

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.W. ROLPH, J.F. FELTHAM, E.S. WHITE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DEREK L. BOYD  
FIRE CONTROLMAN SEAMAN (E-3), U.S. NAVY**

**NMCCA 200301520  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 11 January 2002.

**Military Judge:** CAPT Carole Gaasch, JAGC, USN.

**Convening Authority:** Commanding Officer, USS CURTIS WILBUR  
(DDG 54).

**For Appellant:** Col K.S. Gunther, USMCR; Maj Brian Jackson,  
USMC.

**For Appellee:** Maj R.E. Beal, USMC; LCDR G.J. Rojas, JAGC,  
USN; LT Craig Poulson, JAGC, USN.

**26 September 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

WHITE, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of conspiracy to distribute methylenedioxymethamphetamine (MDMA, also known as "ecstasy"),<sup>1</sup> wrongful distribution of ecstasy on board a vessel

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<sup>1</sup> The appellant pled guilty to having conspired to distribute ecstasy with both Fire Controlman Seaman (FCSN) Nathan McComas and Electrician's Mate Fireman Apprentice (EMFA) Gonzalo Pradomora, but the military judge excepted FCSN McComas from his finding of guilty to this specification.

used by the armed forces, and wrongful use of ecstasy, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The appellant was sentenced to be confined for 60 days, to forfeit \$600.00 pay per month for two months, to be reduced to pay grade E-1, and to be discharged with a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 30 days for twelve months from the date of trial pursuant to a pretrial agreement.

This case was originally docketed with us on 11 August 2003. Due to problems with the post-trial processing of the record, we set aside the convening authority's action and returned the record for new post-trial processing. A new convening authority's action was taken on 7 December 2004, and the case was returned to us to complete review on 28 April 2005. Because of several defects in the second round of post-trial processing, we again set aside the convening authority's action and returned the record for new post-trial processing. A new convening authority's action was taken on 5 January 2007, and on 24 January 2007, the record was again docketed with us for appellate review.

In his initial filing with the court, on 30 September 2003, the appellant summarily assigned three errors. When the case returned to us a second time, the appellant filed a supplemental assignment of error. Now, upon the case's third appearance before us, the appellant has not filed any further assignments of error. The second original assignment of error and the supplemental assignment of error are moot because as a result of the most recent round of post-trial processing.<sup>2</sup> The first and third original assignments of error, however, remain to be decided. Because the appellant originally assigned these errors summarily, and neither party had fully briefed them, we ordered the parties to fully brief the two remaining assignments of error.

First, the appellant contends the delay in the post-trial processing and review of his case warrants relief. Second, he argues his convictions of conspiring to distribute ecstasy and distributing ecstasy constitute an unreasonable multiplication of charges and violates Wharton's Rule.

We have considered the record of trial, the appellant's two remaining assignments of error, and the Government's answer. We find that the post-trial delay in this case affects the sentence that should be approved, and take corrective action in our decretal paragraph. After taking corrective action, we conclude the findings and sentence are correct in law and fact, and that

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<sup>2</sup> The second original assignment of error alleged that the convening authority had failed to abide by the terms of the pretrial agreement by not suspending adjudged confinement in excess of 30 days. The supplemental assignment of error alleged errors in the second round of post-trial processing.

no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

### **I. Wharton's Rule/Unreasonable Multiplication of Charges**

Citing *United States v. Crocker*, 18 M.J. 33, 40 (C.M.A. 1984), the appellant contends his convictions of both conspiracy to distribute ecstasy and distribution of ecstasy violate Wharton's Rule, and constitutes a "needless piling-on of charges." Appellant's Supplemental Brief and Assignment of Error, Out of Time, of 6 Jul 2007 at 10.

#### **A. The Facts**

In the specification under Charge I, the Government alleged the appellant conspired with Fire Controlman Seaman (FCSN) Nathan McComas and Electrician's Mate Fireman Apprentice (EMFA) Gonzalo Pradomora to distribute ecstasy. This specification further alleged that, in order to effect the object of the conspiracy, the appellant distributed ecstasy on board USS CURTIS WILBUR. In Specification 2 of Charge II, the Government alleged that, on board USS CURTIS WILBUR, the appellant wrongfully distributed ecstasy.

