

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

BEFORE

J.D. HARTY

R.G. KELLY

W.M. FREDERICK

UNITED STATES

v.

**Fredrick M. TAYLOR
Ship's Serviceman First Class (E-5), U.S. Navy**

NMCCA 200601276

Decided 19 June 2007

Sentence adjudged 18 May 2006. Military Judge: D.J. Sherman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region Northwest, Silverdale, WA.

CDR THOMAS FICHTER, JAGC, USN, Appellate Defense Counsel
LT JUSTIN E. DUNLAP, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK Judge:

A military judge, sitting as a general court-martial convicted the appellant, consistent with his pleas, of three specifications of wrongful use of methamphetamine, and one specification of distributing methamphetamine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to 14 months confinement, reduction to pay-grade E-1, total forfeitures, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered it executed. In an act of clemency, the CA suspended confinement in excess of 10 months for a period of one year.¹ Pursuant to the pretrial agreement, adjudged forfeitures were suspended and automatic forfeitures were waived for six months from the date of the CA's action.

¹ The pretrial agreement had no effect on confinement as adjudged. Although we agree with counsel's decision not to raise this as an assignment of error, we note that the CA's action fails to state the date of inception of the suspension of confinement. Absent an agreement to the contrary, we conclude the suspension took effect on the date of the CA's action. *United States v. Elliott*, 10 M.J. 740, 741 (N.M.C.M.R. 1981).

We have reviewed the record of trial, the appellant's three assignments of error,² and the Government's answer. We 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.

Background

The appellant, a frocked first class petty officer serving on board USS ABRAHAM LINCOLN, admitted to using methamphetamine on numerous occasions with junior Sailors. The appellant told the court that he used and distributed drugs with Airman Apprentice (AA) S during LINCOLN's San Francisco port visit, after work at AA S's apartment, and on board LINCOLN on two occasions.

Multiplicity and Unreasonable Multiplication of Charges

The appellant contends that Specification 3 of Charge II (wrongful use of methamphetamine) and Specification 5 of Charge II (wrongful distribution of methamphetamine) are multiplicitious for findings because "[t]he possession and distribution not only share a unity of time and place, but are based upon the same factual conduct." Appellant's Brief of 29 Nov 2006 at 4. In the alternative, the appellant argues that his "criminality was exaggerated because charges which were based on the same conduct were considered separate offenses for findings and sentencing" and constituted an unreasonable multiplication of charges. *Id.* at 6. We disagree.

A. Multiplicity

We conduct a *de novo* review of multiplicity claims. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002)(citing *United States v. Cherukuri*, 53 M.J. 68, 71 (C.A.A.F. 2000)). Specifications are multiplicitious for findings if each alleges the same offense, if one offense is necessarily included in the other, or if they describe substantially the same misconduct in two different ways. RULES FOR COURTS-MARTIAL 907(b)(3)(B), Discussion, MANUAL FOR COURTS-MARTIAL UNITED STATES (2005 ed.). Ordinarily, an unconditional guilty plea waives any multiplicity issue. See *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). However, an appellant may "overcome waiver if the specifications are 'facially duplicative,' that is, factually the same." *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)(citing,

² I. SPECIFICATION 3 OF CHARGE II IS BASED UPON THE SAME FACTUAL CONDUCT AS SPECIFICATION 5 OF CHARGE II AND SHOULD BE DISMISSED.

II. THE STAFF JUDGE ADVOCATE'S RECOMMENDATION WAS DEFECTIVE WHEN IT FAILED TO ADDRESS ALLEGATIONS OF LEGAL ERROR RAISED AS REQUIRED BY R.C.M. 1106(d)(4).

III. THE SENTENCE IMPOSED BY THE MILITARY JUDGE WAS INAPPROPRIATELY SEVERE.

Lloyd, 46 M.J. at 23; *United States v. Britton*, 47 M.J. 195, 198 (C.A.A.F. 1997)). To determine whether offenses are facially duplicative, we review the "language of the specifications and 'facts apparent on the face of the record'" to determine if the specifications are factually the same. *Id.*

Here, the appellant pled guilty to using and distributing methamphetamine. As part of the providence inquiry, the appellant explained that he rented a hotel room during LINCOLN's port call to San Francisco in November 2005. He invited AA S to this room, where the two shared their individual supplies of methamphetamine, smoking the drugs by passing a methamphetamine pipe between them. Record at 31.

The appellant argues that "[t]he possession and distribution not only share a unity of time and place, but are based upon the same factual conduct" and are multiplicitious. Appellant's Brief at 4. The appellant cites case law focusing on the multiplicitious nature of drug possession and distribution charges. *Id.* at 4-5. Unfortunately for the appellant, he stands convicted of *using* methamphetamine and distributing the drug to a subordinate shipmate, AA S, not *possession* and distribution of the drug. The specifications at issue do not allege the same offense, one offense is not necessarily included in another, nor do they describe substantially the same conduct. The appellant has not met his burden of proving that the specifications are facially duplicative; therefore, the appellant's argument, based on factual inaccuracy, is without merit.

B. Unreasonable Multiplication of Charges

The doctrine of unreasonable multiplication of charges stems from "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." See *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). To resolve claims of an unreasonable multiplication of charges, we look at: (1) whether the appellant objected to proceeding on charges at trial based on an unreasonable multiplication of charges theory; (2) whether the specifications are aimed at distinctly separate criminal acts; (3) whether the charges misrepresent or exaggerate the appellant's criminality; (4) whether the charges unreasonably increase an appellant's exposure to punishment; and, (5) whether the charges suggest prosecutorial abuse of discretion in the drafting of the specifications. Weighing all of these factors together, we are able to determine whether the charges are unreasonably multiplied. *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002)(en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition). While conducting our *Quiroz* analysis, we are also mindful that "what is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4), Discussion.

