UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ERIK W. SAXON
United States Air Force

ACM 35069

30 August 2004

Sentence adjudged 12 October 2001 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 42 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Patricia A. McHugh, and Captain L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel Jennifer R. Rider.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification each of failure to go, wrongful introduction of ecstasy onto Yokota Air Base (AB), Japan, divers use of ecstasy, divers distribution of ecstasy, and disorderly conduct, in violation of Articles 86, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 912a, 934. He was also convicted, contrary to his pleas, of one specification each of disrespect to a noncommissioned officer, and possession and distribution of lysergic acid diethylamide (LSD), in violation of Articles 91 and 112a, UCMJ, 10 U.S.C. §§ 891, 912a. The general

court-martial, consisting of a military judge sitting alone, sentenced the appellant to a dishonorable discharge, confinement for 42 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

The appellant has submitted four assignments of error: (1) That the court-martial lacked jurisdiction over the offense involving wrongful introduction of ecstasy onto Yokota AB due to the appellant's prior conviction in a Japanese court; (2) That the military judge erred by failing to dismiss the wrongful introduction specification as being contrary to policy set forth in Air Force Instruction (AFI) 51-201; (3) That the convening authority did not consider all of the appellant's clemency matters prior to taking action; and (4) That the court-martial lacked jurisdiction over the use and distribution of ecstasy specifications. This last assignment was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding no error, we affirm.

Background

On 11 May 2000, agents of the Air Force Office of Special Investigations searched the appellant's on-base quarters at Yokota AB, Japan. They seized 21 pills later identified through laboratory testing as ecstasy. Subsequent investigation revealed that on more than one occasion the appellant had used ecstasy and distributed it to other members of the Air Force, and that he had arranged to obtain ecstasy from a civilian at a location on Yokota AB.

In accordance with treaty obligations, the Air Force notified the Japanese authorities of the appellant's misconduct. Japanese authorities subsequently advised that they would exercise jurisdiction over the possession of ecstasy offense. They did not assert jurisdiction over the use, distribution, or introduction of ecstasy.

At his trial in Japanese court, the appellant was questioned by the Japanese prosecutor as to the facts underlying his possession of ecstasy. He admitted that he obtained the drug from a civilian in order to supply it at an upcoming party. He also stated that he expected to be prosecuted for use and distribution of ecstasy by the United States Air Force. The court sentenced the appellant to two years confinement with forced labor, which was suspended for a period of three years.

Jurisdiction

This court reviews questions of jurisdiction de novo. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). We review the military judge's findings of fact under a clearly erroneous standard. *Id*.; *United States v. Owens*, 51 M.J. 204, 209 (C.A.A.F. 1999).

The appellant contends that the Treaty of Mutual Cooperation and Security Between the United States of America and Japan precludes the exercise of court-martial jurisdiction over the offense of wrongful introduction of ecstasy onto Yokota. Article 17 of the Treaty provides, in part, that "[w]here an accused has been tried . . . either by [the United States or Japan] . . . he may not be tried again for the same offense within the territory of Japan by the authorities of the other state." Treaty of Mutual Cooperation and Security Between the United States of America and Japan, 19 Jan 1960, U.S.-Japan, 11 U.S.T. 1632. The appellant contends that the introduction of ecstasy onto Yokota AB is the same offense as possession of ecstasy on Yokota AB, for which the appellant was convicted in the Japanese court.

The court-martial specification in question reads in part that the appellant "did, at Yokota Air Base, Japan, between on or about 1 May 2000 and on or about 11 May 2000, wrongfully introduce [ecstasy] . . . onto . . . Yokota . . . with the intent to distribute the said controlled substance." The Japanese conviction was for the possession of "twenty tablets" of ecstasy found at the appellant's home on Yokota AB on 11 May 2000.

