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

Before
R.E. VINCENT, J.A. MAKSYM, J.R. PERLAK
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSEPH A. BALDWIN
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800882
GENERAL COURT-MARTIAL

Sentence Adjudged: 1 July 2008.
Military Judge: Maj V. Danyluk, USMC.
Convening Authority: Commanding General, 2d Marine Aircraft Wing, Cherry Point, NC.
Staff Judge Advocate's Recommendation: Maj S.D. Schrock, USMC.
For Appellant: LT Dillon Ambrose, JAGC, USN.
For Appellee: LT Duke Kim, JAGC, USN.

29 October 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MAKSYM, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of two specifications of wrongful use of Benzylpiperazine (BZP), a schedule I controlled substance, two specifications of wrongful distribution of BZP, two specifications of wrongful introduction of BZP onto an installation used by the armed forces, and two specifications of knowingly causing an article declared nonmailable by 18 U.S.C. § 1716 to be delivered through the

mail, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The military judge also convicted the appellant, pursuant to his pleas, of two specifications of failure to obey a lawful order, three specifications of wrongful use of marijuana, and one specification of wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892 and 912a. Finally, the military judge acquitted the appellant, in accordance with his pleas, of one specification of incapacitation for the proper performance of his duties, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to confinement for a period of 30 months, a bad-conduct discharge, total forfeitures, and reduction to pay grade E-1. The convening authority suspended all confinement in excess of 24 months and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant asserts the following errors: 1) the findings of guilty to the two specifications of knowingly causing BZP to be delivered through the mail are factually and legally insufficient; 2) the record of trial in this case must be remanded for proper authentication; and 3) the findings of guilty to the specifications of using, introducing, and distributing BZP and causing BZP to be delivered through the mail are factually and legally insufficient.[1] This court specified the following two issues for oral argument: 1) whether 18 U.S.C. § 1716 applies to a servicemember's internet order placed and received while outside the territorial jurisdiction of the United States; and 2) whether, and to what extent, the Code of Federal Regulations and agency manuals may be used in defining a term in a federal criminal statute.

Upon consideration of the record of trial, the pleadings of the parties, and the oral arguments presented before this court on 10 August 2009, we find that the appellant's conviction of two specifications of violating 18 U.S.C. § 1716, under Article 134, UCMJ, must be set aside as factually and legally insufficient and the appellant's sentence reassessed. We conclude that the appellant's third assignment of error is without merit. After the corrective action taken in our decretal paragraph, we conclude that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

[1] The appellant's second assigned error was mooted by the Government's 9 April 2009 motion to attach the Authentication of the Record of Trial signed by the military judge. The appellant raises his third assigned error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Background

The charges against the appellant arose from a series of events prior to, during, and following his unit's deployment to Al Asad Air Base, Iraq, in support of Operation Iraqi Freedom. In October 2006, January 2007, November 2007, and December 2007, the appellant, while on leave, purchased and smoked marijuana. Record at 40-44, 45-48, 48-52. Also in January 2007, the appellant purchased and snorted cocaine. *Id*. at 37. In February 2007, the appellant was found to have drug paraphernalia in his personal vehicle following a traffic stop. *Id*. at 32. The appellant's connection to controlled substances, however, did not end there. While in Iraq, the appellant placed two orders for pills containing BZP through www.herbalhighs.com, a website operated from the country of Belize. *Id*. at 83; Prosecution Exhibit 4 at 1; PE 2 at 5. The appellant received the BZP pills through the mail while in Iraq and possessed the pills while onboard a U.S. military installation, namely, Al Asad Air Base. Record at 123, 136, 139. In addition to consuming the pills himself, the appellant supplied pills to fellow Marines while in Iraq. *Id*. at 147. Finally, while in Iraq, the appellant possessed a mobile telephone despite the Al Asad Air Base Order 5000.1C which forbade the possession of personal mobile telephones. *Id*. at 33-36.

Standard of Review

This court considers *de novo* the factual and legal sufficiency of a finding of guilty in those cases referred to it. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002)(citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)). The test for factual sufficiency is whether, "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A.1987). The test for legal sufficiency is whether, "considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *Id.* at 324 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In assessing the legal sufficiency of the evidence, we limit our review to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Discussion

Before being charged and convicted of an offense under the UCMJ, a servicemember must be afforded notice that his or her conduct is forbidden and punishable under the UCMJ. *See United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)(citing *Parker v. Levy*, 417 U.S. 733, 756 (1974)). The potential sources of "fair notice" that one's conduct is definitively proscribed include federal law, state law, military case law, military custom and usage, and military regulations. *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003).

