. 1999). The government asks that we consider the testimony at trial to determine the one instance of ecstasy distribution found by the court members. This we cannot do. The ambiguity cannot "be resolved by weighing [the] evidence and concluding that evidence of one [drug distribution] is quantitatively or qualitatively inferior" to another. *United States v. Seider*, 60 M.J. 36, 38 n.* (C.A.A.F. 2004). We further conclude this Court is without authority to correct the ambiguity in Specification 2 through a proceeding in revision pursuant to Rule for Courts-Martial (R.C.M.) 1102(b)(1). *United States v. Timmerman*, 28 M.J. 531 (A.F.C.M.R. 1989).

In Issue II, the appellant asserts that Specification 1 (possession of ecstasy on divers occasions) is multiplicious with Specification 2 (distribution of ecstasy on one occasion). However, because we must set aside and dismiss Specification 2, the multiplicity issue is moot. We now address Issue III in some detail.

Background

At trial, the government offered evidence suggesting the appellant used and distributed ecstasy on as many as five occasions. Prior to the presentation of evidence, the trial defense counsel expressed concern about the duplitious nature of both specifications. *See generally* R.C.M. 307(c)(4) ("Each specification shall state only one offense."). Trial defense counsel specifically disavowed any desire to have the offenses severed.[2] Nonetheless, he asked the military judge to give the standard spillover instruction during preliminary instructions to the court members, in addition to giving it immediately prior to the findings arguments. The military judge granted this request. The military judge gave the spillover instruction a third time at the request of the defense immediately after closing arguments. The third time he gave the instruction, the military judge advised the court members:

> Let me remind you that an accused may be convicted based only on evidence before the court. Each offense must stand on its own, and you must keep the evidence of each offense separate. *And I will note here that there are two specifications in this case. Each specification alleges multiple offenses.*

[2] *But see* R.C.M. 906(b)(5), Discussion ("The sole remedy for a duplicitous specification is severance of the specification into two or more specifications.").

(Emphasis added.) Unlike his previous spillover instructions, the military judge's final instruction also included the language emphasized above.

When the members returned to the courtroom after their deliberations to announce the verdict, the military judge examined the findings worksheet and found it was not in proper form. Indeed, the court members' annotations and lineouts were confusing and contradictory. The military judge promptly obtained a clean copy of the findings worksheet and provided it to the court president. The military judge went over the worksheet in detail with the court members in open court. Neither side objected to the worksheet or the military judge's instructions on how to complete it. When the court members returned from their deliberations shortly thereafter, the military judge examined the completed findings worksheet and this time found it to be in proper form. It was returned to the president, who announced the findings as reflected on the worksheet. The worksheet itself was marked as follows for Specification 1 of the Charge:

> **II: Mixed Findings or Findings by Exceptions and Substitutions**
>
> **(1)** Of Specification 1 of the Charge:
>
> ~~(Not Guilty)~~
>
> ~~(Guilty)~~
>
> (Not Guilty, but Guilty of the Lesser Included Offense of Possession of 3, 4 – Methylenedioxy-N-Ethylamphetamine and/or 3, 4 Methylenedioxymethamphetamine, and/or 4 – Methoxyamphetamine, and/or some derivative thereof, commonly known as Ecstasy, also in violation of article 112a, UCMJ)
>
> ~~(Not Guilty, but Guilty of the Lesser Included Offense of Attempted Use of 3, 4 – Methylenedioxy-N-Ethylamphetamine and/or 3, 4 Methylenedioxymethamphetamine, and/or 4 – Methoxyamphetamine, and/or some derivative thereof, commonly known as Ecstasy, in violation of article 80, UCMJ)~~
>
> ~~(Guilty, except the word(s)_____, substituting therefore the words _____; of the excepted word(s): Not Guilty; of the substituted word(s): Guilty)~~.