The factual basis for the Japanese conviction of wrongful possession was the search of the appellant's quarters on 11 May 2000. The basis for the appellant's plea of guilty to wrongful introduction of ecstasy in the court-martial was set forth in the providence inquiry:

> ACC: I do not remember the exact date. I know that it was not 11 May. I met someone on the base who I knew would be delivering the tablets of [ecstasy] to me. So . . . whereas I may not have been the one that actually brought them across the line, it was because of me that they were. So it was my introduction to the base, as I understand it.
>
> . . . .
>
> MJ: Now, you told me that it didn't occur on 11 May. Can you estimate for me how long before then you actually got these pills?
>
> ACC: I would estimate at least three days before 11 May, but no more than a week before 11 May.
>
> . . . .
>
> MJ: Where were you when the individual gave you the pills?
>
> ACC: I was driving in the car. I would say somewhere between the food court and the gym.

MJ: Here on base?

ACC: Yes, Sir.

The Japanese court convicted the appellant of possessing ecstasy on Yokota AB on 11 May 2000, and the court-martial convicted him of introducing ecstasy onto Yokota AB at some point during the week before.

We conclude that the prior Japanese trial does not prevent the appellant's subsequent court-martial for wrongful introduction of ecstasy onto the base. In the first place, as the military judge noted, wrongful introduction of an illegal drug onto a United States military installation is not a crime in Japan. As a matter of law, the two offenses are different.

In the second place, they are also factually distinct. As the appellant stated during the providence inquiry, the wrongful introduction of ecstasy was consummated at least three days prior to the date alleged in the possession charge. As the appellant could easily have disposed of the ecstasy in the intervening days, his possession of the drug on 11 May 2000 was independent of his having introduced it at some point during the previous week. *See United States v. Heryford,* 52 M.J. 265 (C.A.A.F. 2000).

Therefore, we conclude that the United States did not prosecute the appellant for the same offense for which the Japanese court sentenced him. We hold that the United States properly exercised jurisdiction over the offense of introducing ecstasy onto Yokota AB.

Failure to Dismiss

We review questions of law de novo. *See United States v. Acevedo*, 50 M.J. 169, 174 (C.A.A.F. 1999). In raising this assignment of error, the appellant relies upon AFI 51-201, *Administration of Military Justice*, ¶¶ 2.5.1, 2.5.2 (2 Nov 1999). This Instruction provides:

> 2.5.1. In General. Trial in a state or foreign court is not a legal bar to a later prosecution in federal court based on the same act or omission. Except as provided [below] do not court-martial . . . any member of the Air Force for substantially the same act or omission for which a state or foreign court tried the member.
>
> 2.5.2. Secretarial Exception. Only [the Secretary of the Air Force] may approve initiation of court-martial . . . action against a member who has been previously tried by a state or foreign court for the same act or omission.

The appellant contends that the wrongful introduction and possession offenses are substantially the same. Further, because prosecutors did not first obtain Secretarial approval, they had no authority to proceed. Therefore, the appellant contends that he was entitled to a dismissal of the specification alleging wrongful introduction of ecstasy onto Yokota AB.

We do not agree. As stated above, the two offenses in question are separate and distinct. As a consequence, there was no need for the prosecutors to obtain Secretarial approval prior to trial.

Even if the two offenses were substantially the same, however, we find no basis to conclude that the regulatory provision in question confers any rights on the appellant. *See United States v. Kohut*, 44 M.J. 245, 250 (C.A.A.F. 1996). To the contrary, this provision was "most likely . . . promulgated primarily [to assure] efficient allocation of prosecutorial resources" rather than to confer an enforceable benefit upon an accused. *See United States v. Sloan*, 35 M.J. 4, 9 (C.M.A. 1992). Therefore, we hold that paragraphs 2.5.1 and 2.5.2 of AFI 51-201 bestow on the appellant no standing to complain about any violation of the policy announced therein. *See Kohut*, 44 M.J. at 250.

Other Issues

We resolve the remaining issues adversely to the appellant. There is no basis in the record to conclude that the convening authority did not consider all matters actually submitted by the appellant in his petition for clemency. *See United States v. Craig*, 28 M.J. 321, 322 (C.M.A. 1989). Therefore, we hold that post-trial processing in the appellant's case was consistent with Rule for Courts-Martial 1107. For reasons set forth in the first assignment of error discussed above, we hold that the court-martial had jurisdiction over the specifications alleging use and distribution of ecstasy.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court