

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

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

**UNITED STATES OF AMERICA**

**v.**

**CHRISTOPHER M. SEALS  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200301331  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 06 January 2003.

**Military Judge:** LtCol Phillip Betz, USMC.

**Convening Authority:** Commanding Officer, 1st Light  
Armored Reconnaissance Battalion, 1st Marine Division, Camp  
Pendleton, CA.

**Staff Judge Advocate's Recommendation:** LtCol R.M. Miller,  
USMC.

**For Appellant:** CDR Kelvin Stroble, JAGC, USN.

**For Appellee:** Maj James Weirick, USMC.

**22 April 2008**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

STOLASZ, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of two specifications of wrongful use of ecstasy, and of single specifications of wrongful use of methamphetamine and marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 75 days, forfeiture of \$700.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. The

convening authority (CA) approved the sentence and, in accordance with the terms of the pretrial agreement, suspending confinement in excess of 60 days for 12 months from the date of trial.

On 25 May 2004, this court set aside the CA's action and returned the record of trial to the Judge Advocate General for remand to the CA for preparation of a new staff judge advocate's recommendation (SJAR) and CA's action. We determined that the substitute defense counsel had provided ineffective post-trial representation because he failed to establish an attorney-client relationship with the appellant, and failed to submit clemency matters on the appellant's behalf despite the appellant's expressed desire to do so.<sup>1</sup> *United States v. Seals*, No. 200301331, unpublished op. (N.M.Ct.Crim.App. 25 May 2004).

Upon remand, a new substitute defense counsel was detailed. This substitute defense counsel was unable to locate the appellant, and also failed to submit clemency matters to the CA. This court, in a 26 June 2007 decision, held that the substitute defense counsel had also provided ineffective assistance by failing to submit clemency matters to the CA. The court set aside the CA's action and ordered a new SJAR to be served on counsel of record, including appellate and trial defense counsel. *United States v. Seals*, No. 200301331, unpublished op. (N.M.Ct.Crim.App. 26 Jun 2007).

A new SJAR was prepared on 17 July 2007, and served on substitute trial defense counsel on 20 July 2007. In an affidavit, dated 29 August 2007, substitute defense counsel stated he had spoken with the appellant on two occasions and, that he would not be submitting any clemency matters to the CA in compliance with the appellant's instructions. Affidavit of Captain Bow Bottomly, USMC, of 29 Aug 2007 at 3. The CA's action of 11 September 2007 noted the appellant did not desire to submit clemency matters, and approved the sentence as adjudged.

The appellant initially raised three assignments of error. When the case was before us the second time, he raised three supplemental assignments of error. This time, he has raised no

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<sup>1</sup> The appellant submitted an unsworn statement, dated 11 October 2003, stating he would have requested suspension of his bad-conduct discharge, and submitted statements from members of his unit regarding his rehabilitative potential.

new supplemental assignments of error.<sup>2</sup> Our prior decisions have rendered moot two of the six assigned errors. Four assignments of error remain: (1) the military judge erred by failing to consolidate Specifications 1 and 3 of the Additional Charge, which allege use of methamphetamine and ecstasy; (2) the appellant's plea to Specification 3 of the Additional Charge was improvident; (3) the appellant was denied due process as a result of post-trial delay; and (4) the appellant's pleas to the specification under the Charge and Specification 1 of the Additional Charge were improvident.

We have examined the record of trial, the appellant's four remaining assignments of error, his briefs, and the Government's answers. We agree with the appellant that the 1,283 days of post-trial delay in this case is excessive, and that it violates due process. We will take appropriate action in our decretal paragraph. Following our corrective action, 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 remains. See Arts. 59(a) and 66(c), UCMJ.

**Consolidation of Specifications 1 and 3 of the Additional Charge, and Providence of the Plea to Specification 3.**

The appellant asserts that the military judge erred by failing to consolidate Specifications 1 and 3 of the Additional Charge, and that his plea to Specification 3 of the Additional Charge is improvident. The respective specifications allege use of ecstasy on 28 Oct 2002, and use of methamphetamine on 28 Oct 2002. The providence inquiry established that on that date the appellant used one ecstasy tablet, and felt the expected physiological effects. He subsequently tested positive on a urinalysis for ecstasy and methamphetamine. Record at 20-23, 26-28.

