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

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

UNITED STATES OF AMERICA

v.

JAMES J. KIM
AVIATION MAINTENANCE ADMINISTRATIONMAN AIRMAN APPRENTICE (E-2), U.S. NAVY

NMCCA 200900440
SPECIAL COURT-MARTIAL

Sentence Adjudged: 19 June 2009.
Military Judge: CDR K.R. O'Neil, JAGC, USN.
Convening Authority: Commanding Officer, Electronic Attack Squadron 133, Naval Air Station Whidbey Island, Seattle, WA.
For Appellant: Capt Peter Griesch, USMC.
For Appellee: Mr. Brian Keller, Esq.

22 December 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A military judge alone sitting as a special court-martial convicted the appellant, pursuant to his pleas, of possession and introduction of cocaine 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 200 days, forfeiture of $933.00 pay per month for seven months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged. Pursuant to a pretrial agreement, all confinement in excess of 150 days was suspended for the period of confinement adjudged plus six months.

Although this case was submitted to the court without assignment of error, we note, that the record reflects that appellant was convicted of both possession and introduction with the intent to distribute the same quantity of cocaine, the former being a lesser included offense of the latter. *See United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999)(holding that convictions for possession with intent to distribute and distribution occurring the same day were multiplicious). The military judge, *sua sponte*, expressly held that possession of cocaine was a lesser included offense of introduction with intent to distribute occurring on the same day and merged the two specifications together for sentencing as an appropriate remedy. Record at 61. While we agree with the military judge's conclusion regarding multiplicity, his remedy was inadequate. Where one specification is a lesser included offense of another, the appropriate remedy is dismissal of the lesser included offense. *Savage*, 50 M.J. at 245. Thus, we will provide appropriate relief in our decretal paragraph. Following our corrective action, we conclude that the remaining findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant remains. Arts. 59(a) and 66(c), UCMJ.

The finding of guilty to Specification 1 under the Charge is set aside and the specification is dismissed. The remaining findings are affirmed. The military judge stated on the record that he would consider the two specifications as one offense for sentencing purposes, and we presume that he did so. *United States vs. Rodriquez*, 60 M.J. 87, 90 (C.A.A.F. 2004). Accordingly, the appellant is not entitled to any further sentencing relief. *Savage*, 50 M.J. at 245. The sentence approved by the convening authority is affirmed.

For the Court

R.H. TROIDL
Clerk of Court