

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

**Before
J.F. FELTHAM, R.G. KELLY, P.G. STRASSER
Appellate Military Judges**

**UNITED STATES OF AMERICA
v.**

**BENJAMIN M. SMITH
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200700117
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 30 October 2001.

Military Judge: Maj C.H. Wesely, USMC.

Convening Authority: Commanding Officer, Marine Air Control Group 38, 3d Marine Wing Aircraft Wing, MCAS Miramar, CA.

Staff Judge Advocate's Recommendation: Col W.D. Durrett, USMC.

For Appellant: CAPT James Wynn, JAGC, USN; LCDR M.E. Eversole, JAGC, USN.

For Appellee: CAPT T.J. DeMay, JAGC, USN; LT Justin Dunlap, JAGC, USN.

10 October 2007

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

STRASSER, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, in accordance with his pleas, of two specifications of wrongful use of controlled substances, wrongful importation of controlled substances into the United States, wrongful possession of controlled substances, and wrongful introduction of controlled substances onto an installation used by the armed forces, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of confinement for 180 days, reduction to pay grade E-1, and a bad-

conduct discharge, but suspended all confinement in excess of 75 days in accordance with a pretrial agreement.

We have examined the record of trial, the two assignments of error, and the Government's response. We have determined that the findings 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.

Improvident Plea

In his first assignment of error, the appellant claims his guilty pleas were improvident because there is a basis to have questioned whether his use, possession, and importation of valium, oxycontin, percodan, and ritalin were "wrongful." We disagree.

While stationed at Marine Corps Air Station (MCAS), Yuma, Arizona, the appellant suffered pain because of boils in his groin area. Because the medication dispensed to him by the Navy did not relieve his symptoms, he crossed the border into Mexico, where he was prescribed valium, oxycontin, percodan, and ritalin by a Mexican doctor. From November 2000 to April 2001, the appellant imported several bottles of these medications into the United States, introduced them onto MCAS Yuma, and ingested their contents.

Despite pleading guilty to five specifications based upon this activity, the appellant now claims his pleas were improvident because the record "fails to sufficiently establish that his conduct was wrongful under the circumstances." Appellant's Brief of 10 May 2007 at 6.

"To be punishable under Article 112a, possession, use, distribution, introduction, or manufacture of a controlled substance must be wrongful. Possession, use, distribution, introduction, or manufacture of a controlled substance is wrongful if it is without legal justification or authorization." MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 37c(5). Possession, use, distribution, introduction, or manufacture of a controlled substance is not wrongful if such act or acts are: done pursuant to legitimate law enforcement activity; done by authorized personnel in the performance of medical duties; or done without knowledge of the contraband nature of the substance. *Id.* In the absence of evidence to the contrary, possession, use, distribution, or manufacture of a controlled substance may be inferred to be wrongful. *Id.* "The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit." *Id.* If the evidence presented gives rise to an issue concerning wrongfulness, the burden of proof is then upon the Government to establish that the use, possession, manufacture, or introduction was wrongful. *Id.*

The appellant argues that the military judge should have elicited facts sufficient to determine whether he complied with the requirement for a "declaration to an official of the Bureau of Customs and Border Protection," which, under 21 C.F.R. § 1301.26, might have permitted his importation of the named substances. This regulation permits an individual who possesses a controlled substance, which he has lawfully obtained for his or her personal medical use, to enter or depart the United States with such substance, provided certain conditions are met.

The controlled substance must be in the original container in which it was dispensed to the individual, and the individual must make a declaration to "an appropriate official of the Bureau of Customs and Border Protection," stating: (1) that the controlled substance is possessed for the individual's personal use; and (2) the trade or chemical name and the symbol designating the schedule of the controlled substance if it appears on the container label, or, if the name does not appear on the container label, the name and address of the pharmacy or practitioner who dispensed the substance and the prescription number 21 C.F.R. § 1301.26(a),(b) and (c).

The issue of a "declaration" to an official at the border was never raised at trial by the appellant or by the evidence presented, and there is no valid basis for the appellant to now claim the military judge should have ferreted out the existence, or non-existence, of such a "declaration" during the providence inquiry.

The appellant specifically admitted during the providence inquiry that: (1) his prescription in Mexico did not give him permission to import controlled substances into the United States; (2) he knew he was not permitted to bring controlled substances into the United States, and that it was illegal for him to do so; (3) he knew he had no legal justification for importing controlled substances into the United States; (4) he knew he had no authority to use pills obtained by means of a Mexican prescription in the United States; (5) he knew at the time he did so that he was introducing controlled substances onto MCAS Yuma; (6) he knew that his actions were wrongful; and (7) he knew he had no legal authority to use any of these medications. Record 20-33; Prosecution Exhibit 1 (Stipulation of Fact).

