

**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.**

**Kyle H. WARREN  
Hospitalman Apprentice (E-2), U.S. Navy**

NMCCA 200602355

Decided 7 June 2007

Sentence adjudged 28 June 2005. Military Judge: T.A. Daly. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 7th Marines, 1st Marine Division (REIN), FMF, Marine Corps Air Ground Combat Center, Twentynine Palms, CA .

LCDR M. EVERSOLE, JAGC, USN, Appellate Defense Counsel  
LT TYQUILI BOOKER, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FREDERICK, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, consistent with his pleas, of: conspiracy; unauthorized absence; introduction of Valium onto a military installation; wrongful possession, distribution, and use of Valium; and, larceny, in violation of Articles 81, 86, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 886, 912a, and 921. The appellant was sentenced to 60 days confinement, reduction to pay-grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and except for the bad-conduct discharge, ordered it executed.

We have reviewed the record of trial, the appellant's three assignments of error,<sup>1</sup> and the Government's answer. We conclude

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<sup>1</sup> I. WHETHER CHARGE I (CONSPIRACY TO POSSESS AND INTRODUCE VALIUM) AND THE SPECIFICATIONS UNDER CHARGE III (POSSESSION, INTRODUCTION, USE AND DISTRIBUTION OF VALIUM) REPRESENT AN UNREASONABLE MULTIPLICATION OF CHARGES.

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 was serving with 1st Battalion, 7th Marines, in Iraq. He held the billet of squad corpsman. While in Husaybah, Iraq, the appellant's platoon was involved in a firefight against enemy forces. The squad was ordered to secure a building, which turned out to be an Iraqi medical center. While in the building, the appellant found and took two bottles of what he believed to be Valium. Each bottle contained 500 pills. He placed them in his backpack and, with his squad, returned to the Iraqi National Guard (ING) compound from which they were operating.

At the ING compound, the appellant discussed the contents of the bottles with another squad Sailor, Hospital Corpsman Third Class (HM3) B. HM3 B confirmed that the pills, labeled diazepam, were in fact, Valium. The appellant asked HM3 B to hold the pills while the appellant and his squad went on patrol. They also had an understanding that HM3 B would bring the pills on board Camp Gannon if HM3 B's squad returned to camp before the appellant was able to retrieve them from him. Following his return to the ING compound, the appellant retrieved the pills from HM3 B. When the appellant's squad returned to their home base at Camp Gannon, he brought the Valium onto the base and hid them in his berthing space. He also gave some of the pills to HM3 B, who concealed them in his berthing space.

While on board Camp Gannon, the appellant ingested Valium. He also distributed the drug to two Marines in his unit who complained of sleeplessness and anxiety. The two Marines were with the appellant when he took the drugs from the Iraqi medical center. The appellant did this even though he knew he was not authorized to distribute Valium without authorization from a medical doctor or a senior corpsman.

### **Unreasonable Multiplication of Charges**

In his first assignment of error, the appellant alleges that the "conspiracy to possess and introduce [V]alium (Charge I) and the specifications related to the introduction, possession, use and distribution of [V]alium (Charge III) are aimed at the same criminal conduct," and therefore constitute an unreasonable multiplication of charges. Appellant's Brief of 9 Jan 2007 at 6. The appellant argues that the separate charges greatly exaggerate

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II. WHETHER APPELLANT'S SUBSTANTIAL RIGHT TO SPEEDY POST-TRIAL REVIEW WAS MATERIALLY PREJUDICED BY THE UNREASONABLE DELAY IN POST-TRIAL PROCESSING?

III. WHETHER A SENTENCE INCLUDING A BAD-CONDUCT DISCHARGE WAS INAPPROPRIATELY SEVERE GIVEN THE NATURE OF THE OFFENSES AND THE CHARACTER OF THE OFFENDER?

his criminal conduct and the sentence should be reassessed. We disagree.

