

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

**Before  
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**VICTOR G. RAMOS  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100264  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 17 December 2010.

**Military Judge:** LtCol David M. Jones, USMC.

**Convening Authority:** Commanding General, 3d Marine  
Logistics Group, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** LtCol J.J. Murphy,  
USMC.

**For Appellant:** Capt Michael D. Berry, USMC.

**For Appellee:** LT Benjamin Voce-Gardner, JAGC, USN.

**31 October 2011**

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**OPINION OF THE COURT**  
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**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS  
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of wrongful distribution of cocaine on divers occasions in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to be confined for four years, to be reduced to pay grade E-1, to forfeit all pay and allowances, to pay a fine of \$10,000, and

to be confined for an additional six months in the event that he fails to pay the fine, and to be discharged with a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the discharge, ordered it executed.<sup>1</sup>

The appellant advances one assignment of error: The Government offered no physical evidence of distribution of cocaine, thus the guilty finding as to cocaine distribution was factually insufficient to support the conviction. Although not articulated by the appellant in his assignment of error, we first consider whether the evidence was factually sufficient to support a conviction of distribution on divers occasions.

For the reasons set out below, we affirm a conviction for a single act of distribution of cocaine after determining that the evidence is factually insufficient to support the "on divers occasions" general verdict returned by the members at trial. We amend the specification, striking the language "on divers occasions," affirm the findings as amended, and reassess the sentence. Following our corrective action, no error materially prejudicial to the substantial rights of the appellant remains. Art. 59(a) and 66(c), UCMJ.

### **Factual Sufficiency**

When we examine the factual sufficiency of the evidence, we must ourselves be convinced beyond a reasonable doubt of the appellant's guilt. We conduct our review with the understanding that we did not personally observe the witnesses. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

To convict the appellant of the distribution specification, the Government was required to prove: (1) that on divers occasions between 1 August 2009 and 15 November 2009, at Camp Leatherneck, Afghanistan, the accused distributed cocaine; (2) that he actually knew he distributed the substance; (3) that he actually knew that the substance he distributed was cocaine or of a contraband nature; (4) that the distribution by the accused was wrongful; and (5) that at the time he distributed that substance, the accused was receiving special pay under 37 U.S.C. § 310. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 37.

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<sup>1</sup> To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment it is a legal nullity. See *United States v. Tarniewicz*, \_\_ M.J. \_\_, No. 201100158, 2011 CCA LEXIS 150 (N.M.Ct.Crim.App. 30 Aug 2011).

From May 2009 to April 2010, the appellant deployed to Camp Leatherneck, Afghanistan as a postal clerk. Members of his postal clerk unit came under investigation for mail fraud while in Afghanistan and, in the ensuing investigation, implicated the appellant in drug activity.

At trial, the Government produced several witnesses who testified that they saw the appellant in possession of cocaine and heard him make statements intimating that he distributed cocaine. Record at 171, 205-08, 284-89, 294-95, 345-46. Only one witness, Private (Pvt) A, testified that he actually obtained cocaine from the appellant. *Id.* at 203. A second witness, Lance Corporal (LCpl) SJ, testified that he tried to purchase cocaine from the appellant on one occasion, but was unsuccessful. *Id.* at 174-84. A third witness, Sergeant (Sgt) E, testified that the appellant once offered her some cocaine, but that she refused the offer. *Id.* at 343.

In his closing argument, trial counsel argued that these three instances were all distributions, as the attempted transfers to LCpl SJ and Sgt E constituted deliveries within the meaning of Article 112a. *Id.* at 596. Mindful that the members then convicted the appellant of distribution on divers occasions, this court examines the factual sufficiency of these three alleged distributions.

We turn first to the two attempted transfers that trial counsel referred to in his closing argument. In our practice, attempts are most typically charged under Article 80, UCMJ, and not under the substantive offense of Article 112a. Notwithstanding our usual practice, attempted transfers may be charged as actual distributions under Article 112a. Although Congress did not explicitly define "distribute" in the UCMJ, in the federal counterpart to Article 112a the term "distribute" means "to deliver . . . a controlled substance. 21 U.S.C. § 802(11). "The terms "deliver" or "delivery" mean the actual, constructive, or *attempted transfer* of a controlled substance . . . ." 21 U.S.C. § 802(8) (emphasis added). The President, in Part IV of the Manual for Courts-Martial, restates those same definitions for "distribute" and "deliver" from 21 U.S.C. 802. MCM, App.23, *Analysis*, ¶ 37(3), at A23-12.

Under the analogous federal criminal statute, 21 U.S.C. § 841, federal courts have upheld convictions for distribution in which the defendant attempted the transfer of a controlled substance, but the actual transfer was thwarted by the defendant's arrest. *United States v. Tamargo*, 672 F.2d 887

(11th Cir. 1982); *United States v. Oropeza*, 564 F.2d 316 (9th Cir. 1977). Similarly, this court has previously held that an accused's attempt to transfer a gram of cocaine to a buyer and his receipt of one-half payment constituted an "attempted transfer," and therefore a "delivery" and a "distribution" under Article 112a, although the appellant had not yet relinquished physical possession of the cocaine when he was arrested. *United States v. Omick*, 30 M.J. 1122 (N.M.C.M.R. 1989).