During the providence inquiry, the appellant explained that, on or about 30 June 2001, EMFA Pradomora asked him if he could get EMFA Pradomora drugs to improve his mood. Later that day, the appellant asked FCSN McComas if McComas could provide him with drugs. Because the appellant did not know what drugs EMFA Pradomora wanted, he left FCSN McComas, found EMFA Pradomora, and asked him what he wanted. EMFA Pradomora told the appellant he wanted three ecstasy pills. The appellant returned to FCSN McComas to check the price for three ecstasy pills. FCSN McComas told the appellant the drugs would cost \$160 to \$170. The appellant returned to EMFA Pradomora, and obtained from him the money to make the purchase. Subsequently, the appellant gave that money to FCSN McComas. Two or three hours later, in a berthing area on board USS CURTIS WILBUR, FCSN McComas handed the appellant a small baggie containing the drugs, which the appellant delivered to EMFA Pradomora. Record at 23-38.

During the providence inquiry, the appellant said he never told FCSN McComas he was buying these drugs for someone else, and that FCSN McComas had no reason to believe the drugs were for anyone else. Subsequently, prior to entering findings, the military judge discussed with counsel whether FCSN McComas was a co-conspirator, as charged. The Government conceded the accused's statements during the providence inquiry did not support including FCSN McComas in the conspiracy. *Id.* at 48. Consequently, in entering findings, the military judge excepted from the specification the language alleging FCSN McComas was part of the conspiracy. *Id.* at 49.

## B. Principles of Law

Normally, both conspiracy and the substantive crime that is the object of a conspiracy may be separately charged and punished. *Iannelli v. United States*, 420 U.S. 770, 777 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946); *United States v. Simmons*, 34 M.J. 243, 245 (C.M.A. 1992); *Crocker*, 18 M.J. at 36. Such is the case because "conspiracy poses distinct dangers quite apart from those of the substantive offense." *Iannelli*, 420 U.S. at 778.

Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish . . . [and] [c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."

*Callanan v. United States*, 364 U.S. 587, 593-94 (1961).

As an exception to this general rule, conspiracy may not be separately punished if the agreement of two people is necessary to complete the substantive crime, and there is no ingredient in the conspiracy which is not present in the completed crime. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 5c(3); *see Crocker*, 18 M.J. at 37. This exception is known as "Wharton's Rule", for the legal commentator Francis Wharton who first articulated it in his treatise on criminal law. *Iannelli*, 420 U.S. at 780.<sup>3</sup> Wharton's Rule functions as a judicial presumption about legislative intent. If the court can discern the legislative intent concerning the separateness of conspiracy and the substantive offense, that intent controls. *Iannelli*, 420 U.S. at 782; *Crocker*, 18 U.S. at 37.

"Wharton's Rule applies only to offenses that *require* concerted criminal activity, a plurality of criminal agents." *Iannelli*, 420 U.S. at 785 (emphasis in original); *Crocker*, 18 M.J. at 38. *See United States v. Previte*, 648 F.2d 73, 78 (1st Cir. 1981)(participation of both persons must be "culpable" under

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<sup>3</sup> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. . . . In other words, when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense -- e.g., adultery -- shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy." 2 F. Wharton, *Criminal Law* § 1604, p. 1862 (12th ed. 1932).

the substantive statute). In determining whether an offense requires a plurality of criminal agents, the court "focuses on the statutory requirements of the substantive offense rather than the evidence offered to prove those elements at trial." *Iannelli*, 420 U.S. at 780 (citing *United States v. Holte*, 236 U.S. 140, 145 (1915)). The Rule does not apply where a "conspiracy involves the cooperation of a greater number of persons than is required for commission of the substantive offense." *Id.* at 775 (citing *Gebardi v. United States*, 287 U.S. 112, 122 n.6 (1932)).

The classic crimes to which Wharton's Rule has traditionally applied are adultery, bigamy, incest, and dueling. These crimes all share the following characteristics. First, in each, there is a "general congruence between the agreement and the completed substantive offense." *Crocker*, 18 M.J. at 37. Second, the parties to the agreement are the only persons who participate in commission of the substantive offense. Third, the immediate consequences of the crime rest on the parties themselves rather than on society at large. Finally, the agreement that is part of the substantive offense does not pose the distinct kinds of threats to society that the law of conspiracy seeks to avert. *Iannelli*, 420 U.S. at 782-83.

### C. Discussion

The legislative history of Article 112a, UCMJ, is silent on whether Congress intended a charge under the already-existing article of the Code prohibiting conspiracy to be separate from a distribution charge under the new Article 112a.<sup>4</sup> Consequently, we apply the traditional judicial presumption that conspiracy and the underlying substantive offense are separate crimes, unless Wharton's Rule applies. We conclude that it does not.

