

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

**Before
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RICHARD C. LEFTWICH
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900672
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 20 September 2009.

Military Judge: Maj Glen Hines, USMC.

Convening Authority: Commanding Officer, Marine Corps
Combat Service Support Schools, Training Command, Camp
Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol J.L. Gruter,
USMC.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: CDR Christopher Vanbrackel, JAGC, USN; LT
Brian Burgtorf, JAGC, USN.

25 May 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of conspiracy to possess marijuana and one specification each of introduction of marijuana onto a military installation, possession of marijuana, use of marijuana, and distribution of marijuana, in violation of Articles 81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The military judge sentenced the appellant to confinement for 120 days, forfeiture of \$932.00 pay per month for four months, and a bad-conduct discharge. The convening

authority approved the findings and the sentence as adjudged, but in accordance with the pretrial agreement, suspended confinement in excess of 48 days for 12 months from the date of his action.

The appellant raises two errors on appeal: that the military judge erred in not finding, *sua sponte*, that appellant's marijuana possession was multiplicitious with his use and distribution; and, that charging the appellant with possession of marijuana constitutes an unreasonable multiplication of charges.

The evidence adduced at trial indicates that on 5 August 2009, the appellant knowingly possessed some amount of marijuana and then, on the same day, used and distributed the same marijuana. Although the record suggests that the appellant possessed marijuana after he used and distributed it, neither the providence inquiry nor the Stipulation of Fact, Prosecution Exhibit 1, establishes that he did so. In this instance the record fails to adequately establish that the appellant continued to possess some quantity of marijuana after he had distributed and used it. Accordingly, we find Specification 2 of Charge III, possession of marijuana, multiplicitious with Specifications 3 and 4 of Charge III, the use and distribution of the same marijuana. See *United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999) (holding that convictions for possession with intent to distribute and distribution occurring the same day were multiplicitious).¹ We will order corrective action in our decretal paragraph. Following that 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. Arts. 59(a) and 66(c), UCMJ.

The finding of guilty of Specification 2 of Charge III is set aside. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1988) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, to include the appellant's previous summary court-martial conviction for using cocaine and marijuana, we are satisfied beyond a reasonable doubt that there has not been a dramatic change in the penalty landscape at this special court-martial and that even if Specification 2 had been dismissed, the military judge would have adjudged a sentence no less than which he did adjudge in this case. Art. 66(c), UCMJ. The remaining findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

¹ Our conclusion moots the appellant's second assigned error.