

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

C.A. PRICE

M.J. SUSZAN

R.C. HARRIS

UNITED STATES

v.

**Jerry A. SHEPHERD II
Private First Class (E-3), U.S. Marine Corps**

NMCCA 200301834

Decided 27 February 2004

Sentence adjudged 24 June 2003. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Aviation Logistics Squadron 26, Marine Aircraft Group 26, 2d Marine Aircraft Wing, U.S. Marine Corps Forces, Atlantic, Jacksonville, NC.

LtCol W. CRAIG WILLIAMS, USMCR, Appellate Defense Counsel
Maj J. ED CHRISTIANSEN, USMC, Appellate Defense Counsel
CDR ROBERT TAISHOFF, JAGC, USN, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

HARRIS, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The military judge sentenced the appellant to confinement for 90 days, reduction to pay grade E-1, forfeiture of \$700.00 pay per month for 3 months, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, pursuant to a pretrial agreement, suspended confinement in excess of 45 days for a period of 12 months.

After carefully considering the record of trial, submitted without specific assignment of error, 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. See Arts. 59(a) and 66(c), UCMJ.

Sentencing Evidence

Although not assigned as error, during the sentencing portion of the appellant's trial, the military judge, without objection by the trial defense counsel, considered a Record of Conviction by Court-Martial from the appellant's service record, which reflects that the appellant had a prior summary court-martial conviction on 11 April 2003 for wrongful use of marijuana, in violation of Article 112a, UCMJ. Record at 29; Prosecution Exhibit 1 at 12. The record also contains evidence that this summary court-martial was reviewed by a judge advocate pursuant to Article 64(a), UCMJ, and RULE FOR COURTS-MARTIAL 1112, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). Prosecution Exhibit 1 at 13. The record does not contain evidence that the appellant was counseled concerning his right to consult with counsel prior to this summary court-martial. See *United States v. Booker*, 5 M.J. 238 (C.M.A. 1977), as modified by, *United States v. Mack*, 9 M.J. 300 (C.M.A. 1980).

When the Government offers evidence of a prior summary court-martial conviction in aggravation that was reviewed by a judge advocate in accordance with Article 64(a), UCMJ, and R.C.M. 1112, and there is no objection for lack of proof of an advisory in compliance with *Booker/Mack*, any issue as to the evidence's admissibility is forfeited. *United States v. Kahmann*, 58 M.J. 667, 668 (N.M.Ct.Crim.App. 2003); see MIL. R. EVID. 103(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). We presume an advisory in compliance with *Booker/Mack* was made when the trial defense counsel raises no objection at trial to the admission of the prior summary court-martial conviction in aggravation. *Kahmann*, 58 M.J. at 668.¹ Consequently, we find no error, much less prejudice, and decline to grant relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority.

Judge SUSZAN concurs.

¹ There is no evidence in the record to suggest that the appellant exercised, or even intended to exercise, his right to request review of his summary court-martial conviction by the Judge Advocate General of the Navy pursuant to R.C.M. 1306(d). See Art. 69(b), UCMJ.

PRICE, Senior Judge (concurring in part and dissenting in part):

I concur with the decision to affirm the findings. However, I must respectfully dissent as to the decision to affirm the sentence.

In my view, the military judge erred in admitting a prior summary court-martial (SCM), part of Prosecution Exhibit 1, without documentation of necessary *Booker* warnings. *United States v. Kahmann*, 58 M.J. 667 (N.M.Ct.Crim.App. 2003)(Price, S.J., dissenting). Noting the absence of objection, I would find plain error. *United States v. Powell*, 49 M.J. 460, 461-65 (C.A.A.F. 1998); *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986). Not only is the error plain and obvious, it materially prejudiced a substantial right of the appellant, because there is an appreciable risk that the court gave considerable weight to the prior SCM in sentencing. See *United States v. Kelly*, 45 M.J. 259, 264 (C.A.A.F. 1996); *United States v. Dyke*, 16 M.J. 426, 427 (C.M.A. 1983). The risk arises from the following factors: (1) the SCM punished the appellant for the same offense, wrongful use of marijuana, as we have in this case; (2) the trial counsel heavily emphasized that fact in his sentencing argument; and (3) the military judge then adjudged the same sentence that the trial counsel requested.

I would reassess the sentence and affirm only confinement for 60 days, reduction to pay grade E-1, forfeiture of \$700.00 pay per month for two months, and a bad-conduct discharge.

For the Court

R.H. TROIDL
Clerk of Court