Federal crimes "'are solely creatures of statute'" and, as such, "we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985)(quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)). A criminal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . ," *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983), and in reviewing a statute a court ought to consider whether Congress has "spoken in language that is clear and definite" before adopting the harsher of two interpretations, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952). The rationale behind this rule is not only to provide the "fair notice" referenced above, but also "because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

The question raised by the Government's application of 18 U.S.C. § 1716 to the appellant's ordering of BZP is whether the term "poison," as used in the statute, applies to BZP to make it a nonmailable article. In resolving this issue, we must apply the standard principles of statutory construction. As a general rule of statutory interpretation, "'[w]hen the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007)(quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, N.A., 530 U.S. 1, 6 (2000)). We afford a statute the interpretation that would render it consistent with its "general scope or purview," *United States v. Baker*, 40 C.M.R. 216, 219 (C.M.A. 1969), and give words their "common and approved usage," *United States v. McCollum*, 58 M.J.

323, 340 (C.A.A.F. 2003)(citation and internal quotation marks omitted).

The statute at issue addresses "injurious articles" that have been deemed by Congress to be nonmailable within the United States Postal Service (USPS). In pertinent part, the statute provides the following:

> All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, reptiles, and all explosives, hazardous materials, inflammable materials, infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or material which may kill or injure another, or injure the mails or other property, whether or not sealed as first-class matter, are nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any officer or employee of the Postal Service.

18 U.S.C. § 1716(a). The statute goes on to state:

> Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, according to the direction thereon, or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared nonmailable by this section, unless in accordance with the rules and regulations authorized to be prescribed by the Postal Service, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1716(j)(1). The statute does not define the term "poison" and it is not clear from either the plain meaning of the statute or its legislative history what Congress intended that term to mean.

While courts generally exercise restraint in considering the scope of a federal criminal statute out of deference for Congress's authority in defining federal crimes, *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703 (2005), we may consider what, if any, guidance the Executive branch has offered on the interpretation of a statute, *United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). The Executive branch or independent

federal agencies may, based upon a delegation of authority by Congress, promulgate rules and regulations that define what conduct is criminal. *Loving v. United States*, 517 U.S. 748, 768 (1996); *Mistretta v. United States*, 488 U.S. 361, 372 (1989).[2]

In this case, 18 U.S.C. § 1716 does not expressly delegate to the competent agency, specifically the USPS, the authority to promulgate rules or regulations that define the term "poison." We are convinced, however, that 39 U.S.C. § 401(2), in which Congress enumerates as one of the general powers of the USPS the authority "to adopt ... such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its function under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title," provides the USPS with rulemaking authority in enforcing 18 U.S.C. § 1716. *See United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 122-23 (1981)(stating that "under 39 U.S.C. § 401 the Postal Service is broadly empowered to adopt rules and regulations designed to accomplish [an efficient system of collection, sorting, and delivery of mail nationwide]").

Nonetheless, even given such a delegation of rulemaking authority, prosecution for a violation of those rules and regulations is contingent upon the following three conditions: first, Congress must make the violation of those rules and regulations an offense; second, Congress must fix the punishment for such an offense; and third, the regulations must "'confine themselves within the field covered by the statute.'" *Loving*, 517 U.S. at 768 (quoting *United States v. Grimaud*, 220 U.S. 506, 518 (1911)). 18 U.S.C. § 1716 lacks any language from Congress criminalizing a violation of the USPS rules and regulations regarding the mailing of "poisons," thus failing the initial prong of this test.

Assuming, *arguendo*, that Congress had made violation of the USPS rules an offense under 18 U.S.C. § 1716, those rules and regulations fail to extend the definition of nonmailable articles to controlled substances. We acknowledge that USPS Publication 52 categorizes controlled substances as "restricted matter," however, we also observe inconsistencies in the

[2] "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'" *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Government's reliance on that in extending 18 U.S.C. § 1716 to the appellant's conduct. Publication 52, specifically § 471.1, states that, *inter alia*, "controlled substances include poisons." In other words, the USPS rules and regulations consider "poison" to be a subset of controlled substances. Meanwhile, to support its argument today, the Government contends that controlled substances are included in the term "poison" as used in 18 U.S.C. § 1716. The USPS regulations are similarly inconsistent in that they distinguish between controlled substances and "poisonous drugs and medicines." United States Postal Service, Publication 52, at §§ 473.1 and 473.3 (January 2008).