Applying the *Quiroz* factors to the facts of this case, we first find that the appellant did not object at trial to an unreasonable multiplication of charges. Second, the *actus reus* of the wrongful use charge in Specification 3 of Charge II, is the introduction of the controlled substance into the human body. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 37c(10). In contrast, the *actus reus* of the wrongful distribution charge in Specification 5 of Charge II focuses on delivering or transferring the illegal substance, here methamphetamine, to another. *Id.* at ¶ 37c(3). Each specification focuses on an entirely different criminal act. Third, the charges in no way exaggerate the appellant's criminality. The appellant was not only personally using methamphetamine in the presence of various subordinate shipmates, he also distributed methamphetamine to one of his subordinate shipmates. With regard to the fourth factor, charging the appellant with both distribution and use of methamphetamine increases the appellant's exposure to criminal liability on all charges from 30 to 35 years. This is not unreasonable. Finally, there is no indication of prosecutorial abuse of discretion in the drafting of charges. This case does not involve an unreasonable multiplication of charges.

Error in the Staff Judge Advocate's Recommendation

The appellant argues the staff judge advocate's recommendation (SJAR) failed to include allegations of legal error raised by the appellant in post-trial matters submitted in accordance with R.C.M. 1105. *See* R.C.M. 1106(d)(4).³ We agree with the appellant, and the Government concedes, that the staff judge advocate (SJA) erred by failing to include the appellant's allegations of legal error in an addendum to the SJAR. We decline, however, to grant relief.⁴

³ "[T]he staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate." R.C.M. 1106(d)(4).

⁴ We also note that the SJA failed to include the appellant's Global War on Terrorism Expeditionary Service Medal in the SJAR, served on the detailed defense counsel on 12 July 2006. Clemency matters submitted by the appellant on 25 July 2006, did not mention the SJAR omission. Clemency Request of 25 Jul 2006. Failure to comment on errors or omissions in the SJAR forfeits the issue, absent plain error. *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); *United States v. Lugo*, 54 M.J. 558, 560 (N.M.Ct.Crim.App. 2000). The appellant does not allege, nor do we find, plain error where the CA indicated he reviewed the record of trial prior to taking his action. The record of trial twice reflects the appellant was entitled to the Global War on Terrorism Expeditionary Service Medal. Further, the awards omitted were not personal decorations for valor, heroism, or service in combat, and we find that their omission in the SJAR was "neither material nor likely to have misled the convening authority concerning the nature of the appellant's service." *United States v. Serrata*, 34 M.J. 693, 694 (N.M.C.M.R. 1991).

To be entitled to relief for errors associated with the CA's post-trial review of a court-martial, the appellant must allege that there was error, the error resulted in prejudice, and articulate an appropriate remedy. *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). "[T]here is a material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *Id.* at 289 (quoting *United States V. Chatman*, 46 M.J. 321, 323-34 (C.A.A.F. 1997)). However, in cases where there is error, but the appellant suffered no prejudice, appellate courts "preferably should say so and articulate reasons why there is no prejudice." *Id.*

The appellant submitted a clemency request on 25 July 2006, in which he raised sentence disparity, noting that one "co-accused" was sentenced to only 6 months confinement and a bad-conduct discharge, another was sentenced to only 100 days confinement, and others were administratively separated from active duty. The staff judge advocate did not address sentence disparity in an addendum to the SJAR. That failure, while error, did not prejudice the appellant, because there was no sentence disparity, and the CA granted confinement clemency.

We will assume, without deciding, that the companion cases referred to in the appellant's clemency request were "closely related cases" to the appellant's case, and that the sentences were "highly disparate." See *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999)(quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). The burden now shifts to the Government to show a rational basis for the disparity. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001); *Lacy*, 50 M.J. at 288. Here, a frocked first class petty officer used methamphetamines and distributed methamphetamines to Sailors very junior to himself. The betrayal of trust granted to petty officers alone is sufficient to establish a rational basis for any disparity. Because there was a rational basis for any sentence disparity, the appellant could not be prejudiced by the SJA's failure to comment on that legal issue. In any event, the CA reduced the appellant's confinement by four months after considering the appellant's clemency request which was based, in part, on the sentence disparity claim.

Sentence Severity

In his final assignment of error, the appellant argues that "the sentence imposed was inappropriately severe in light of the unreasonable multiplication of charges, appellant's over ten years of honorable service and his cooperation with the [G]overnment in related cases." Appellant's Brief at 9. We disagree.

First, there was no unreasonable multiplication of charges. Second, the appellant's offenses were serious, aggravated by his position of leadership in LINCOLN's enlisted community. Instead

of setting an example for his junior Sailors to follow, the appellant abandoned his position as a frocked first class petty officer and smoked and distributed methamphetamines with his subordinates. The appellant's conduct was aggravated by the fact his crimes included smoking methamphetamine on board LINCOLN on two occasions, at least once while underway. Record at 28-29.

After reviewing the entire record, including the appellant's military record, we conclude that the sentence is appropriate for this offender and these offenses. *United States v. Baier*, 60 M.J. 382 (C.A.A.F. 2005); *Healey*, 26 M.J. at 395; *Snelling*, 14 M.J. at 268.

Conclusion

Accordingly, the findings, and the sentence as approved by the convening authority, are affirmed.

Senior Judge Harty and Judge Kelly concur.

For the Court

R.H. TROIDL
Clerk of Court