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

Before
F.D. MITCHELL, J.A. MAKSYM, D.O. VOLLENWEIDER
Appellate Military Judges

UNITED STATES OF AMERICA

v.

DANIEL C. CARNEY
ELECTRONICS TECHNICIAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200900296
SPECIAL COURT-MARTIAL

Sentence Adjudged: 4 March 2009.
Military Judge: CAPT James Redford, JAGC, USN.
Convening Authority: Commanding Officer, Naval Submarine Support Facility New London, Groton, CT.
Staff Judge Advocate's Recommendation: LCDR J.L. Marsh, JAGC, USN.
For Appellant: CAPT Edward Mallow, JAGC, USN.
For Appellee: Mr. Brian Keller, Esq.

5 November 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

The appellant was convicted, pursuant to his pleas, of a total of eight specifications of violating Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a, by variously using, possessing, introducing, and distributing Percocet and Oxycodone over two periods of time in 2008. The military judge, sitting as a special court-martial, sentenced him to confinement for 120 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence adjudged, and,

pursuant to the pretrial agreement in the case, suspended confinement in excess of sixty days.

This case was submitted on its merits without assignment of error. Having completed our statutory review, this court finds two errors that require correction. We will address each below.

Failure to Suspend Punitive Discharge

The pretrial agreement contained the following sentence limitation binding on the convening authority:

> **Punitive Discharge**: May be approved as adjudged. However, if a punitive discharge is adjudged, it will be suspended for a period of 6 months from the date of the convening authority's action, at which time, unless sooner vacated, the suspended punitive discharge will be remitted without further action.

While the convening authority approved the sentence as adjudged, and suspended a portion of the confinement as required by the pretrial agreement, the convening authority failed to suspend the bad-conduct discharge.

An accused who pleads guilty pursuant to a pretrial agreement is entitled to the fulfillment of any promises made by the Government as part of that agreement. *Santobello v. New York*, 404 U.S. 257, 262 (1971); *United States v. Smith*, 56 M.J. 271, 272 (C.A.A.F. 2002). Thus, the convening authority erred by failing to enforce the terms of the pretrial agreement by not suspending the adjudged bad-conduct discharge.

When a convening authority fails to comply with the terms of a pretrial agreement, this court has the authority to enforce the agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972); *United States v. Carter*, 27 M.J. 695, 697 n.1 (N.M.C.M.R. 1988); *see also United States v. Bernard*, 11 M.J. 771, 772-74 (N.M.C.M.R. 1981). We will take corrective action in our decretal paragraph.

Multiplication of Charges

An unconditional guilty plea ordinarily forfeits a multiplicity claim absent plain error. *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000). However, the "[a]ppellant may show plain error and overcome [waiver] by showing that the specifications are facially duplicative,"

United States v. Barner, 56 M.J. 131, 137 (C.A.A.F. 2001)(citation omitted), "that is, factually the same," *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997). Whether specifications are facially duplicative is determined by reviewing the language of the specifications and facts evident on the face of the record. *Heryford*, 52 M.J. at 266.

Specifications 3, 5, and 7 allege introduction, possession, and use of Oxycodone between April and December 2008. Specifications 4, 6, and 8 allege introduction, possession, and use of Percocet over the same time period. No evidence in the record indicates that the drugs introduced were greater than those possessed, or that the drugs possessed were greater than those introduced. The trial judge made no inquiry as to whether the drugs under the possession specifications were the same drugs used and introduced in the other specifications. A fair reading of the providence inquiry is that the drugs possessed were the same as those introduced and used by the appellant or distributed by the appellant to another Sailor.

Possession is a lesser included offense of both use and introduction. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 37d. We conclude that the possession specifications may not be affirmed. We therefore will dismiss Specifications 5 and 6 of the Charge.

As a result of our action on the findings, we must reassess the sentence in accordance with the principles of *United States v. Moffeit,* 63 M.J. 40 (C.A.A.F. 2006); *United States v. Cook,* 48 M.J. 434 (C.A.A.F. 1998); *United States v. Peoples,* 29 M.J. 426, 428 (C.M.A. 1990); and *United States v. Sales,* 22 M.J. 305, 307-08 (C.M.A. 1986). The appellant pled guilty to wrongful introduction of Oxycodone to Naval Support Facility New London with intent to distribute, wrongful introduction of Percocet, wrongful distribution on base of both drugs to fellow Sailors, and wrongful use of both drugs on base on divers occasions.

We conclude that there has not been a "dramatic change in the penalty landscape," *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006), and that the sentence received by the appellant would not have been any lighter even if he had not been charged with wrongful possession of Oxycodone and Percocet. We further find that the adjudged sentence is appropriate for this offender and the remaining offenses.

Conclusion

The findings of guilty as to Specifications 5 and 6 are set aside and Specifications 5 and 6 of the Charge are dismissed. We affirm the remaining findings and sentence as adjudged, but suspend the bad-conduct discharge pursuant to the pretrial agreement.

For the Court

R.H. TROIDL
Clerk of Court