To be sure, deference is ordinarily owed the interpretation of the administrative agency charged with overseeing a particular statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984). Contrary to the Government's argument, however, deference to the USPS rules and regulations in this case would not result in a determination that "poison" includes controlled substances, as required for prosecution under 18 U.S.C. § 1716, but rather that controlled substances include poisons. In any event, we would decline to apply *Chevron* deference to the USPS interpretation in this case. The rule of lenity militates against such deference in the context of a criminal statute lacking clear and definite terms, particularly when the statute at issue fails to make the violation of the respective agency's rules and regulations an offense. *See Crandon v. United States*, 494 U.S. 152, 177-78 (1990)(Scalia, J., concurring); *see also United States v. Bartlett*, 66 M.J. 426, 427-28 (C.A.A.F. 2008)("*Chevron* deals with the deference given to an administrative agency's interpretation of a regulatory statute, the administration of which has been committed to it by Congress"). "If Congress desires to go further, it must speak more clearly than it has." *McNally v. United States*, 483 U.S. 350, 360 (1987). Moreover, the lack of clarity within the regulatory regime which we are invited to consult in analyzing this statute limits its effect here. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994)(Thomas, J., dissenting)(stating that "agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law").

Finally, the purpose underlying 18 U.S.C. § 1716, as represented by the Government in its supplemental brief, assures us of the validity of our reading of the statute. *See Geier v. American Honda Motor Company*, 529 U.S. 861, 873 (2000)

(considering the purpose of a statute in its interpretation). The Government correctly argues that the objective of the statute is the protection of postal employees from potentially hazardous items shipped in the mail, confirming that the subject of the statute is the proper preparation and packing of mail. Government's Supplemental Brief of 6 Aug 2009 at 9. This argument, however, supports the reading we announce today as the shipping of a controlled substance is not analogous to the shipping of a bomb, knife, or hazardous material, nor is the statute designed as a tool for drug control.[3] As a result, inclusion of controlled substances like BZP within the category of "injurious articles" deemed nonmailable is no more supported by the purpose of the statute than by its terms.

We conclude that controlled substances are not included in the definition of "poison" in 18 U.S.C. § 1716 and the appellant's conviction under that statute for causing BZP to be delivered through the mail is neither supported by the law or facts before us. As to Specification 1 of Charge III and Additional Charge III, we are not convinced of the appellant's guilt beyond a reasonable doubt, nor do we believe that a reasonable factfinder could find all of the essential elements to be proved beyond a reasonable doubt. Therefore, those charges and specifications must be set aside and we take appropriate action in our decretal paragraph.

Having resolved the controversy before us as to 18 U.S.C. § 1716 on the second court-specified issue, we need not rule on the question of its extraterritorial application. *See United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003). We find the appellant's third assigned error to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Sentence Reassessment

As a result of our action on the findings with regard to Specification 2 of Charge III and Additional Charge III, we must reassess the appellant's sentence. *See United States v. Moffeit*, 63 M.J. 40, 42 (C.A.A.F. 2006). We are satisfied that the sentencing landscape in this case has not changed dramatically as a result of our decision to set aside the findings of guilty to the appellant's causing BZP to be

[3] Additionally, we note the availability of 21 U.S.C. § 843(b) in prosecuting drug distribution through the mails. In fact, the United States Department of Justice has identified 21 U.S.C. § 843(b) as a tool in investigating and prosecuting the "use of mails to violate the Controlled Substances Act." UNITED STATES ATTORNEY'S MANUAL, Title 9, Criminal Resource Manual, at 2186.

delivered through the mail. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). We conclude that the adjudged sentence for the remaining offenses would have been at least the same as that adjudged by the military judge and approved by the convening authority. *Id*. at 478.

Conclusion

Accordingly, findings of guilty to Specification 2 of Charge III and the specification under Additional Charge III are set aside and Specification 2 of Charge III and the specification under Additional Charge III and Additional Charge III are dismissed. The remaining findings and the sentence are affirmed.

Senior Judge VINCENT and Judge PERLAK concur.

For the Court

R.H. TROIDL
Clerk of Court