

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BYRON M. LEWIS
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 200600045
GENERAL COURT-MARTIAL**

Sentence Adjudged: 29 April 2005.

Military Judge: Maj Anthony Williams, USMC.

Convening Authority: Commanding General, III Marine Expeditionary Force, Camp Foster, Okinawa, Japan.

Staff Judge Advocate's Recommendation: Col P.B. Collins, USMC.

For Appellant: LT Heather Cassidy, JAGC, USN; CDR T. Fichter, JAGC; LCDR Kristina Reeves, JAGC, USN.

For Appellee: LtCol John G. Scott, USMCR; Capt G.S. Shows, USMC; LCDR D.S. Mayer, JAGC, USN; LT David Lee, JAGC, USN.

14 August 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

This case is before us upon the order of our superior court to address an assignment of error "that Appellant raises for the first time on appeal . . . regarding the legal sufficiency of the evidence with respect to Specification 1 of Charge I (conspiracy to distribute drugs)." *United States v. Lewis*, ___ M.J. ___, 2008 CAAF LEXIS 601 (C.A.A.F. May 13, 2008). Specifically, we are to consider whether the Government failed to provide any evidence that the alleged overt acts occurred after the conspiratorial agreement arose. *Id.* After another careful review of this case, we again conclude that the findings and sentence are correct in

law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

We previously considered the factual and legal sufficiency of the appellant's conviction for conspiracy to distribute cocaine, marijuana, and ecstasy. *United States v. Lewis*, No. 200600045, 2007 CCA LEXIS 422, unpublished op. (N.M.Ct.Crim.App. 11 Oct 2007). Applying the test for legal sufficiency set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), we found that "[o]n the basis of the record before us and considering the evidence in the light most favorable to the Government, a reasonable factfinder could have found all the essential elements of the charged offenses beyond a reasonable doubt." *Id.* (citing *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006)(internal citations omitted)).

An appellant's right to have all issues fully considered and ruled on by the appellate court does not equate to the right to a full written opinion on every issue raised. *United States v. Pajooh*, 143 F.3d 203, 204 (5th Cir. 1998); *see also United States v. Reed*, 54 M.J. 37, 42 (C.A.A.F. 2000)(citing *United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987)(Court of Criminal Appeals need not specifically address all arguments raised by an appellant)). Even though this court did not expressly discuss the appellant's belated assertion of error -- because he failed to assert it on direct appeal -- the issue remanded for our review nonetheless received full consideration and a ruling upon our initial review of this case.

In discharging our statutory obligation under Article 66, UCMJ, this Court necessarily considered the legal and the factual sufficiency of the evidence of each charge and specification. Our discharge of this duty is reflected in the text of our opinion on direct review, which begins with a general finding that "the findings and sentence are correct in law and in fact and that no error materially prejudicial to the appellant's substantial rights was committed." *Lewis*, 2007 CCA LEXIS 422 at 2. Moreover, with respect to the factual and legal sufficiency of the evidence of conspiracy, the opinion states that the evidence was "legally and factually sufficient." *Id.* at 5.

Turning to the issue specified by our superior court, we again conclude that the appellant's conviction for conspiracy to distribute drugs is legally sufficient. The appellant was charged with conspiring with Private First Class Kelley and Lance Corporal Martinez to distribute marijuana, cocaine, and ecstasy. Charge Sheet. The alleged overt acts in furtherance of the alleged agreement involved solicitations by Kelley and Martinez of Private First Class Pennington and Lance Corporal Hovenga to purchase ecstasy. *Id.* Martinez ultimately testified that there was a criminal agreement between the appellant, Kelley, and himself to distribute cocaine, marijuana, and ecstasy:

- Q. Whose room were you in?
A. Corporal Lewis', sir.
- Q. And what did Corporal Lewis tell you as far as he was looking for buyers for what drugs?
A. Ecstasy and marijuana, sir.
- Q. Did you or Kelly ever go out and solicit Hovenga or Pennington for any drugs?
A. Yes, sir.