In response to specific questions by the military judge, the appellant further admitted that: (1) he went to a Mexican doctor for the purpose of illegally obtaining valium, oxycontin, percodan, and Ritalin; (2) there was no medical reason for him to go to a Mexican doctor; (3) he knew at the time that it was illegal for him to use valium, oxycontin, percodan, and ritalin; (4) he had no authority, nor did he believe he had authority, to use any of these substances; and (5) he believed his use of these substances was wrongful. Record at 24-25.

Before accepting a guilty plea, the military judge must find that there is a sufficient factual basis to satisfy each and every element of the pled offense. *United States v. Care*, 40 C.M.R. 247, 253 (C.M.A. 1969). Once the guilty plea is accepted, we will not disturb it, unless the record reveals a substantial conflict between the plea and the accused's statements or other evidence of record. *United States v. Shaw*, 64 M.J. 460, 462 (C.A.A.F. 2007). "[T]he mere possibility of conflict between a guilty plea and the accused's statements" does not necessitate the rejection of his plea. *United States v. Logan*, 47 C.M.R. 1, 3 (C.M.A. 1973).

The appellant's statements during the providence inquiry were consistent with the stipulation of fact that supported his pleas of guilty. Despite the military judge declaring a recess to allow the appellant to discuss possible defenses with his trial defense counsel, the appellant persisted in his pleas of guilty. We find that the appellant understood the criminal nature of his conduct at the time of the offenses and knew he was breaking the law. The burden of going forward with evidence to show that his conduct was not wrongful was upon the appellant. He presented no such evidence. Herein was a "mind at fault," which is the core requirement for wrongfulness. *See United States v. Thomas*, 65 M.J. 132, 134-35 (C.A.A.F. 2007).¹

With such a substantial factual basis to satisfy the element of wrongfulness, there was no legal requirement for the military judge to have delved into any possible exceptions. Accordingly, we find that the appellant's answers during the providence inquiry provide a sufficient basis in law and fact to support his pleas of guilty, and conclude that there is no basis in law and fact to question them. *Shaw*, 64 M.J. at 462. We decline to grant relief on this assignment of error.

II. Post-Trial Delay

The appellant asserts that he was denied speedy post-trial review of his court-martial because five years (1,825 days) elapsed between the adjournment of the trial and docketing of the record of trial for appeal with this court.

We conclude that despite the fact that the appellant has failed to show specific prejudice, taking five years to docket a

¹ In *United States v. Thomas*, appellant moved to reverse his plea, claiming that his introduction of marijuana onto a military installation was not "wrongful" because he simply did not know he was entering a military installation. The Court agreed, stating that in order to be convicted of introduction, an accused must have actual knowledge he is entering an installation. This was so even though no one questioned that Thomas knew of the nature of the drug and knew that he had it on his person. But, even though the plea was improvident, the Court upheld the conviction and sentence on the grounds that possession is a lesser included offense of introduction.

53-page record of trial works to diminish the public's perception of the fairness and integrity of the military justice system. Therefore, our consideration of the four factors announced in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), leads us to conclude that the appellant was denied his due process right to speedy review and appeal.

"Having found a due process violation, we now test for harm and prejudice." *United States v. Haney*, 64 M.J. 101, 108 (C.A.A.F. 2006)(citing *United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006)). Here, there is no evidence of any specific harm resulting from the delay. The appellant's other appellate issue affords him no relief; there is no oppressive incarceration resulting from the delay; there is no particularized anxiety caused by the delay; and no rehearing has been ordered which might be impacted by excessive post-trial delay. Thus, we conclude that the appellant has not suffered any prejudice resulting from the delay in his case. As we find that the appellant has not suffered specific prejudice, we hold that the error in processing this case was harmless beyond a reasonable doubt.

We also examine the issue of this five-year post-trial delay under Article 66(c), UCMJ, in light of our superior court's guidance in *Toohey v. United States*, 60 M.J. 100, 101-02 (C.A.A.F. 2004) and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (en banc). The facts in this case demonstrate an extreme lack of professional oversight of the post-trial process by the Joint Law Center, San Diego, California. Their inexcusable carelessness, however, must be balanced against all of the factors in the record before us, including the appellant's wrongful use of drugs. Having done so, we conclude that any meaningful relief would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay. Therefore, we find that the delay in this case does not affect the findings or sentence that should be approved. Art. 66(c), UCMJ.

Conclusion

Accordingly, we affirm the findings and sentence as approved by the convening authority.

Senior Judge FELTHAM and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court