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

Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CHRISTOPHER L. DUTTON
PRIVATE FIRST CLASS (E-2), U.S. MARINE CORPS

NMCCA 200700818
SPECIAL COURT-MARTIAL

Sentence Adjudged: 14 June 2007.
Military Judge: Maj Charles Hale, USMC.
Convening Authority: Commanding Officer, Marine Air Control Group 18, 1st Marine Aircraft Wing, Okinawa, Japan.
Staff Judge Advocate's Recommendation: LtCol D.S. Jump, USMC.
For Appellant: LtCol Kevin Conway, USMCR.
For Appellee: Maj James Weirick, USMC.

24 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VINCENT, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of desertion, unauthorized absence, violating a lawful general order, wrongfully distributing Oxycodone, a Schedule II controlled substance, and forgery, in violation of Articles 85, 86, 92, 112a, and 123, Uniform Code of Military Justice, 10 U.S.C. §§ 885, 886, 892, 912a, and 923. The appellant was sentenced to confinement for 270 days, forfeiture of $860.00 pay per month for nine months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant initially submitted the case on its merits. Upon review of the record, we specified three issues.[1] Having reviewed the record of trial and the parties' briefs on the specified issues, we conclude we must set aside the finding of guilty to the forgery charge (Charge V) and reassess the sentence. We will take corrective action in our decretal paragraph. Following our corrective action, we conclude the remaining findings and the reassessed sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

VIOLATION OF LAWFUL GENERAL ORDER

The first question is whether the appellant's guilty plea to the specification under Charge III, a violation of a lawful general order, to wit: Secretary of the Navy Instruction (SECNAVINST) 5300.28D at ¶ 5(c) (5 Dec 2005), is provident. Paragraph 5(c) of SECNAVINST 5300.23D prohibits service members from the unlawful use of prescribed medication "with the intent to induce intoxication, excitement, or stupefaction of the central nervous system."

We "review a military judge's decision to accept a guilty plea for an abuse of discretion and questions of law arising from a guilty plea *de novo*. In doing so, we apply the substantial basis test, looking at whether there is something in the record of trial, with regard to the factual basis or the law, that would raise a substantial question regarding the appellant's guilty plea." *United States v. Inabinette,* 66 M.J. 320, 2008 CAAF LEXIS 664 at 7 (C.A.A.F. 2008).

During the providence inquiry, the appellant informed the military judge he had been medically prescribed OxyContin in order to relieve pain associated with the recent extraction of his wisdom teeth. Record at 41. The prescribed method of

[1] I. Whether the appellant's guilty pleas to Charge III and its sole specification are provident where the appellant, who had a valid prescription for oxycotin, ingested that drug by crushing it and inhaling it through his nose vice ingesting it by mouth as instructed and testified that he used the drug in that manner both to relieve the pain for which it had been prescribed and to become intoxicated, and the record is devoid of any evidence that oxycotin can produce an intoxicating effect?
II. Whether there is a fatal variance rendering the appellant's guilty pleas to Charge V and its sole specification improvident where the appellant testified during the providence inquiry he prepared an unsigned leave request vice travel orders, as alleged in the specifications?
III. If the second specified issue is answered in the negative, then is the unsigned leave request prepared by the appellant a writing which would, if genuine, impose a legal liability on another or change a legal right or liability to another's prejudice, and if so, is such fact adequately established by the providence inquiry to support the appellant's guilty plea?

ingesting the pain medication was orally. *Id.* at 45. Nevertheless, after taking the medication for a week or two, the appellant decided to crush the medication and inhale it through his nose to enhance the effects of the medication. *Id.* at 45-46, 48.

The appellant admitted SECNAVINST 5300.28D was a lawful general order which he had a duty to obey. He further admitted he had wrongfully snorted the drug through his nose to induce intoxication, and not because the pain was so severe that he needed to accelerate its pain relieving effects. *Id.* at 49.

We have previously determined that paragraph 5(c) of SECNAVINST 5300.28D is constitutionally sound and establishes a clear standard against which an appellant's conduct can be measured. *United States v. Cochrane*, 60 M.J. 632, 635 (N.M.Ct.Crim.App. 2004). Additionally, we held "[t]he phrase, 'with the intent to induce intoxication or excitement, or stupefaction of the central nervous system' makes clear that a criminal intent is required . . . ." *Id.* Finally, we determined "the Secretary of the Navy has a legitimate and overriding interest in preventing the *unlawful* use" of prescribed medications by Department of the Navy personnel "when those persons have the *intent* to induce intoxication . . . ." *Id.* (italics in original). We also note ¶ 5(c) of SECNAVINST 5300.28D does not require proof that prescribed medication can induce intoxication, excitement, or stupefaction of the central nervous system.

Recently, our Air Force sister court held "[o]nce an individual uses the controlled substance for some purpose other than medical treatment, the use is no longer legally justified or authorized and is wrongful." *United States v. Pariso,* 65 M.J. 722, 724 (A.F.Ct.Crim.App. 2007), *rev. denied*, 66 M.J. 94 (C.A.A.F. 2008). In the instant case, the appellant's admissions that he used the prescribed medication in an unauthorized manner with the intent to induce intoxication were adequate to establish legal and factual bases for his guilty plea.[2]

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[2] This case is distinguishable from two other cases cited in the court's order. In *United States v. Walters*, 46 C.M.R. 255 (C.M.A. 1973), the appellant was charged with wrongful *possession* of a prescribed medication rather than wrongful *use*. Since, however, there was evidence the appellant innocently possessed the prescribed medication, the military judge was obligated to inquire further before accepting the appellant's guilty plea. *Id.* at 259. In *United States v. Lancaster,* 36 M.J. 1116, 1118 (A.F.C.M.R. 1993), our Air Force sister court determined the military judge's instructions, which implied that use of leftover prescribed medication for a different ailment constituted wrongful use as a matter of law, were incorrect. In the instant case, the military judge conducted a thorough inquiry establishing the appellant used the prescribed medication in an unauthorized manner for an unauthorized purpose.

