

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

**Before
M.D. MODZELEWSKI, C.K. JOYCE, K.K. THOMPSON
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DAVID J. HEROLD
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201200110
GENERAL COURT-MARTIAL**

Sentence Adjudged: 7 November 2011.

Military Judge: LtCol Nicole K. Hudspeth, USMC.

Convening Authority: Commanding General, 2d Marine
Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Maj J.T. Leggett,
USMC.

For Appellant: CAPT Johnathan W. Bryan, JAGC, USN.

For Appellee: LCDR Gregory R. Dimler, JAGC, USN; Maj David
N. Roberts, USMC.

22 August 2012

OPINION OF THE COURT

**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 general court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy, one specification of possessing oxycodone with intent to distribute, one specification of distributing oxycodone, one specification of using oxycodone, one specification of possessing marijuana, and two specifications of solicitation, in violation of Articles 81,

112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 912a, and 934. The appellant was sentenced to three years confinement, reduction to pay grade E-1, and a dishonorable discharge. Pursuant to a pretrial agreement, the convening authority (CA) mitigated the dishonorable discharge to a bad-conduct discharge and suspended all confinement over two years for the period of confinement served plus twelve months from the date of his action, and ordered the sentence executed.¹

At trial, the defense counsel made a motion to merge specifications under two charges for the purpose of sentencing. Under Charge III, the military judge merged Specification 1, possession of oxycodone with intent to distribute, into Specification 2, the actual distribution of oxycodone. Under Charge V, the military judge also merged the two specifications of solicitation into one specification (Specification 1) of solicitation to distribute oxycodone. However, the military judge declined to merge the remaining solicitation specification into the specification of wrongful distribution of oxycodone (Charge III, Specification 2).

The appellant raises two assignments of error: first, that the military judge's failure to merge Specification 2 of Charge III with the single (merged) specification of Charge V resulted in an unreasonable multiplication of charges for sentencing; second, that the appellant's approved sentence of two years confinement and a bad-conduct discharge is unjustifiably severe. We disagree and decline to provide relief.

At trial, the appellant raised the issue of unreasonable multiplication of the specifications under Charge III and Charge V, one a violation of Article 112a, and the other a violation of Article 134. Two specifications charged under Article 112a concerned the possession of oxycodone by the appellant and the subsequent distribution of the same oxycodone. The military judge held that these two specifications were multiplicitous and merged them. The appellant further requested that the military judge merge Specification 2 under Charge III with the remaining solicitation specification under Charge V in violation of Article 134 for sentencing. The appellant argued that the distribution of the oxycodone by the appellant was part of the course of conduct that was the subject of the solicitation offense. The appellant solicited another Marine to use a false prescription to obtain oxycodone, then to deliver the oxycodone

¹ To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a legal nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

to the appellant. In return, the appellant had agreed to give the Marine some of those pills. The appellant urged the court to find that the subsequent delivery of the pills in payment to the Marine did not constitute a separate criminal act of distribution, but was part of the same overall conspiracy. The military judge disagreed and denied the appellant's request to merge the specifications.

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. Rejecting the appellant's assertion of error, we agree with the actions of the court below and conclude that the military judge did not abuse her discretion. The offense of solicitation was complete when the appellant induced the other Marine to obtain the oxycodone. The pay-off to the Marine for his criminal act of obtaining and delivering the oxycodone involved the commission of a separate criminal act of distribution by the appellant to the Marine. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012) (citing *United States v. Pauling*, 60 M.J. 91 (C.A.A.F. 2004) and *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001)).

As to the appellant's second assignment of error, we find it to be without merit and decline to provide relief. Based upon the appellant's misconduct as developed in this record, we find that the sentence is appropriate for this offender and his offenses. Granting sentence relief at this point would be engaging in an act of clemency, a prerogative reserved to the CA, which we decline to do.²

Conclusion

We have examined the record of trial, the appellant's assignments of error, and the parties' pleadings, and conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial

² See *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005); *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959));.

rights of the appellant was committed. Arts. 59(a) and 66(c),
UCMJ. The findings and the sentence as approved are affirmed.

For the Court

R.H. TROIDL
Clerk of Court