Record at 319. Pennington testified that Kelley solicited him to purchase ecstasy for \$100. *Id.* at 165. Hovenga testified that Martinez and Kelley shared a bathroom between their barracks rooms, and that he recalled being in one of their rooms when the subject of ecstasy was discussed. *Id.* at 158-60. Present during this conversation, in addition to Hovenga, were "at least" Sergeant Risner, Kelley, Martinez, or "two of those three." *Id.* at 159. One of the three individuals gave ecstasy to Hovenga. *Id.* at 158, 161-62.

While there are certain inconsistencies between the testimony of the appellant's co-conspirators and the two Marines who were solicited to purchase drugs, we are mindful that reasonable doubt does not require that the evidence be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006)(citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007). The solicitation of Pennington by Kelley to purchase ecstasy is logically and factually consistent with the criminal agreement testified to by Martinez. Considering all of the testimony together, a reasonable factfinder could infer that the criminal agreement between the appellant, Kelley, and Martinez occurred before Kelley's solicitation of Pennington. Every reasonable inference from the evidence of record will be drawn in favor of the prosecution. *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). After viewing the evidence in the light most favorable to the prosecution, including all reasonable inferences, we find that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Brown*, 65 M.J. 227, 229 (C.A.A.F. 2007) (quoting *Jackson*, 443 U.S. at 318-19). We conclude that the appellant's conviction for conspiracy to distribute drugs is legally sufficient.

Conclusion

We have considered anew the appellant's previously asserted four assignments of error.¹ For the reasons stated in our

¹ I. THE TRIAL COUNSEL INTENTIONALLY SOLICITED INADMISSIBLE, INFLAMMATORY, PREJUDICIAL, AND MISLEADING TESTIMONY AND MADE INAPPROPRIATE COMMENTS AND ARGUMENTS, THEREBY PREJUDICING APPELLANT'S RIGHT TO A FAIR TRIAL.

earlier decision, *United States v. Lewis*, No. 200600045, 2007 CCA LEXIS 422 unpublished op. (N.M.Ct.Crim.App. 11 Oct 2007), we find no error. *Reed*, 54 M.J. at 42 (citing *Matias*, 25 M.J. at 363). Accordingly, we affirm the findings and the sentence.²

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

II. THE MILITARY JUDGE ERRED BY PERMITTING TRIAL COUNSEL TO QUESTION A DEFENSE WITNESS ABOUT SPECIFIC ACTS OF PRIOR MISCONDUCT IN VIOLATION OF M.R.E. 404(a) OVER DEFENSE OBJECTION.

IV. A SENTENCE OF EIGHT YEARS CONFINEMENT IS HIGHLY DISPARATE WITH THE SENTENCES (SIC) OF APPELLANT'S CO-CONSPIRATOR, WHO RECEIVED CONFINEMENT FOR 42 MONTHS.

V. THE CONVENING AUTHORITY'S ACTION IS DEFECTIVE BECAUSE HE DID NOT CONSIDER IN HIS ACTION THE CLEMENCY MATTERS SUBMITTED BY APPELLANT.

² In June 2007, the court received a record of trial in an unrelated case from the Navy Marine Corps Appellate Review Activity. Attached to the front of that record was a sealed envelope marked "Prosecution Exhibit 4 Page 1 of 1." Inside the envelope was an audiotape labeled "S/Noel Wire Recording/ Working Copy." Since PE-4 in that case was not an audiotape, efforts were made to identify the case to which the audiotape belonged through NCIS, and the appellate divisions were notified. During the current review of this case it was determined that the envelope contains PE-4 to the appellant's record of trial. There being a transcript of the audiotape in the record (Appellate Exhibit XVIII) and the Government having produced a CD copy of the tape during the original review of this case (Consent Motion to Attach of 2 Oct 2007), the absence of the exhibit did not prejudice either party. PE-4 has been inserted in its proper place in the record.