Accordingly, in applying the substantial basis test, we do not discern anything in the record of trial, either in the factual basis of the plea or the law, which would raise a substantial question regarding the appellant's guilty plea to the specification under Charge III.

FORGERY OFFENSE

The second and third specified issues concern the providence of the appellant's guilty plea to the specification under Charge V, forgery.

The appellant testified he obtained from the Internet a military leave authorization form,[3] similar to those he had observed in his barracks. Record at 23, 28-29, 32-34. He explained he inserted his name, local Japanese address, MOS, social security number, and home of record address on the leave request. *Id.* at 23. He did not enter any funding or accounting information, check the "approved" block, or enter the name of his commanding officer on the leave request. *Id.* The appellant also did not make any signatures, including his own or his commanding officer's, on the leave request. *Id.* at 23-24.

The appellant then proceeded to the local Japanese airport on Okinawa, where he presented his leave authorization form and a commercial airline ticket he had electronically purchased to a Japanese civilian airline employee, and boarded an airplane for the United States. *Id.* at 24-26. He informed the military judge he placed as much information on the leave papers as he thought necessary to convince the Japanese airline employees that he had permission to leave the island. *Id.* at 37. The appellant explained that Japanese air carriers routinely required United States military personnel to produce evidence they were authorized to leave the island before allowing them to board outbound flights. *Id.* at 30, 37.

We begin our legal analysis of the third specified issue by noting that, under Article 123, UCMJ, forgery by making or altering is committed when "[a]ny person subject to this chapter who, with intent to defraud, (1) *falsely* makes or alters any signature to, or any part of, any writing which would, if genuine, apparently impose a legal liability on another or change his legal right or liability to his prejudice . . .". MANUAL FOR

[3] Initially, the appellant testified he created his own travel orders. Record at 23, 28-29. However, after being appraised that the Government does not possess the alleged forged document, the military judge again asked the appellant to describe the Government form he used. The appellant responded that the document was a standard leave authorization form, and offered Appellate Exhibit V as an example of the form he used. *Id.* at 32.

COURTS-MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 48a(1)(emphasis added).[4]

The explanation section of the Manual pertaining to the word, false, states, in pertinent part:

> "False" refers not to the contents of the writing or to the facts stated therein but to the making or altering of it. Hence, forgery is not committed by the genuine making of a false instrument even when made with intent to defraud.

Id. at ¶ 48c(2).

Our superior court has held that signed official leave authorization papers may be a proper subject of forgery. *United States v. James,* 42 M.J. 270, 275 (C.A.A.F. 1995). In *James*, the court determined that the leave authorization form, "when signed by the appropriate commander, is an instrument which apparently perfected appellant's right to take leave ...." *Id.* at 274 (citing *United States v. Addye*, 23 C.M.R. 107, 109 (C.M.A. 1957)).

In the instant case, the appellant did not complete the authorization section of the leave request/authorization form, including making any authorizing signature. Hence, he did not falsely make any document. Rather, he prepared a genuine document, i.e., a document that was what it purported to be, a *request* for leave.

As noted above, we review questions of law arising from a guilty plea *de novo*. *Inabinette,* 66 M.J. 320, 2008 CAAF LEXIS 664 at 7. In this case, we conclude, as a matter of law, that the appellant did not commit forgery because he did not falsely make any document.

Having found the plea to the specification under Charge V to be improvident, we must reassess the sentence in accordance with the principals set forth in *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), and *United States v. Sales*, 22 M.J. 305, 307-09 (C.M.A. 1986).

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[4] Regarding the second specified issue, we concur with both the appellant's and the Government's assertions that the appellant's testimony that he prepared an unsigned leave request instead of "travel orders", as alleged in the specification, was not a fatal variance. The specification informed the appellant of the offense against which he had to defend himself, barred a future prosecution for the same offense, and did not cause any substantial prejudice to his rights. *United States v. Farano,* 60 M.J. 932, 934 (N.M.Ct.Crim.App. 2005)(quoting *United States v. Gallo,* 53 M.J. 556, 564 (A.F.Ct.Crim.App. 2000), *aff'd*, 55 M.J. 418 (C.A.A.F. 2001) and *United States v. Dailey*, 37 M.J. 1078, 1080 (N.M.C.M.R. 1993)).

After carefully considering the entire record, we are satisfied beyond a reasonable doubt that, even if the appellant had not been convicted of forgery, the court-martial would not have adjudged a sentence less than that approved by the convening authority in this case. We note our action does not create a dramatic change in the sentencing landscape of the appellant's special court-martial. *See United States v. Buber*, 62 M.J. 476 (C.A.A.F. 2006).

We find that the sentence continues to be appropriate for the offenses and the offender and no greater than that which would have been adjudged if the prejudicial error had not been committed.

CONCLUSION

The findings of guilty to Charge V and its specification are set aside. The specification under Charge V and Charge V are dismissed. The remaining findings and the sentence, as approved by the convening authority, are affirmed.

Senior Judge WHITE and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court