

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Timothy O. SANDERS
Corporal (E-4), U. S. Marine Corps**

NMCCA 200500657

Decided 31 May 2007

Sentence adjudged 2 December 2003. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Fighter Attack Squadron 323, Marine Aircraft Group 11, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

LT ANTHONY S. YIM, JAGC, USN, Appellate Defense Counsel
LtCol TERRI Z. JACOBS, USMCR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LT JASON LIEN, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongfully using a controlled substance (methamphetamine) on divers occasions and of wrongfully endeavoring to impede an adverse administrative proceeding, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The military judge sentenced the appellant to confinement for 90 days, forfeiture of \$760.00 pay per month for 3 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of 45 days for a period of 12 months from the date of his action, in accordance with the terms of a pretrial agreement.

Following our review of the record of trial, submitted without specific assignment of error, we specified two issues:

- (1) Whether there is a substantial basis in law and fact to question the military judge's acceptance of the appellant's guilty plea to the Additional Charge and its specification (wrongfully endeavoring to impede an adverse administrative proceeding); and,
- (2) Whether a urinalysis is an "adverse administrative proceeding" under Article 134, UCMJ.

We have again reviewed the record of trial, the appellant's brief on the two specified issues, and the Government's response. We conclude that the appellant's plea of guilty to wrongfully endeavoring to impede an adverse administrative proceeding is provident. We conclude that the findings and the 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.

Facts

At the time of his offenses, the appellant was assigned to Marine Fighter Attack Squadron 323 on board Marine Corps Air Station Miramar, San Diego, California. The appellant admitted during the providence inquiry and in a stipulation of fact with the Government that he knowingly and wrongfully used methamphetamine on 26 July 2003 and then again on 9 August 2003.

On 10 August 2003, the appellant and another Marine went to a store in Pacific Beach, California and purchased a drink that "was supposed to detoxify one's body of illegal substances." Appellate Exhibit I at 4. The next day, the appellant's unit held a urinalysis. Before participating in the urinalysis, the appellant consumed the "detoxification drink" he had purchased. The appellant was charged with using methamphetamine under Article 112a, UCMJ. He was also charged with wrongful interference with an administrative proceeding under Article 134, UCMJ:

In that Corporal Timothy O. Sanders, U.S. Marine Corps, on active duty, did, on board Marine Corps Air Station Miramar, San Diego, California, on or about 11 August 2003, wrongfully endeavor to impede an adverse administrative proceeding, by consuming a bottle of detoxification drink to mask his urinalysis.

Charge Sheet.

In his stipulation of fact, the appellant stated that he purchased and consumed the detoxification drink prior to his urinalysis in order to hide the fact that he had used methamphetamines. He wanted to hide his methamphetamine use in order to avoid getting in any kind of legal or administrative trouble with the Marine Corps. AE I at 4-5.

During the plea inquiry, the military judge engaged in the following colloquy with the appellant:

MJ: When you went to the store with Haynes and brought his [sic] detoxification drink, did you know there was going to be a urinalysis the following day?

ACC: No, we did not, sir.

MJ: Then why did you go buy the drink?

ACC: Just in case, sir.

MJ: So it was in anticipation that someone might order such a urinalysis?

ACC: Yes, sir.

MJ: And did you realize that if you took a urinalysis and tested positive that the command may very well initiate an adverse administrative proceeding against you?

ACC: Yes, sir.

MJ: That could have been a separation from the Marine Corps proceeding or administrative reduction which could have caused you to lose one of your stripes?

ACC: Yes, sir.

MJ: And receiving an other than honorable discharge from the service?

ACC: Yes, sir.

MJ: Was it your purpose in purchasing that drink and later consuming it to avoid or to impede that administrative proceeding should it come to pass?

ACC: Yes, sir.

MJ: Was it also your intent to impede the decision maker who would some -- I presume your Battalion Commander -- in making a decision whether some adverse administrative proceeding should be initiated against you for your use of methamphetamine?

ACC: Yes, sir.

Record at 16-17.

Urinalysis as an Adverse Administrative Proceeding

In response to our second specified issue, the appellant argues that his urinalysis was not an "adverse administrative proceeding" as this term is used in Article 134, UCMJ. The Government does not contest this position.

A compulsory urinalysis conducted as part of a periodic unit sweep or random sampling of unit personnel is a valid unit inspection under MILITARY RULE OF EVIDENCE 313(b), MANUAL FOR COURTS-

MARTIAL, UNITED STATES (2002 ed.). *United States v. Turner*, 33 M.J. 40, 41-42 (C.M.A. 1991); *United States v. Bickel*, 30 M.J. 277, 279-81 (C.M.A. 1990). MIL. R. EVID. 313(b) provides in relevant part that:

An "inspection" is an examination of the whole or part of a unit ... conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit. ... An inspection may include but is not limited to an examination to determine and to ensure that any or all of the following requirements are met: that the command is properly equipped, functioning properly, maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness, and that personnel are present, fit, and ready for duty. An inspection also includes an examination to locate and confiscate unlawful weapons and other contraband. An order to produce bodily fluids, such as urine, is permissible in accordance with this rule. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings is not an inspection within the meaning of this rule.