The elements of the substantive offense of distribution under Article 112a, UCMJ, do not necessarily require concerted criminal activity, or a plurality of culpable criminal agents; an agreement between the distributor and the recipient is not

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<sup>4</sup> In enacting Article 112a, UCMJ, Congress believed the abuse of controlled substances to be "one of the most significant disciplinary problems facing the armed forces," creating "substantial dangers to morale and readiness." S. REP. NO. 98-53 at 11, 29 (1983). *Accord*, H.R. REP. NO. 98-9 at 41 (1983). Despite the seriousness of the problem, Congress noted, the "criminal use of drugs [was] not the subject of a specific punitive article," and the prosecution of drug offenses under Articles 133, 134 and 92, UCMJ, was "cumbersome and led to litigation over the technical requirements of those articles." *Id.* Consequently, Congress decided it had the responsibility to provide express guidance on drug offenses. *Id.* at 11. The mere fact that Congress believed drug abuse to be a serious problem for the armed forces does not indicate it intended conspiracy to be a separately punishable offense. Further, unlike the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. § 801 *et seq.*, which provides separate penalties for conspiracy to violate the Act and substantive violations of the Act, neither the language nor the structure of Article 112a indicates any specific legislative intent on this point.

necessary. One may be guilty of distribution under Article 112a, UCMJ, without the recipient of the drug being guilty, as would be the case if the recipient was mistaken about the nature of the substance delivered into his possession. See *United States v. Jiles*, 51 M.J. 583, 589 (N.M.Ct.Crim.App. 1999). Because the crime of distribution of a controlled substance does not necessarily require concerted criminal activity and a plurality of criminal agents, it is not among the class of crimes covered by Wharton's Rule.<sup>5</sup>

Further, the crime of distribution does not fit the paradigm of classic Wharton's Rule crimes. First, because distribution does not require culpable collaboration between the distributor and the recipient, there does not exist a general congruence between the agreement (here between the appellant and EMFA Pradomora) and the completed substantive offense. Second, the immediate consequences of drug distribution reach far beyond the parties themselves, and affect military society at large in direct and serious ways. Third, conspiracy to distribute illicit drugs presents the distinct threats to society that the law of conspiracy seeks to avert. As seen in this case, the conspiracy between the appellant and EMFA Pradomora greatly increased the

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<sup>5</sup> In *Crocker*, our superior court noted "difficulty" with the argument that Wharton's Rule only applies where the statute defining the substantive offense requires concerted criminal activity. The court observed that if Wharton's Rule applied only in cases where both parties had to have criminal intent, then the Rule would not apply to the classic Wharton Rule offenses of adultery and bigamy. At least with respect to adultery, this difficulty can be resolved by reference to *United States v. Hickson*, 22 M.J. 146 (C.M.A. 1986), in which the court traced the history of the crime of adultery in English and American law. While no longer the case, at one time *both* participants were guilty of adultery where sexual intercourse occurred between a married woman and a man who was not her husband. *Id.* at 147 (citing 2 WHARTON'S CRIMINAL LAW 357-58 (C. Torcia 14th ed. 1979)). The "difficulty" presented by bigamy is not as easily overcome, as it appears bigamy has, since it was first criminalized in England and Wales in 1603, generally placed culpability only on the married party. See MODEL PENAL CODE § 230.1, Comment (Official Draft and Revised Comments 1980). Perhaps the answer lies in the fact that, in a number of states, bigamy is also committed when one knowingly marries a married person. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 457 (3d ed. 1982). In such circumstances, both parties would be guilty of bigamy. We need not, however, definitively resolve this "difficulty". It is sufficient that both the Supreme Court and the Court of Appeals for the Armed Forces have held that, for Wharton's Rule to apply, the elements of the substantive offense at issue must require "concerted criminal activity". *Iannelli*, 420 U.S. at 145; *United States v. Earhart*, 18 M.J. 421 (C.M.A. 1984) (summarily affirming, in light of *Crocker*, a United States Air Force Court of Military Review decision, 14 M.J. 511, 514 (A.F.C.M.R. 1982), holding that in order to determine the applicability of Wharton's Rule, the court had to look to the elements of the substantive law violated, rather than the actual facts of the offense charged, and decide whether the statute necessarily required the criminal culpability of all parties). We have also considered *United States v. Oestmann*, 60 M.J. 660 (N.M.Ct.Crim.App. 2004), and find it distinguishable. That case concerned conspiracy to possess hashish with intent to distribute and possession of hashish with intent to distribute. Those offenses are different than the ones that confront us in this case. Further, in *Oestmann*, the court explicitly limited its decision to the particular specifications "as they appear on the charge sheet."

