

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DEAN H. LACROIX
PRIVAT FIRST CLASS (E-2), U.S. MARINE CORPS**

**NMCCA 201100126
GENERAL COURT-MARTIAL**

Sentence Adjudged: 26 October 2010.

Military Judge: LtCol Paul L. Starita, USMCR.

Convening Authority: Commanding General, 3d Marine Division
(-)(Rein), Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol K.J. Estes,
USMC.

For Appellant: CDR Howard A. Liberman, JAGC, USN.

For Appellee: CAPT Martin A. Grover, JAGC, USN; Capt Mark
V. Balfantz, USMC.

21 June 2011

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 general court-martial convicted the appellant, pursuant to his pleas, of two specifications of using 3,4-Methylenedioxymethamphetamine, also known as ecstasy, and one specification of distributing ecstasy, in violation of Articles 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to 19 months confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended all confinement in excess of 15 months.

The appellant raises the following four errors on appeal: 1) that Specifications 1 and 2 are multiplicitious for findings; 2) that the military judge did not obtain a sufficient factual basis to find the appellant guilty of distributing "approximately 50" ecstasy pills; 3) the CA's action fails to reference the amount of pretrial confinement; and, 4) that his command failed to visit him for 160 days.¹

Multiplicity

Specifications 1 and 2 of the charge allege the use of ecstasy over two time periods that overlap. The Government concedes that the specifications are facially duplicative and that one should be dismissed. We agree and note that this error does not impact the sentencing landscape as the military judge found the specifications multiplicitious for sentencing purposes. We will take corrective action in our decretal paragraph.

Factual Basis for Pleas

The appellant avers that his guilty plea to Specification 3 of the charge is improvident because the military judge failed to establish a factual basis for the appellant's distribution of approximately 50 ecstasy pills. A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). The guilty plea will not be set aside unless there is a substantial basis in law or fact for questioning the plea. *Id.*

Our review of the record convinces us that there is reason to question the number of pills that the appellant distributed. Although the appellant pled guilty to distributing approximately 50 ecstasy pills, the appellant never quantified the actual number of pills he distributed. Likewise, the stipulation of fact, Prosecution Exhibit 2, does not resolve this matter. Although the stipulation of fact indicates that the appellant made two purchases totaling 50 ecstasy pills, it also indicates that he used some of those pills before distributing the remainder. The record is devoid of any indication as to how many of the 50 pills he used and how many he distributed. At best, the record supports a conviction for distributing some amount of ecstasy as the appellant did admit to distributing ecstasy to six different persons on five different occasions. Record at 31-32. We will take corrective action in our decretal paragraph.

CA's Action

The appellant avers that the CA's action is incomplete as it does not include the length of pretrial confinement served by the appellant. The appellant does not cite any authority which requires the inclusion of such information in an action. *Cf.*

¹ The last assignment of error is raised under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)

RULE FOR COURTS-MARTIAL 1107(f)(4)(F), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) (requiring the CA to include in the CA's action any credit awarded for illegal pretrial confinement). In the absence of some claim that the appellant served confinement for which he was to be credited, there is no error.

Command Visits

Finally, the appellant argues that he should receive 2-for-1 credit for the 160 days that his command did not visit him while in the brig. Command visits are mandated by Secretary of the Navy Instruction 1640.9C (3 Jan 2006). The instruction, however, does not confer a right on the individual. See *United States v. Miller*, 66 M.J. 571, 576 (N.M.Ct.Crim.App. 2008). The appellant does not allege any prejudice and failure to conduct command visits is, alone, not evidence of prejudice. The appellant's claim for additional credit is denied.

Sentence Reassessment

Having dismissed one of the specifications to which the appellant pled guilty, and having excepted the aforementioned language, i.e., approximately 50 pills, from Specification 3, we reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and carefully considering the entire record, we are satisfied beyond a reasonable doubt that the sentencing landscape has not changed significantly, and that the military judge would have adjudged a sentence no less than that approved by the CA in this case. We find the adjudged sentence continues to be fair and appropriate for the appellant's offenses.

Conclusion

The findings as to the Charge and Specification 1 of the Charge are affirmed except for the date "14 June 2010" and substituting therefor the date "6 July 2010." The finding as to Specification 2 of the Charge is set-aside and Specification 2 is dismissed. The finding as to Specification 3 of the Charge is affirmed except for the words and numbers "approximately (50) fifty pills" and substituting therefor the words "some amount."

Following our corrective action, we are convinced that the modified findings and the 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 sentence as approved by the CA is affirmed.

For the Court

R.H. TROIDL
Clerk of Court