The appellant contends that the wrongful use of ecstasy in Specification 1 necessarily included the wrongful use of methamphetamine charged in Specification 3, since methamphetamine is a component part of ecstasy (i.e., 3,4

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<sup>2</sup> The appellant's two ineffective assistance of counsel claims were resolved in the appellant's favor by this court's two previous decisions. Of the four remaining assignments of error, 1 and 2, as listed above, appear as assignments of error II and III in appellant's initial brief, while 3 and 4, as listed above appear as assignments of error V and VI in appellant's supplemental brief.

methylenedioxy methamphetamine).<sup>3</sup> Appellant's Brief and Assignment of Errors of 12 Nov 2003 at 7. He argues, therefore, that Specification 3 is multiplicitious for findings with Specification 1. *Id.* (citing *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)). He further argues, Congress did not intend for use of ecstasy and methamphetamine to be separately charged when the use results from a single criminal impulse. *Id.* at 8. (citing *United States v. Bilyeu*, No. 200000861, 2000 CCA LEXIS 299, unpublished op. (N.M.Ct.Crim.App. 22 Nov 2000)). We disagree.

In this case, the appellant admitted using *both* ecstasy and methamphetamine. He admitted feeling the physiological effects of ecstasy and, after examining his urinalysis test results, was convinced he had used both ecstasy and methamphetamine. He further admitted, based on lab results and conferences with his defense counsel, that the methamphetamine was likely the result of an adulterated ecstasy tablet. Record at 28. There is no evidence in the record to suggest either that the methamphetamine charged in Specification 3 was simply a component part of the ecstasy, or that the appellant believed that it was. Thus, we do not find a substantial basis in law or fact to question the providence of the appellant's guilty plea to Specification 3. See *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). We further conclude the two specifications are not multiplicitious for findings, since they allege, and the appellant admitted, use of two separate illegal drugs, one of which was not a necessary component part of the other. See *United States v. Ray*, 51 M.J. 511 (N.M.Ct.Crim.App. 1999).

This court's unpublished opinion in *Bilyeu* is not in conflict with our decision in this case. In *Bilyeu*, the accused was charged with one specification of using amphetamine and one specification of using methamphetamine. He admitted only to using one tablet of ecstasy knowing that the pill contained both amphetamine and methamphetamine. The court found that, on the basis of the providence inquiry in that case, it was improper to charge separately the use of each illegal component of ecstasy, rather than charge a single use of ecstasy. Here, the appellant admitted he used both ecstasy and methamphetamine, and does not claim that he knew at the time he ingested the pill that it included methamphetamine. Consequently, the logic of the *Bilyeu*

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<sup>3</sup> Although the pharmacological name and the original formula for ecstasy includes methamphetamine, and its chemical structure is similar to methamphetamine, the term now encompasses a wide variety of ingredients, with both stimulant and hallucinogenic properties, and does not necessarily include methamphetamine.

decision does not require us to consolidate Specifications 1 and 3 of the Additional Charge in this case.

Additionally, we note the military judge held that Specifications 1 and 3 of the Additional Charge were multiplicitous for sentencing. Record at 57. Thus, even assuming *arguendo* that the specifications should have been consolidated, we find no prejudice to the appellant. We also find the appellant's plea to using methamphetamine was itself provident. As long as the appellant knows the substance he is ingesting is prohibited by law, the fact that he is not aware of the exact pharmacological identity of the ingested substance is of no legal consequence. *United States v. Stringfellow*, 32 M.J. 335, 336 (C.A.A.F. 1991).

### **Post-Trial Delay**

The total post-trial delay in this case encompasses 1,283 days. While we recognize that this case was remanded twice, we find a delay of this length entirely too long for an uncomplicated 56-page record of trial. The Government concedes that the aggregate delay in returning the record to the Judge Advocate General for post-trial processing and docketing with this court is unacceptable, and offers no explanation or excuse for this delay. However, the Government asserts the appellant's due process rights were not violated. Government's Supplemental Brief of 24 Nov 2006 at 7.

