

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

**Before  
M.D. MODZELEWSKI, E.C. PRICE, T.R. ZIMMERMANN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**SETH R. AYERS  
PRIVATE (E-1), U.S. MARINE CORPS**

**NMCCA 201200097  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 5 October 2011.

**Military Judge:** LtCol Gregory L. Simmons, USMC.

**Convening Authority:** Commanding Officer, 3d Light Armored  
Reconnaissance Battalion, 1st Marine Division (Rein), FMF,  
Twentynine Palms, CA.

**Staff Judge Advocate's Recommendation:** Maj V.G. Laratta,  
USMC.

**For Appellant:** LCDR Brandon Boutelle, JAGC, USN.

**For Appellee:** Maj Crista Kraics, USMC.

**31 August 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..**

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, pursuant to his pleas, of one specification of conspiring to distribute ecstasy, one specification of using 3, 4 methylenedioxymethamphetamine ("ecstasy"), one specification of distributing ecstasy, and one specification of using D-amphetamine, in violation of Articles

81 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 912a. The approved sentence included confinement for ten months, forfeiture of \$978.00 pay per month for ten months, and a bad-conduct discharge.<sup>1</sup> The pretrial agreement had no effect on the sentence.

The appellant asserts the following errors: (1) the military judge erred in accepting the appellant's guilty plea to wrongful distribution of ecstasy (Specification 2 of Charge I), and (2) the military judge erred in accepting the appellant's guilty plea to conspiracy to distribute ecstasy (Specification 2 of Charge II). In both cases he alleges a lack of a factual basis to support the pleas.

We have examined the record of trial, the appellant's assignments of error, and the pleadings of the parties. We 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 was committed. Arts. 59(a) and 66(c), UCMJ.

#### **Facts**

The appellant was friends with another Marine in his unit, Private (Pvt) Ruby. In late 2010, the appellant loaned \$250.00 to Pvt Ruby. Record at 41. A couple of weeks later, Pvt Ruby told the appellant that he had used this money to buy "his first pills." *Id.* The appellant knew these pills to be a controlled substance known as "ecstasy" and his reaction upon hearing the news was "okay." The appellant explained to the military judge during the providence inquiry that, "that's when I first got into the selling part." *Id.*

Almost every weekend between October and December 2010, the appellant would accompany Pvt Ruby to dance clubs known as "raves," where they would engage in the following course of conduct: Pvt Ruby would give the appellant free ecstasy pills that the appellant would ingest, and then the appellant would become very "high" and dance at the club, always within eyesight of Pvt Ruby. When other people at the club would observe the appellant in his obviously intoxicated condition and ask him where he got his pills, he would point to Pvt Ruby. Pvt Ruby would then sell ecstasy pills to those people who approached him

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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*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

at the appellant's direction. *Id.* at 25-26, 42-44. In addition to the free ecstasy, Pvt Ruby would also provide food and hotel rooms to the appellant as payment for his participation in this endeavor. *Id.* at 44.

### **Standard of Review**

Prior to accepting a guilty plea, a military judge must make an inquiry of an appellant to ensure a factual basis exists for the plea. Art. 45(a), UCMJ; *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969); RULE FOR COURTS-MARTIAL 910(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This inquiry must elicit sufficient facts to satisfy every element of the offense in question. R.C.M. 910(e). We review a military judge's decision to accept a guilty plea for an abuse of discretion and review questions of law arising from a guilty plea *de novo*. See *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) and *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). In order to reject a guilty plea on appellate review, the record must show a substantial basis in law or fact for questioning the plea. *Inabinette*, 66 M.J. at 322.