At trial, the trial counsel argued that two incidents amounted to attempted transfers and therefore distributions within the meaning of Article 112a. The first involved LCpl SJ, who testified: that the appellant told him that he sold cocaine for \$100 per eightball; that LCpl SJ had later approached the appellant to buy three eightballs; that he then drove with the appellant to Camp Bastion to look for the appellant's supplier; that the appellant could not find any cocaine to sell to LCpl SJ; and that they returned to Camp Leatherneck with no cocaine. Record at 171-78. The appellant himself never came into possession of any cocaine on the night in issue. One cannot personally attempt to transfer drugs that one does not possess. *United States v. Williams*, 4 M.J. 507, 509 (A.C.M.R. 1977). Although the appellant's behavior that evening certainly raised the question of whether he was attempting to purchase cocaine for resale, the facts are too remote and attenuated to support a finding that he attempted to transfer cocaine to LCpl SJ.

Mindful that the members saw and heard LCpl SJ, we are not ourselves convinced beyond a reasonable doubt that the appellant distributed cocaine to this Marine.

In a separate incident, Sgt E testified that she was standing outside the postal tent when she observed the appellant pull out a ChapStick tube and snort from it. She asked him what he was doing, and the appellant replied, "Oh, it's cocaine, do you want some?" He held out the tube to her, and she observed a white, powdery substance. Sgt E said "No," and the appellant put the tube away. Record at 343-47. We are mindful that the members saw and heard Sgt E, and that they acquitted the appellant of the use of cocaine that Sgt E described as part of the same course of conduct in which she testified that he attempted to transfer cocaine to her. In light of that fact, and of the off-handed and casual nature of the offer to Sgt E of some cocaine, we are not ourselves convinced beyond a reasonable doubt the appellant distributed cocaine to Sgt E within the meaning of Article 112a.

The final distribution involved Pvt A. Pvt A testified that he once saw the appellant with a black bag that contained small plastic bags filled with white powder, that he asked the appellant what the substance was, and that the appellant told him that it was cocaine. Although the appellant declined to sell him any cocaine on that occasion, Pvt A eventually purchased a small amount of cocaine for \$60, which he gave to a friend, LCpl M. *Id.* at 205-07. Pvt A testified that the cocaine was packaged in a corner of a plastic bag and that he tested it by taste and that his mouth went numb. *Id.* at 208-10. He also testified with considerable detail about the marked effect that the cocaine had on LCpl M, based on his knowledge of LCpl M's typical behavior and how he behaved after sniffing the cocaine. *Id.* at 211-13. The testimony of Pvt A was corroborated by other witnesses who testified that they saw the appellant with cocaine in his possession while at Camp Leatherneck; that they observed him with cocaine packaged in the same manner described by Pvt A; and that the appellant had offered to sell them cocaine.

Both at trial and before this court, the appellant argues that Pvt A had a motive to fabricate, as he was testifying pursuant to the terms of a pretrial agreement, and had a poor character for truthfulness, as he had admittedly lied during the course of the earlier mail fraud investigation. Record at 240-45; Appellant's Brief of 8 Aug 2011 at 7. Recognizing that we did not personally see Pvt A testify, we are nonetheless persuaded as to the plausibility of his account.

We turn now to the appellant's specific assignment of error regarding factual sufficiency. Citing the lack of physical evidence, the appellant argues that we cannot be convinced beyond a reasonable doubt that the substance he distributed was in fact cocaine. Appellant's Brief at 4-7. The appellant cites no authority for the proposition that physical evidence is required to convict an accused of distribution of cocaine. It is well-established that eyewitness testimony and circumstantial evidence are sufficient to sustain a conviction, even in the absence of physical evidence.

We find that the evidence is factually sufficient to sustain a conviction for the wrongful distribution of cocaine to Pvt A, and affirm a conviction for this single act, but determine that the evidence is factually insufficient to support the "on divers occasions" general verdict returned by the members at trial. Because the members entered a general verdict of guilty to the "on divers occasions" specification without

exception, we may affirm any one of the individual acts. *United States v. Rodriguez*, 66 M.J. 201, 203 (C.A.A.F. 2008).

### **Sentence Reassessment**

As a result of our action on the findings, we reassess the sentence in accordance with the principles of *United States v. Moffeit*, 63 M.J. 40, 41-42 (C.A.A.F. 2006); *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006); *United States v. Eversole*, 53 M.J. 132, 133 (C.A.A.F. 2000); *United States v. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Although our action on findings changes the sentencing landscape, the change is not sufficiently dramatic so as to gravitate away from our ability to reassess. *Buber*, 62 M.J. at 479. What has changed is that the appellant now stands convicted of a distribution on one occasion, rather than divers occasions. Nevertheless, the appellant remains convicted, as before, of one specification of distributing cocaine while receiving special pay under 37 U.S.C. § 310. The maximum penalty remains the same: confinement for twenty years, total forfeitures, and a dishonorable discharge.

The admissible evidence to be considered at sentencing does not alter significantly. Had the appellant not been charged with distribution on "divers occasions," the evidence surrounding the other attempted distributions would have been properly admissible MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), evidence. Similarly, the circumstances surrounding Pvt A's purchase of the \$60.00 bag of cocaine would have been permissible aggravation evidence "directly related" to the distribution of which the appellant has been convicted; those circumstances included: how Pvt A knew to approach the appellant as a potential distributor, the fact that Pvt A saw the appellant in possession of numerous baggies packaged for sale, and Pvt A's conversation with the appellant about his drug distribution activities.

We affirm a sentence of confinement for three years, reduction to pay grade E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. Considering the offense of which the appellant was found guilty, the aggravating circumstances noted above, and his two prior nonjudicial punishments, we are convinced that, absent the error, the members would have imposed a sentence of at least this severity.

### **Conclusion**

The findings are affirmed except for the words "on divers occasions" in Specification 2 of Charge III. Only so much of the sentence as includes a bad-conduct discharge, confinement for three years, total forfeiture of all pay and allowances, and reduction to the grade of E-1 is affirmed.

For the Court

R.H. TROIDL  
Clerk of Court