After announcement of the findings, the military judge engaged in the following colloquy with the trial defense counsel:

> MJ: Defense counsel if you would like to inquire of the court in any way with regard to---- Well, let me do that. Members, of the court, is that in fact, based upon my reading of the initial worksheet and the second worksheet--are these the findings that in fact you voted upon? Is that how---- In general--I'm not asking for anybody's individual votes. Okay? I just want to make sure that all of your--this was in fact what the court agreed upon.
>
> Okay. And that's an affirmative response from all members, and that is a guilty finding of the lesser included offense of possession with regard to Specification 1, and guilty of Specification 2, excepting the words, "on divers occasions." Is that a correct finding of the court?
>
> That's an affirmative response from all members.
>
> CDC [Circuit Defense Counsel]: If I could, Your Honor?
>
> MJ: Certainly.
>
> CDC: As to Specification 1, "divers?" There was a finding of guilty on, "divers." Could you inquire of the court if that's correct?
>
> MJ: The court did not except out any words with regard to Specification 1 of the Charge. However, they did find him guilty of the lesser included offense.
>
> CDC: Okay. Thank you, Your Honor.

Trial defense counsel did not object or express any dissatisfaction with either the way the military judge handled the problematic worksheet or with his handling of the announcement of the verdict. Indeed, defense counsel complimented the judge by saying, "I'm very impressed with the way you handled that."

Discussion

The issue that remains is whether the finding of guilty for possessing ecstasy on divers occasions is legally and factually sufficient in light of the ambiguous findings on the distribution specification. On appeal, the appellant concedes that *on its face* the findings worksheet was in proper form. We agree. There is nothing irregular about the second findings worksheet as completed or in the announcement of the findings.

Nonetheless, the appellant sets forth three basic arguments urging this Court to find that this specification is legally and factually insufficient:

> (1) It is his position that the court members improperly captured their true findings on the second worksheet, i.e., he believes they found him guilty of possession on a single occasion but neglected to except out the words "on divers occasions." In support of this position, he argues the findings worksheet was misleading in that it may have suggested to the court members that they could not modify the lesser-included offense of possession by excepting out the words "on divers occasions." He urges us to reach this conclusion based upon the difficulty the court members had with the initial findings worksheet.
>
> (2) He further suggests that the fatal ambiguity in Specification 2 "taints" Specification 1.
>
> (3) Finally, he contends the military judge abused his discretion by not asking the court members to clarify their findings.

We first turn to the appellant's assertion that the findings worksheet was misleading.[3] The appellant appears to argue that the worksheet should have included a provision for exceptions and substitutions immediately after each lesser-included offense. Instead, the worksheet only included a provision for exceptions and substitutions as it related to the greater offense. But a "worksheet" is just that—a tool for court members to put their findings in proper form. If the court members had actually intended to except out the "on divers occasions" language, they could have readily modified the worksheet itself by combining the possession finding with the exceptions and substitutions block. Thus, while we agree that under the circumstances of this case, more explicit options may have been desirable, we do not find the worksheet to be plainly in error. *United States v. Powell*, 49 M.J. 460, 462 (C.A.A.F. 1998). Even if we were persuaded the worksheet reflected some inadequacies, we are absolutely convinced the court members were properly advised that they could make a variance to the lesser-included offense of possession. Rather than isolate our attention on the worksheet, we have considered the entire record, to include the following:

> (1) The court members were very clearly advised of the need to consider each allegation individually, having received a spillover instruction three times. In order to accept the appellant's assertion that the court members were confused about whether they were permitted to except out the "on divers occasions" language, we would have to assume that the court

[3] Compare R.C.M. 918(a)(1), Discussion, with the format used by the military judge in fashioning the findings worksheet.

members ignored the multiple spillover instructions advising them that each offense had to be considered separately. This proposition runs counter to the long-established rule that court members are presumed to have followed a military judge's instructions. *See United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975).

(2) The oral and written instructions on findings clearly advised the court members that the lesser-included offense of possession was alleged "on divers occasions." We also presume the court members followed this instruction. *Id.*

(3) When the trial defense counsel asked whether the findings to Specification 1 were "divers," the military judge responded, "The court did not except out any words with regard to Specification 1 of the Charge." Our review of the entire record reveals the court members were very attentive to the judge and parties throughout the proceedings. We are convinced these court members would not have sat moot during this colloquy if the judge had misstated their findings.

