

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

**Before
B.L. PAYTON-O'BRIEN, R.G. KELLY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**VINCENT P. WITTIG
LIEUTENANT (O-3), U.S. NAVY**

**NMCCA 201200183
GENERAL COURT-MARTIAL**

Sentence Adjudged: 17 January 2012.

Military Judge: CAPT John Waits, JAGC, USN.

Convening Authority: Commander, Navy Region Southeast,
Naval Air Station, Jacksonville, FL.

Staff Judge Advocate's Recommendation: CDR M.C. Holifield,
JAGC, USN.

For Appellant: CDR Don Evans, JAGC, USN.

For Appellee: Capt Samuel Moore, USMC.

25 September 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 wrongful possession of marijuana with the intent to distribute and one specification of wrongful manufacture of marijuana with the intent to distribute, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for

33 months, total forfeitures, a fine of \$10,000.00, and a dismissal from the United States Navy. The convening authority (CA) approved the sentence as adjudged. Pursuant to pretrial and post-trial agreements, the CA suspended the fine, confinement in excess of 18 months, and total forfeitures, and waived automatic forfeitures in the amount of \$1,507.00 per month for six months.

Statement of the Facts

The Government charged the appellant with possessing and manufacturing marijuana with the intent to distribute. The appellant pleaded guilty to both offenses without exception.¹ Prior to the guilty plea inquiry, the civilian trial defense counsel noted for the record that "there was actually 41 plants, and 36 cuttings."² When further questioned by the military judge whether the cuttings are excluded from the definition of manufacturing, the civilian counsel replied, "[n]o, sir. I believe that fits within the definition of manufacturing."³

During the guilty plea inquiry, after hearing the details of the appellant's growing and cultivation of the marijuana, the military judge asked the appellant, "[d]o you agree that the plants-both the plants and the cuttings, as far as manufacturing, that what you were doing constituted preparation, propagation of these plants?"⁴ The appellant responded, "[y]es, sir," indicating that his actions with respect to both the cuttings and the plants met the definition of manufacture.⁵ Additionally, in the Stipulation of Fact, the appellant agreed that it was his intention to use each cutting in an effort to grow individual marijuana plants.⁶

Appellant's Assignment of Error

The appellant now presents this court with the following issue: "[w]hether, under Specification 2, Appellant was properly

¹ The specifications alleged that the appellant possessed more than 30 grams of marijuana and manufactured about 77 "Cannabis Sativa plants."

² Record at 19.

³ *Id.*

⁴ *Id.* at 51.

⁵ *Id.*

⁶ Prosecution Exhibit 1 at 2.

found guilty of and sentenced for the wrongful manufacture of about 77 *Cannabis Sativa* 'plants' when 36 of those 'plants' were day-old cuttings lacking established root systems."⁷

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*. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008); *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). 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.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 37c(4) defines manufacture as ". . . the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin" The term "production" includes the planting, cultivating, growing, or harvesting of a drug or other substance. *Id.* Here, the appellant admitted in his stipulation of fact that ". . . it was his intention to use each cutting in an effort to grow individual marijuana plants."⁸ In fact, what the appellant possessed was 41 mature plants and 36 clippings from the "mother plants" planted in water (for the purpose of production).⁹ Whether the appellant possessed mature marijuana plants or marijuana clippings planted in water, his clear intent was the manufacture of marijuana with the intent to distribute and that characterization of both mature plants and cuttings as "plants" did not materially prejudice any substantial rights of the appellant. There is no more severe punishment for the number or type product that is used in the manufacture of marijuana. It is the manufacture itself that is the crime. The appellant was clearly on notice of the offense, to which he pled guilty,

⁷ Appellant's Brief of 12 Jun 2012 at 1.

⁸ PE 1 at 2.

⁹ Record at 48-50.

stipulated to that fact, and has not suffered any material prejudice based on this undisputed quantification of the state of propagated plants. We find that the military judge did not abuse his discretion in accepting the appellant's plea to manufacturing 71 marijuana plants and that there is no basis in law or fact for rejecting that plea.

We hold that the assigned error is without merit and 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 occurred. Arts. 59(a) and 66(c), UCMJ.

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court