

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

**Before  
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**BRIAN D. ALEXANDER  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201100421  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 29 April 2011.

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

**Convening Authority:** Commanding Officer, Marine Wing Support Squadron 172, Marine Wing Support Group 17, 1st Marine Aircraft Wing, Okinawa, Japan.

**Staff Judge Advocate's Recommendation:** Col J.R. Woodworth, USMC.

**For Appellant:** CAPT Stephen White, JAGC, USN.

**For Appellee:** Capt David N. Roberts, USMC.

**31 January 2012**

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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.**

WARD, Judge:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of three specifications of failure to obey a lawful general order, one specification of failure to obey a lawful order, wrongful use of a controlled substance, wrongful possession of a controlled substance, and violation of the general article for fleeing the scene of an accident in violation of Articles 92, 112a, and 134,

Uniform Code of Military Justice, 10 U.S.C. §§ 892, 912a, and 934. The appellant was sentenced to confinement for 120 days, forfeiture of \$975.00 pay per month for four months, reduction to pay grade E-1, and to be discharged from the Marine Corps with a bad-conduct discharge. Pursuant to a pretrial agreement, the convening authority (CA) approved the sentence as adjudged, but suspended all confinement in excess of forty-five days for the period of confinement served plus six months thereafter.

The appellant raises three assignments of error: (1) the military judge erred by not dismissing Charge I, Specification 1 (violation of a lawful general order) as multiplicitous with Charge III, Specification 1 (possession of a controlled substance); (2) the military judge erred by not dismissing Charge I, Specification 1, as an unreasonable multiplication of charges with Charge III, Specification 1; and (3) the sole specification under Charge IV (fleeing the scene of an accident) fails to state an offense because it does not expressly allege the terminal element of Article 134.

### **Background**

During October 2010, the appellant and other members of his unit participated in Amphibious Landing Exercise (PHIBLEX) 2011 on board Clark Air Force Base, Phillipines. Record at 36, 43; Prosecution Exhibit 1. During this exercise, the appellant purchased anabolic steroids known as "Danabol DS Methandrostenolone" (Danabol) from an unknown seller on the street in the Phillipines. Record at 36-37. Over a two-week period, he used these steroids daily, ingesting eight pills each day, and kept the remainder in a pill bottle stored in his temporary quarters on board Clark AFB. *Id.* at 59-67. On 18 October 2010, the Criminal Investigation Division (CID) searched the appellant's personal belongings in his quarters and found a pill bottle labeled "Danabol DS Methandrostenolone" still partially filled with steroids. *Id.* at 38; PE 1 at 2. At the time, Brigadier General M. A. Brilakis, Commander, III Marine Expeditionary Brigade (III MEF), had issued General Order No. 1 for U.S. Personnel Participating in PHIBLEX 2011. Appellate Exhibit I. General Order No. 1 prohibited the purchase of any drug, medication, or other substance, prescription or over-the-counter, that is controlled under U.S. law or III MEF order, even if the purchase was lawful under Phillipine law. *Id.* at 3.

At trial, the appellant pleaded guilty to all charges and specifications. Specification 1 of Charge I alleges a violation of the aforementioned General Order No. 1 on or about

18 October 2010 for the appellant's purchase of Danabol steroids while attending PHIBLEX. Charge Sheet. Charge III, Specifications 1 and 2 both allege violations of Article 112a and are factually the same<sup>1</sup> with the exception of one element; Specification 1 alleges the wrongful possession of Danabol steroids and Specification 2 alleges the wrongful use of Danabol steroids. *Id.*

### **Multiplicity**

With an unconditional guilty plea, a multiplicity claim will fail on appeal unless the specifications are facially duplicative. *United States v. Campbell*, 68 M.J. 217, 219-20 (C.A.A.F. 2009). Whether specifications are facially duplicative is a question of law reviewed *de novo*. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Specifications that are factually the same are facially duplicative. *Id.* Specifications are not factually the same if they each require proof of a fact the other does not. *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004). We review the entire record of the guilty plea to make this determination. *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). We find that the specifications complained of are not facially duplicative as each requires proof of facts independent from the other.

During the providence inquiry on Specification 1 of Charge I, the appellant explained to the military judge that he purchased Danabol steroids on or about 18 October 2010 "[f]rom a guy, just a random guy" on the street. Record at 37. Later during the providence inquiry on Specification 1 of Charge III, the appellant acknowledged his daily use of these Danabol steroids over approximately a two-week period, taking eight pills each day as he "went beast mode" lifting weights. *Id.* at 60-63. He also explained that he kept these steroids in his temporary quarters, which he described to the military judge as a cabin in "the Villa" at Clark AFB. *Id.* at 60. Finally, on 18 October 2010, the appellant gave CID permissive authorization to search his quarters whereupon CID discovered a pill bottle labeled "Danabol DS Methandrostenolone" still containing tablets of these steroids. PE 1 at 2.

As the general order prohibited purchases, this offense was consummated once the appellant purchased the steroids from an

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<sup>1</sup> Both specifications under Charge III allege a violation of Article 112a on divers occasions at or near Clark AFB, Philippines between on or about 3 October 2010 and 18 October 2010.

unknown seller on the street. While some degree of possession is required to complete a purchase, continued possession for an extended period of time following the purchase is not axiomatic. The appellant's subsequent acts of transporting these steroids to his temporary quarters where he then used them daily over a two-week period are factually distinct from the initial act of purchasing the steroids on the street. Thus, the record reveals that these are separate and discrete offenses and therefore not factually the same. See *United States v. Young*, 64 M.J. 404, 408 (C.A.A.F. 2007) (" . . . an accused may be separately convicted and punished for distributing a portion of a quantity of drugs and for possessing that portion he retains"); *United States v. Heryford*, 52 M.J. 265, 267 (C.A.A.F. 2000) (holding distribution and possession specifications were not facially duplicative where contraband substance was possessed for two days prior to distribution).