likelihood illicit drugs would actually be distributed and used on board a naval vessel. Further, the conspiratorial agreement between the appellant and EMFA Pradomora apparently spurred the appellant to commit the separate offenses of soliciting distribution of a controlled substance from FCSN McComas, and led FCSN McComas to distribute a controlled substance.<sup>6</sup>

Having concluded Wharton's Rule does not bar separate punishment for conspiracy to distribute ecstasy and distribution of ecstasy, we must determine whether charging them separately in this case is, nonetheless, an unreasonable multiplication of charges. We conclude it is not. First, the appellant did not object at trial. Second, as explained above, the conspiracy and distribution charges are aimed at distinctly separate criminal acts. Third, the number of charges and specifications do not misrepresent or exaggerate the appellant's criminality, nor do they increase his punitive exposure.<sup>7</sup> Finally, there is no evidence of prosecutorial overreaching or abuse in drafting the charges.

## II. Post-Trial Delay

The appellant also contends the post-trial delay in processing his case has denied him his Fifth Amendment right to due process. We consider four factors in determining if post-trial delay violates due process: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is reasonable, further inquiry is unnecessary. If, however, the delay is "facially unreasonable," we must balance the length of the delay against the other three factors. *Id.*

We evaluate prejudice to the appellant in light of three interests: (1) preventing oppressive incarceration pending appeal; (2) minimizing anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limiting the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal and retrial, might be impaired. *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006)(hereinafter *Toohey II*)(quoting *United States v. Moreno*, 63 M.J. at 138 (C.A.A.F. 2006)(quoting *Rheuark v. Shaw*, 628 F.2d 297, 303 n.8 (5th Cir. 1980))). The appellant must show particularized anxiety or concern distinguishable from the normal anxiety experienced by convicted persons awaiting an appellate decision, and that the anxiety or concern is related to the

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<sup>6</sup> Having concluded Wharton's Rule is inapplicable in this case, we need not consider the effect of the "third-party" exception to Wharton's Rule.

<sup>7</sup> The maximum punishment for the substantive offense of distribution by itself exceeded the jurisdictional maximum of the special court-martial.

delay. *Moreno*, 63 M.J. at 140. In extreme cases, the delay itself may "give rise to a strong presumption of evidentiary prejudice." *Toohey*, 60 M.J. at 102.

From the date of trial until the record was docketed with this court for the third and final time, 1,839 days elapsed. Of that time, 522 days (over 1 year, 5 months) passed between the convening authority's (CA) first action and the original docketing of the case with the court. Another 272 days elapsed between the first remand and the second CA's action, and then an additional 142 days elapsed before the case was returned to us. In other words, it took over a year for the CA to fix the errors in the original CA's action and return the record to the court. Finally, after the second remand of the record, again for post-trial processing errors, the CA took 450 days (over 1 year, 2 months) to take a new action and return the record to us. Our superior court has rightly called delays in forwarding a case to the appellate court following CA's action "the least defensible of all" post-trial delays. *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990). The Government has offered no explanation for these delays. This factor weighs heavily in favor of the appellant.

In his summary assignment of errors, filed with this court on 30 September 2003, the appellant complained of the delay up to that point. This filing undoubtedly constituted a demand for speedy post-trial review. Nevertheless, the CA subsequently *twice* took over a year to take required corrective action and return the record to the court. This factor also weighs in the appellant's favor.

The appellant provides no evidence he was actually prejudiced by the delay, and we find no evidence of prejudice in the record. This factor weighs against the appellant. Pursuant to the holding of *Toohey II*, because we find no actual prejudice to the appellant, we will find a due process violation only if, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system. While the delay in this case is lengthy, unjustifiable, and disappointing, we conclude it is not so egregious that it undermines the public's perception of the fairness and integrity of the military justice system. We, therefore, find that the appellant's right to due process has not been violated.

Nevertheless, in exercising our authority under Article 66(c), UCMJ, we conclude the delay in this case does affect the sentence that should be approved. See *Toohey*, 60 M.J. at 102; *United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). After considering the factors identified in *Brown*, we conclude that so much of the sentence as extends to confinement for 60 days and forfeiture of \$600 pay per month for two months should not be approved.

### **Conclusion**

Accordingly, we affirm the findings and so much of the sentence approved by the convening authority as extends to reduction to pay grade E-1 and a bad-conduct discharge.

Senior Judge ROLPH and Senior Judge FELTHAM concur.

For the Court

R.H. TROIDL  
Clerk of Court