### **Providence of the Plea to Conspiracy**

A conspiracy exists when two or more persons enter into an agreement to commit an offense under the code and, while the agreement continues to exist, either conspirator performs an overt act for the purpose of bringing about the object of the conspiracy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 5(b). The agreement "need not be in any particular form or manifested in any formal words." *Id.* at ¶ 5(c)(2). A conspiracy is "generally established by circumstantial evidence and is usually manifested by the conduct of the parties themselves." *United States v. Barnes*, 38 M.J. 72, 75 (C.M.A. 1993). However, a conspiracy requires more than joint commission of a substantive offense; rather, it requires an agreement knowingly entered into by the parties to the agreement. *Id.* (the agreement can be silent and manifested by conduct, but an agreement is still necessary). The evidence must show that the accused possessed "deliberate, knowing, and specific intent to join the conspiracy, not merely that he was associated with persons who were part of the conspiracy or that he was merely present when the crime was committed." *United States v. Mukes*, 18 M.J. 358, 359 (C.M.A. 1984) (citing *United States v. Glen-Archila*, 677 F.2d 809 (11th Cir. 1982)).

The appellant challenges his guilty plea to conspiracy in this case based on an alleged lack of agreement and proof that he had the specific intent to join the conspiracy. Appellant's Brief of 26 May 2012 at 15. He further avers that his conduct at the dance clubs "constitutes no more than mere association with a person (i.e., Private Ruby) who happened to engage in ecstasy distribution at raves that they jointly attended." *Id.*

However, the appellant's own statements during the providence inquiry belie these assertions. The appellant specifically told the military judge that, "there was [sic] raves that I would buy the tickets for and we would go there with the understanding that we were going to sell pills." Record at 43. He also testified that, "after I gave him the 250, the selling started coming in to it and I was like, why not. I mean, I was getting free pills out of it so there was - that's kind of what I was getting paid with was the free pills." *Id.*

It is readily apparent, from the appellant's own descriptions of the conduct, that he and Pvt Ruby had a meeting of the minds - an understood agreement, albeit unspoken, that each of them would perform certain roles when attending the raves in an effort to sell ecstasy. On multiple occasions, the appellant and Pvt Ruby engaged in conduct consistent with that agreement, and Pvt Ruby did successfully distribute ecstasy on those occasions.

The appellant was more than a mere spectator to this endeavor; he was more heavily involved in the misconduct itself rather than merely being associated with Pvt Ruby. In fact, he was an active participant in the drug distribution: he purchased tickets so that he and Pvt Ruby could gain access to the dance clubs for the express purpose of selling ecstasy, consumed ecstasy for the purpose of "modeling" the effect of the pills, and purposefully directed potential customers to Pvt Ruby, with the knowledge and intent that they would purchase ecstasy. The providence inquiry sufficiently established a factual basis for each element of the charged offense, including the fact of an agreement to commit a violation of the UCMJ and criminal intent. Accordingly, finding no substantial basis in law or fact for questioning the plea, we decline to grant relief on this assignment of error.

### **Providence of Plea to Distribution**

The military judge properly advised the appellant that he was criminally liable for wrongfully distributing ecstasy if he knowingly assisted or encouraged another person to commit the offense and if he shared in the criminal purpose or design. Record at 24. The military judge then elicited facts surrounding the conduct of the appellant and Pvt Ruby on the multiple occasions during which the appellant acted as a "model" for the ecstasy use so that other people would buy ecstasy from Pvt Ruby.

The appellant argues that he did not share the same criminal intent that Pvt Ruby had when Pvt Ruby actually distributed the ecstasy pills to people in the dance clubs, and that the appellant "simply agree[d] with the military judge that his conduct was wrongful." Appellant's Brief at 11, 13. He further asserts that his "role" in Pvt Ruby's distribution "merely consisted of gratuitously attending multiple 'raves' with Private Ruby, ingesting pills given to him by Private Ruby, and non-verbally 'pointing out' Private Ruby to party-goers who asked the Appellant where he got his pills." Appellant's Brief at 11 (footnote omitted). Contrary to the appellant's assertions, the conduct he described during the providence inquiry clearly shows a shared criminal intent. His responses are also more than sufficient to support the theory that the appellant aided and encouraged Pvt Ruby's distribution of ecstasy on those occasions. There is simply no factual dispute regarding the appellant's knowledge of, participation in, and intent to further Pvt Ruby's drug distribution operation. Finding no substantial basis in law or fact for questioning the plea, we decline to grant relief on this assignment of error.

### **Conclusion**

The findings and the sentence as approved by the convening authority are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court