### **Unreasonable Multiplication of Charges**

Unreasonable multiplication of charges is a related but distinct concept from multiplicity and is generally understood to address the dangers of prosecutorial overreaching. See *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). To determine whether there has been an unreasonable multiplication of charges, we consider five factors: (1) did the appellant object at trial; (2) are the charges aimed at distinctly separate criminal acts; (3) do the charges misrepresent or exaggerate the appellant's criminality; (4) do the charges unreasonably increase the appellant's punitive exposure; and (5) is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges and specifications? *United States v. Tovar*, 63 M.J. 637, 642-43 (N.M.Ct.Crim.App. 2006) (citing *United States v. Quiroz*, 57 M.J. 583, 585-86 (N.M.Ct.Crim.App. 2002) (en banc), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003) (summary disposition)). We also consider RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR COURTS-MARTIAL (2008 ed.), which provides the following guidance: "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." We grant appropriate relief if we find that the aggregate of charges is as extreme or unreasonable as to warrant invocation of our Article 66(c), UCMJ, authority. See *Tovar*, 63 M.J. at 643.

Here, the appellant pled guilty to both offenses and did not object to any unreasonable multiplication of charges at trial despite being expressly invited to do so by the military judge on two different occasions. Record at 10-13, 86. We find that Specification 1 of Charge I and Specification 1 of Charge

III are aimed at distinctly separate criminal acts. One focuses on the appellant's purchase of steroids and the other focuses on his independent possession of these steroids over an extended period of time in which he used them daily and on one occasion offered some to a fellow Marine. PE 1 at 4. We also find that these specifications do not misrepresent the appellant's criminality, again primarily for reasons stated in our multiplicity discussion above and additionally by the appellant's responses during the providence inquiry. Similarly, these two specifications do not unreasonably increase the appellant's punitive exposure at his special court-martial, because the jurisdictional maximum remained the maximum authorized punishment. Last, we find no indication of any prosecutorial overreaching or abuse.

Our inquiry does not end there, however. Although not raised by the appellant, the record makes clear that the two specifications under Charge III are factually the same except that Specification 1 concerns the appellant's daily use of these steroids and Specification 2 concerns his daily possession of these steroids. Applying the *Quiroz* factors, we find that punishing the appellant for the amount used and possessed each day during this two-week period is an unreasonable multiplication of charges. However, as noted above, the appellant still had an unused portion of steroids in his possession when CID searched his personal belongings on 18 October 2010. Consequently, we will modify the guilty finding to Specification 1 of Charge III to reflect a single possession of some amount of steroids on or about 18 October 2010.

#### **Failure to State an Offense**

The appellant's final assigned error is that pursuant to *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011), the sole specification under Charge IV fails to state an offense because it does not allege the terminal element of Article 134. We review *de novo* whether a specification states an offense. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006). To state an offense, a specification must allege every element of the offense either expressly or by necessary implication. *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Specifications that allege violations of the General Article must include the terminal element either expressly or by necessary implication. *Fosler*, 70 M.J. at 225.

The appellant's case is significantly distinguishable from *Fosler*, requiring strict adherence to the plain language of the

specification, because: 1) the appellant did not challenge the adequacy of the specification at trial; 2) the appellant pled guilty to this specification; 3) the military judge explained and ensured that the appellant understood the terminal element; 4) the appellant provided a factual basis to explain how his conduct was of a nature to bring discredit upon the armed forces; and, 5) the appellant stipulated both that his "conduct was to the prejudice of good order and discipline . . . [and] of a nature to bring discredit on the Armed Forces because these actions occurred in an allied foreign nation." PE 1 at 5. Accordingly, we resolve the assigned error against the appellant. *United States v. Hackler*, \_\_\_ M.J. \_\_\_, No. 201100323, 2011 CCA LEXIS 371 (N.M.Ct.Crim.App. 22 Dec 2011).

### **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. Cook*, 48 M.J. 434, 437-38 (C.A.A.F. 1998), 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. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). The appellant now stands convicted of possessing steroids on a single occasion rather than divers occasions. Yet he remains convicted of violating the general order for his purchase of the steroids, using steroids on divers occasions, and a host of other unrelated offenses. Furthermore, the evidence of his continuing possession and use essentially remains unchanged and was a proper matter for consideration in aggravation. As he was tried by special court-martial, our action on the findings has no effect on the maximum penalty. Consequently, we conclude that, absent the error, the sentencing authority would have imposed and the convening authority would have approved the same sentence that was previously adjudged and approved.

### **Conclusion**

We direct that the supplemental court-martial order reflect a guilty finding to Specification 1 of Charge III for possession of some amount of Danabol DD Methandrostenole on or about 18 October 2010. Having examined the record of trial, the appellant's assignments of error, and the parties' pleadings, we otherwise conclude that the 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 findings, as modified, and the sentence as reassessed are affirmed.

Senior Judge CARBERRY and Judge Modzelewski concur.

For the Court

R.H. TROIDL  
Clerk of Court