UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ELTON P. ROGERS, JR.
United States Air Force

ACM 37027

26 November 2008

Sentence adjudged 01 May 2007 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Stephen Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Tiaundra D. Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, and Captain Jamie L. Mendelson.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with his plea, a military judge sitting as a general court-martial convicted the appellant of one specification of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consisted of a bad-conduct discharge, 30 days confinement, and reduction to E-1.

The appellant raises one issue on appeal: whether the appellant's court-martial lacked jurisdiction because the appellant was already convicted of substantially the same

offense in state court and the convening authority was not empowered to convene this court absent Secretary of the Air Force approval.[1] Finding no error, we affirm.

Background

On or about 22 August 2006, the appellant's then live-in girlfriend called the Bellbrook Police Department to report domestic violence. After the phone call, the appellant removed a black box from inside his home, placed it in his vehicle, and left his home on foot. An officer from the Bellbrook Police Department arrived at the appellant's home. Upon arrival, the appellant's girlfriend informed the officer that there was cocaine in the appellant's vehicle. The officer located the appellant in the vicinity of his home and obtained verbal consent from him to search his vehicle. While conducting his search of the vehicle, the officer found a box containing a substance that appeared to be cocaine. The officer conducted a field test of the drug, and it tested positive for cocaine.

The appellant was transported to the Green County Detention Center, Greene County, Ohio. All evidence seized was sent to Miami Valley Crime Laboratory. The laboratory report made a finding that the substance seized from the appellant's vehicle amounted to approximately 55.11 grams of cocaine.

On 23 August 2006, a military magistrate gave a verbal authorization based on probable cause to seize a sample of the appellant's urine. After receiving the search authorization, the Air Force Office of Special Investigations (AFOSI) obtained a urine specimen from the appellant, who was in custody at the jail in Greene County, Ohio. The urine sample tested positive for the cocaine metabolite.

On 27 October 2006, the appellant was arraigned in the Court of Common Pleas of Green County, Ohio, on the charge of violating Ohio Rev. Code Ann. § 2925.11(A), Possession of controlled substances, and three other charges.[2] On 5 April 2007, the appellant pled guilty to the cocaine possession charge, a felony of the third degree.

On 10 January 2007, the appellant's commander preferred one charge and specification against the appellant for wrongful use of cocaine between on or about 16 August 2006 and on or about 23 August 2006. During the appellant's court-martial on 1 May 2007, he stated that he used the cocaine while alone at his home. After crushing the cocaine on a plate with a credit card, over the course of two to three hours, the appellant snorted 14 or 15 lines with a rolled up dollar bill. This use occurred before his arrest by the Bellbrook Police officer for cocaine possession.

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[1] The Court heard oral argument in this case on 29 August 2008.

[2] The other three charges consisted of one charge of violating Ohio Rev. Code Ann. § 2925.03(A)(1), Trafficking in drugs, and two charges of violating Ohio Rev. Code Ann. § 2923.24(A), Possessing criminal tools.

Discussion

Issues of court-martial jurisdiction are never waived. *United States v. Reid*, 46 M.J. 236, 240 (C.A.A.F. 1997). We review jurisdictional questions de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). If there is a jurisdictional error, it "impacts the validity of the entire trial and mandates reversal." *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005) (citing *United States v. Perkinson*, 16 M.J. 400, 402 (C.M.A. 1983)).

In this case, the appellant argues that his court-martial charge was for substantially the same act or omission as his civilian charge. He references Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 2.5 (26 Nov 2003),[3] which states that except when the Secretary of the Air Force approves it, "do not court-martial or punish under Article 15, UCMJ, any member of the Air Force for substantially the same act or omission for which a state or foreign court tried the member, regardless of outcome." AFI 51-201, ¶ 2.5.

We begin our analysis by determining whether the charges are "for substantially the same act or omission." *Id.* Our superior court has held that if an accused possesses a quantity of some drug and consumes a portion of it, he can be charged with both the use of the drug and possession of the remaining amount of the drug. *United States v. Johnson*, 26 M.J. 415, 419 (C.M.A. 1988); *see also United States v. Smith*, 14 M.J. 430 (C.M.A. 1983); *United States v. Jordan*, 24 M.J. 573, 576-77 (N.M.C.M.R. 1987).

The appellant's possession and use of cocaine took place at two distinct times. First, the appellant snorted 14 or 15 lines of cocaine over two to three hours. Subsequently, whether hours or days later, he was found to be in possession of approximately 55 grams of cocaine.

At the time of the possession, the appellant's then live-in girlfriend was present and she contacted the authorities. According to the appellant's testimony during his *Care*[4] inquiry, he used the cocaine over the course of two to three hours while at his home alone. The appellant did not state which day he used the cocaine, but acknowledged it was before he was arrested by the Bellbrook Police officer.

We look to the charged offenses themselves. The appellant argues that the Ohio statute does not differentiate between possession and use. Therefore, because both possession and use are charged under the same Ohio statute, the two charges may not be separate and distinct in this case. The state code under which the appellant was

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[3] The current version of Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, (21 Dec 2007), was not in effect at the time of the appellant's court-martial; therefore, we rely upon the previous edition of AFI 51-201 (26 Nov 2003) in this opinion.

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

convicted, Ohio Rev. Code Ann. § 2925.11(A), is entitled "Possession of controlled substances." This provision includes obtaining, possessing, or using a controlled substance, much like Article 112a, UCMJ, includes wrongfully using, possessing, distributing, introducing, manufacturing, importing, or exporting a controlled substance. The fact that both actions, using and possessing, are contained under one provision does not bar them from being considered separate and distinct acts for purposes of charging the appellant. As illustrated in *Johnson*, under Article 112a, UCMJ, an accused may be charged with both using and possessing a controlled substance.

The appellant's use and possession are two separate and distinct offenses; therefore, further analysis into the question of jurisdiction is not required. The appellant's court-martial had jurisdiction over the appellant and the charge.

Erroneous Promulgating Order

We note the court-martial order incorrectly states the adjudged sentence as a bad-conduct discharge, 30 days confinement, and reduction to E-1. The adjudged sentence was actually a bad-conduct discharge, two months confinement, and reduction to E-1. Additionally, the court-martial order is not dated. We order the promulgation of a corrected court-martial order.

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, 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

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