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. By 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 "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." RULES FOR COURTS-MARTIAL 307(c)(4), Discussion, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

Applying the *Quiroz* factors to the facts of this case, we first find that the appellant did not make an unreasonable multiplication of charges objection at trial. Second, the *actus reus* of conspiracy contained in Charge I is the agreement between the parties to engage in criminal activity. See *United States v. Shabani*, 513 U.S. 10, 16 (1994); *United States v. Valigura*, 54 M.J. 187, 188 (C.A.A.F. 2000). The criminality targeted by the conspiracy offense is wholly different than that charged in Charge III, specifically the wrongful possession, distribution, introduction, and use of narcotics, and are, therefore, directed at separate and distinct criminal acts. For the same reason, we conclude that the method of charging did not exaggerate the appellant's criminality. Fourth, the charges do not unreasonably increase the appellant's exposure to punishment. The specification alleging distribution of Valium, not part of the appellant's claim of unreasonable multiplication of charges, by itself subjected the appellant to the maximum jurisdictional punishment. Finally, there is no evidence of prosecutorial overreaching. We decline to grant relief.

#### **Post-Trial Delay**

For his second assignment of error, the appellant claims that a delay of 518 days from date of sentencing to the docketing of this 113-page guilty plea case has denied him due process. Appellant's Brief at 7. We disagree.

We consider four factors in determining if post-trial delay violates appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) 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 *Toohy v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.* In the instant case, there was a delay of 518 days from the date of sentencing to the date of docketing.<sup>2</sup> We find this delay to be facially unreasonable, triggering a due process review.

We balance the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government offers no excuse. Government's Answer of 9 Feb 2007 at 5. With respect to the third factor, we find no evidence that the appellant asserted his right to timely post-trial review prior to filing his Brief and Assignment of Error on 9 January 2007. Finally, regarding the fourth factor, the appellant claims prejudice should be presumed based on the length of delay involved in this case. Appellant's Brief at 10. This position is contrary to our superior court's guidance on post-trial delay and prejudice. *See United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). We do not find any material prejudice to the appellant's substantial rights. Considering all four factors, we conclude there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohy*, 60 M.J. at 103; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Considering the factors articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc), we decline to do so.

### **Sentence Severity**

In his final assignment of error, the appellant argues that the imposition of a bad-conduct discharge was unwarranted given the nature of the charges, the appellant's military record, and the appellant's lack of "bad intentions." Appellant's Brief at 13. We disagree.

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and character of the offender.'"

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<sup>2</sup> Sentence was imposed on 28 June 2005 and the record was docketed with this court on 28 November 2006.

*United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

We reject the appellant's argument that he had no "bad intentions." The appellant's criminal intent was displayed inside the Iraqi medical center. Although the appellant was legitimately inside the center, he had no authority to raid the Iraqi medical center's medical supply. The appellant's role as a United States service member gave him no license to steal from the Iraqi people he was stationed there to protect. Quite the opposite is true. The appellant's actions run counter to our Navy's and our nation's long-standing moral and legal principles, and could only serve to tarnish the image of both institutions in the eyes of the Iraqi people. Simply put, his actions were detrimental to our mission in Iraq.

We do not question the appellant's statements regarding the stress encountered by individuals in his unit while serving in Iraq. We cannot ignore, however, the very real implications his actions could have had on the health of the Marines he provided illegal drugs to, or the safety of his unit as a whole.

The 1st Battalion, 7th Marines battalion surgeon testified that only board certified physicians or those licensed by a board certified physician are authorized to prescribe Valium. Record at 96. The appellant had no such authorization. Prosecution Exhibit 1 at 2-5. The battalion surgeon explained that Valium (the more common name for diazepam) is prescribed for anxiety, treatment of seizures and sometimes used to treat sleeplessness and "can cause sedation, dizziness, confusion, increased suicidality, drowsiness," and other related symptoms. Record at 96-98. Given the unit's operational environment at Camp Gannon, described as "a very forward fire base where, really at any time, almost anyone on the base, if not everyone on the base, could be called upon to perhaps defend the base from being overrun," the battalion surgeon seldom prescribed Valium. *Id.* at 97-98. Additionally, when a medication like Valium was prescribed, the chain of command was notified to ensure the Marine's responsibilities were such as not to compromise the Marine's safety or the security of the entire base. *Id.* at 97.

Given the nature of Valium and its potential side effects, it is clear that using, possessing, and distributing the drug to Marines in the middle of a war zone poses a significant threat of disaster. The appellant clearly disregarded the serious implications of his actions.

After carefully reviewing the entire record, we conclude that the sentence including a bad-conduct discharge is appropriate for this offender and his offenses. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *Healy*, 26 M.J. at 395-96; *Snelling*, 14 M.J. at 268.

**Conclusion**

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

Senior Judge HARTY and Judge KELLY concur.

For the Court

R.H. TROIDL  
Clerk of Court