

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

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

UNITED STATES OF AMERICA

v.

**MITCHEL A. SMILEY, JR.
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 200900604
GENERAL COURT-MARTIAL**

Sentence Adjudged: 04 February 2009.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding General, 1st Marine
Division (Rein), Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col B.D. Landrum,
USMC.

For Appellant: Patrick J. Callahan, Esq.; Capt Michael
Berry, USMC.

For Appellee: LCDR Sergio Sarkany, JAGC, USN.

29 April 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:

The appellant was found guilty, in accordance with his pleas, of unauthorized absence, escape from custody, use of ecstasy, possession of ecstasy with intent to distribute, and distribution of ecstasy, violations, respectively, of Articles 86, 95, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 895, and 912a. During his 21 January 2009 arraignment, the appellant requested to be sentenced by a court-martial composed of officer and enlisted members. Those members imposed a sentence of confinement for 54 months and a dishonorable

discharge, and the convening authority approved the adjudged sentence.

The appellant raises three errors for our consideration: that the military judge erred by permitting a sentencing witness to provide an opinion that the amount of drugs that the appellant possessed was consistent with distribution; that the members had impermissible knowledge of the pretrial agreement term relating to confinement; and that a dishonorable discharge is inappropriately severe. He personally asserts the latter two assignments pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Finding that no error materially prejudicial to the substantial rights of the appellant occurred, and determining the findings and sentence to be correct in law and fact, we affirm the findings and the approved sentence.

The appellant, as noted above, pleaded guilty to the possession, use, and distribution offenses. The recording of his colloquy with the military judge, conducted in accordance with *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), was played in open court as one of the Government's pieces of evidence on sentencing. Record at 268-69; Appellate Exhibit XLVI. During the course of his colloquy with the military judge, the appellant admitted to possessing multiple doses of ecstasy with the intent to distribute them and, on separate occasions, distributing ecstasy to three other Marines. The appellant also entered into a stipulation of fact, Prosecution Exhibit 1, detailing these various offenses. While the appellant denied any profit motive in distributing the drugs, he nonetheless did admit all the elements necessary to establish the offenses, and the members heard these admissions during the presentencing case.

After the members heard the recording, the Government called Special Agent (SA) [M] of the Naval Criminal Investigative Service. SA M testified generally to the conduct of the investigation into the appellant's activities, and at one point was asked by the trial counsel whether the amount of ecstasy found in the appellant's car -- 84 doses -- was more consistent with a distributor's amount or a user's amount. The defense objected to the question on the basis that it called for an expert opinion. The military judge overruled the objection, reasoning that SA M, by virtue of his experience in investigating controlled substance offenses, could offer an opinion.

We need not address whether the testimony offered by SA M was, in fact, "expert opinion testimony" as that term is defined in MILITARY RULE OF EVIDENCE 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), or "lay opinion testimony," as defined in MIL. R. EVID. 701, because, in the context of this case, the appellant had already revealed himself to the members as a drug dealer. SA M's testimony was not necessary to resolve a disputed issue of fact, and even if there were error in admitting the testimony from SA M, that error was harmless in this setting.

Regarding the second assignment of error, the appellant has provided no basis, other than a mere coincidence between the punishment adjudged and the punishment allowed to be approved, to question whether the members had some advance notice of the terms of the pretrial agreement and were thus affected in their deliberations on sentencing. See generally *United States v. Johnson*, 34 C.M.R. 328, 331 (C.M.A. 1964).

As to the appellant's third assignment of error, we note that the appellant had served in combat, and we note the rich service tradition from which he came. We also note, however, that while in the combat zone he received nonjudicial punishment for marijuana use immediately before deploying, and we note that he was on post-nonjudicial punishment restriction when he committed the string of offenses in March and April 2008 for which he was sent to general court-martial. We decline to disturb the sentence.

For the Court

R.H. TROIDL
Clerk of Court