The Manual for Courts-Martial defines an adverse administrative proceeding to include "any administrative proceeding or action, initiated against a servicemember, that could lead to discharge, loss of special or incentive pay, administrative reduction in grade, loss of a security clearance, bar to reenlistment, or reclassification." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 96a(c). The requirement that the administrative proceeding or action be initiated "against" a particular servicemember is inconsistent with MIL. R. EVID. 313(b). The subject of an inspection is the unit, in whole or part. While an inspection will normally include the examination of one or more individual members of the unit, these members are being examined as representatives of the whole or part and not as individuals who have been singled out for scrutiny. Our superior court has held that to qualify as an inspection under MIL. R. EVID. 313(b), compulsory urinalysis testing must be performed on a "nondiscriminatory" basis that does not permit a commander to "pick and choose" the members of his unit who will be tested. *Bickel*, 30 M.J. at 286. As a result, a urinalysis performed in accordance with MIL. R. EVID. 313(b) would not target specific individuals and thus could not be said to have been initiated "against" a particular servicemember. For this reason, we hold that a unit inspection conducted under MIL. R. EVID. 313(b) is not an adverse administrative proceeding under Article 134, UCMJ. *Accord, United States v. Denaro*, 62 M.J. 663, 665-66 (C.G.Ct.Crim.App. 2006), *rev. denied*, 63 M.J. 470 (C.A.A.F. 2006).

The appellant does not allege, and we find nothing in the record to suggest, that his urinalysis was the product of anything other than a periodic unit sweep or a random sampling of unit personnel. See *Turner*, 33 M.J. at 42. Accordingly, we find that the appellant's urinalysis was a unit inspection conducted under MIL. R. EVID. 313(b) and conclude that it was not an adverse administrative proceeding.

Improvident Plea

In response to our first specified issue, the Government asserts that the appellant's plea of guilty to the Additional Charge and its specification is provident because his conduct was intended to impede the administrative separation processing that would have resulted from a positive urinalysis result.

The standard of review to determine whether a plea is provident is whether the record reveals a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). Such rejection must overcome the generally applied waiver of the factual issue of guilt inherent in voluntary pleas of guilty, R.C.M. 910(j), and the only exception to the general rule of waiver arises when an error materially prejudicial to the substantial rights of the appellant occurs. Art. 59(a), UCMJ. We consider the entire record in evaluating the providence of a guilty plea. *United States v. Negron*, 60 M.J. 136, 141 (C.A.A.F. 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238-39 (C.A.A.F. 2002)).

After we specified the two issues to be briefed by appellate counsel, the Coast Guard Court of Criminal Appeals decided a factually similar case involving the same issues. In *Denaro*, the accused pleaded guilty to wrongfully interfering with an adverse administrative proceeding by providing a co-worker with a "masking agent" prior to a randomly conducted urinalysis. *Denaro*, 62 M.J. at 664. The accused believed that his co-worker would test positive for drug use and provided her with the masking agent in an attempt to defeat the urinalysis and prevent her administrative discharge. *Id.* Although the Coast Guard court concluded, as we do, that the urinalysis was an inspection and not an adverse administrative proceeding, it nevertheless affirmed the conviction because the plea inquiry showed that the accused had acted with (1) an objectively reasonable belief that his co-worker's positive urinalysis test would result in her processing for administrative separation and (2) a specific intent to interfere with that administrative processing. *Id.* at 665-66. We agree with the well-reasoned logic of the Coast Guard Court of Criminal Appeals as set forth more fully in its *Denaro* opinion.

"Obstruction of Justice" versus "Impeding an Adverse Administrative Proceeding"

While not raised by the appellant, for analytical purposes it is useful to compare the offenses of obstruction of justice (M.C.M., Part IV, ¶ 96) and wrongful interference with an adverse administrative proceeding (M.C.M., Part IV, ¶ 96a), where concealment of wrongdoing was the goal of the alleged offender. Paragraph 96a was promulgated by the President to cover "obstruction of certain administrative proceedings not currently covered by the definition of criminal proceeding found in paragraph 96 c." Analysis of M.C.M., Part IV, ¶ 96a. While paragraph 96a was patterned on paragraph 96, there are obvious differences. Of import to this discussion is the inclusion, in the President's explanation of the offense, of the phrase: "... and, the wrongful destruction or concealment of information relevant to such adverse administrative proceeding." M.C.M., Part IV, ¶ 96a(c)(emphasis added). This phrase is not present in paragraph 96.