(4) It is also clear the members understood the concept of exceptions and substitutions because they excepted out the words "divers occasions" in Specification 2.

(5) Further, we are convinced the military judge's instructions to the court members regarding completion of the findings worksheet resolved the initial difficulties the court members had.

The court members had proper guidance on how to make a variance to Specification 1. In view of the liberal rule we generally follow in interpreting jury verdicts, we hold that neither the worksheet itself nor the court members' initial difficulty in completing it led to an uncertain, indefinite, or ambiguous verdict. *United States v. Dilday*, 47 C.M.R. 172, 173 (A.C.M.R. 1973).

We turn now to the appellant's remaining arguments concerning legal and factual sufficiency. If an announced finding is ambiguous, "the military judge should seek clarification." R.C.M. 922(b), Discussion. When the announced findings are ambiguous because the factfinder has excepted out the words "on divers occasions" without further substitutions, the military judge *must* seek clarification. *United States v. Walters*, 58 M.J. at 391. An announced finding is sufficiently certain, definite, and free of ambiguity if it enables the court to "base judgment thereon and to protect against subsequent prosecution for the same offense." *United States v. Darden*, 1 M.J. 574, 575 (A.C.M.R. 1975) (citing *Dilday*, 47 C.M.R. at 172).

We find we can do so in this case. We are unpersuaded by the appellant's argument that the court members' findings on Specification 2 somehow tainted Specification 1 in such a way that it was rendered vague and ambiguous. We fail to perceive a carry-over effect. This is because a finding that an accused is not guilty of *distributing* a drug is not inherently contradictory to a finding that an accused may have *possessed* the same drug. Similarly, a finding that an accused is not guilty of *using* a drug does not *ipso facto* contradict a finding that he or she *possessed* the drug. Not only do we conclude there are no contradictory findings as a legal matter, but also as a factual matter. Under the facts of this case, the court members had sufficient evidence to conclude beyond a reasonable doubt that the appellant possessed ecstasy on divers occasions, notwithstanding their conclusion that the evidence did not support multiple instances of distribution of the drug. *See United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Nor do the findings run afoul of the principles set forth in *Walters*, 58 M.J. at 391. The exercise of our Article 66(c), UCMJ, powers would not necessarily result in findings of fact that would contradict findings of not guilty reached by the court members. *King*, 50 M.J. at 687.

Based upon the entire record, we are satisfied that the appellant has suffered no prejudice and that the verdict is sufficiently certain to protect the appellant from subsequent prosecution for the same offenses. *Timmerman*, 28 M.J. at 531; *Darden*, 1 M.J. at 575. Thus, reviewing the matter de novo, we conclude the findings are not ambiguous or contradictory, and hold the military judge did not err when he did not ask for further clarification of the findings as to Specification 1.

Remedy

The final determination for this Court is whether we can reassess the sentence based upon the remaining specification. We have the "jurisdiction, authority, and expertise to reassess court-martial sentences . . . after dismissing charges," when we believe we can determine what sentence would have been imposed at the original trial absent the error. *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000). In making this determination, we note that dismissal of Specification 2 reduces the maximum confinement from 20 years to 5 years. We further note that the distribution offenses were the primary focus of the trial below. Under these circumstances, we conclude we are unable to reliably determine what sentence would have been imposed in the absence of the remaining distribution offense and thus, order a sentence rehearing. *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

Conclusion

Specification 2 of the Charge is set aside and dismissed with prejudice. The sentence is also set aside. As to Specification 1 and the Charge, we conclude the findings 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). Accordingly, Specification 1 and the Charge are affirmed. The record of trial is returned to the convening authority for a rehearing on the sentence. In the event that a rehearing on the sentence is impracticable, a sentence of no punishment may be approved.

OFFICIAL

ANGELA M. BRICE
Clerk of Court