If we can determine that any possible error was harmless beyond a reasonable doubt, we need not reach the question of whether an appellant has actually suffered a denial of due process as a result of post-trial delay. *United States v. Allison*, 63 M.J. 365, 371 (C.A.A.F. 2006). The appellant has not identified, and we do not find, any harm from the delay in this case. The appellant has not suffered oppressive incarceration pending appeal, nor has he shown or alleged that he has suffered any particularized anxiety or concern related to the delay, distinct from anxiety or concern normal for persons awaiting appellate decisions. Further, we have found no error that requires a rehearing at which the appellant could be prejudiced by the delay. See *United States v. Toohey*, 63 M.J. 353, 361 (C.A.A.F. 2006) (quoting *United States v. Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006)).

We also do not find the appellant's assertion that post-trial delay compromised his ability to obtain clemency persuasive in light of the fact that the appellant ultimately

decided not to seek clemency. While the delay might have made it more difficult to locate members of his unit to obtain their statements, the appellant offered no evidence of rehabilitative potential from members of his unit during the presentencing phase of his court-martial when it most would have benefited him most. Consequently, it is purely speculative that he could have done so during the post-trial phase.

However, we may still find a due process violation has occurred in the absence of prejudice when "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." *Id.* at 362. Following remand the first time by this court, it took 258 days for a new SJAR to be prepared, and 469 days for a new CA's action, precisely 3 days short of two years. The Government offers no explanation or excuse for its dilatory processing, and we find it careless and negligent. We conclude that a delay of 1,283 days for a 56-page guilty plea could affect the public's perception of the fairness and integrity of the military justice system. Accordingly, we find the appellant has been denied his due process right to speedy post-trial review, and we will take appropriate action in our decretal paragraph.

We also consider whether this is an appropriate case to exercise our authority to grant relief under Article 66(c), UCMJ. We have considered the post-trial delay in light of our superior court's guidance in *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) and *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), and considered the factors explained in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005)(en banc). However, in view of our remedial action addressing the due process violation, we decline to grant additional relief under Article 66(c), UCMJ.

### **Improvident Pleas**

In his final assignment of error, the appellant asserts that his pleas to the specification of Charge I and Specification 1 of the Additional Charge were improvident. He claims the providence inquiry never established the "wrongfulness element" by showing that ecstasy is a controlled substance under the Controlled Substances Act of 1970. Further, he argues the military judge failed to establish that the appellant knew ecstasy was the street name for 3,4-methylethoxy methamphetamine (MDMA). Appellant's Reply Brief

of 26 Dec 2006 at 4; Appellant's Supplemental Brief and Assignments of Error of 26 Sep 2006 at 18. We disagree.

We will reject a guilty plea only if the record of trial shows a substantial basis in law and fact for questioning the guilty plea. *Prater*, 32 M.J. at 436. Four elements must be established for a provident plea to use of a controlled substance:

- (1) That at a certain time and place the accused used a controlled substance;
- (2) That the accused knew he used the substance;
- (3) That the accused knew the substance used was of a contraband nature;
- (4) That the use was wrongful.

Military Judges Benchbook, Dept. of the Army Pamphlet 27-9 at 365 (Ch-2, 1 Jul 2003).

In this case, the providence inquiry established that on 16 Sep 2002 and 28 Oct 2002, the appellant actually used ecstasy, and knew he was ingesting it. Further the appellant admitted he knew the ecstasy he ingested was contraband and therefore illegal and its use was wrongful. Record at 13-24. The military judge's failure to advise the appellant that ecstasy's pharmacological identity is 3, 4-methylenedioxy methamphetamine, and that its use is proscribed under Article 112a(b)(2), UCMJ, and 21 U.S.C. § 812(c)(1) is of no legal consequence. See *Stringfellow*, 32 M.J. at 336; *Bilyeu* unpub. op. The appellant's admission that he knowingly used ecstasy, a contraband substance, without legal justification satisfies us of the providence of his plea.

### **Conclusion**

The findings are affirmed. That portion of the sentence extending to a bad-conduct discharge and forfeiture of \$700.00 pay per month for three months is affirmed. That portion of the approved sentence extending to confinement for 75 days and reduction to E-1 is set aside.

Senior Judge WHITE and Judge VINCENT concur.

For the Court

R.H. TROIDL  
Clerk of Court