Several cases discuss concealment in the context of obstruction of justice. However, these cases deal with offenses committed prior to the 1993 revision of the Manual for Courts-Martial that added paragraph 96a as a newly defined offense. See, e.g., *United States v. Lennette*, 41 M.J. 488 (C.A.A.F. 1995)(offenses and trial in 1991); *United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993)(1990 offense); *United States v. Athey*, 34 M.J. 44 (C.M.A. 1992); *United States v. Turner*, 33 M.J. 40 (C.M.A. 1991); *United States v. Guerrero*, 28 M.J. 223 (C.M.A. 1989); *United States v. Asfeld*, 30 M.J. (A.C.M.R. 1990); and *United States v. Gray*, 28 M.J. 858 (A.C.M.R. 1989). These decisions to one degree or another reflect the sentiment expressed in *Athey* that mere concealment of one's crime "would broaden liability for obstruction of justice beyond its traditional scope in military law." 34 M.J. at 49. However, this sentiment is not applicable to the crime of impeding an adverse administrative proceeding. As a new offense, there is no "traditional scope of military law." Further, to effectuate the meaning of paragraph 96a(c), any tradition that does develop must recognize the differences in the offenses, including the new concealment language used in defining this new offense. The "mere concealment" concept, to the extent that it survives in obstruction of justice analysis, has no justifiable place in the developing paragraph 96a jurisprudence.

Even if the obstruction of justice "concealment" jurisprudence could be conflated with wrongful interference with adverse proceeding analysis, we do not believe a different result would obtain. For example, in *Athey*, the Court of Military Appeals said that the accused must have a subjective "reason to believe there were or would be criminal proceedings pending." 34 M.J. at 48-49 (emphasis added). "Someone who never even foresees that a criminal proceeding may take place cannot intend to obstruct it." *Id.* at 49. There, the appellant believed his

crimes had not been revealed to the government when he asked the victim to conceal his crimes. He had no idea that there would be an investigation of his actions. *Id.* at 46, 48. *See also Finsel*, 36 M.J. at 442-45 (conviction upheld where investigation was inevitable due to the nature of the crime and the acts of concealment occurred prior to reporting of the crime); and *Guerrero*, 28 M.J. at 227 (conviction upheld where the appellant asked witnesses to not report him immediately after his underlying offense, before there was any investigation or report of crime, where due to the nature of the underlying crime, an investigation implicating the appellant was inevitable).

In contrast, the appellant herein subjectively believed that there would be an adverse administrative proceeding if he did not take a masking agent. A urinalysis would show he had been wrongfully using illegal drugs. When wrongful use of illegal drugs was shown, the appellant believed that he would be processed through an adverse administrative proceeding. The appellant's subjective belief was objectively reasonable.

The appellant's specific intent to obstruct an adverse administrative proceeding by masking the drug metabolites in his urine prior to his urinalysis is shown quite clearly by his responses to the military judge's questions during the providence inquiry, and in a stipulation of fact. He used methamphetamine just two days before his urinalysis, and knew that he would test positive for methamphetamine use unless he was able to mask his use. He believed as well that if he tested positive for methamphetamine use, he would be processed for an administrative discharge. He knew at the time he consumed the masking agent that his urine was in fact going to be tested. As stated in *Denaro*:

Appellant intended to impede this administrative process by falsifying its primary, and probably only, source of data. These facts lead us to conclude that [the] Appellant intended to interfere with the administrative actions between the urinalysis and the discharge, even if he did not know precisely what those proceedings would be.

Denaro, 62 M.J. at 666.

As in *Denaro*, upon receipt of the appellant's urinalysis results, mandatory drug processing would commence. It has long been the policy of the Department of the Navy that Sailors and Marines who test positive for drug use *shall* be processed for administrative separation. Unlike criminal prosecutions, individual commanders have no discretion in the matter. *See* Secretary of the Navy Instruction 5300.28C at ¶ 4(d), Encl. 1 at ¶¶ 3(b)(2) and 7(b), and Encl. 2 at ¶ 2 (24 Mar 1999); Marine Corps Separation and Retirement Manual at § 1004, ¶ 4(e), § 6210, ¶¶ 1(c) and 5 (30 May 2001); Marine Corps Order P1700.24B at § 3011, ¶ 4(j)(Ch-1, 27 Dec 2001). The appellant's subjective

belief that there would be an adverse administrative proceeding against him was objectively reasonable. Therefore, in this case, the elements of the offense of wrongful interference with an adverse administrative proceeding were established.

Conclusion

Accordingly, the findings and the sentence are affirmed.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court