

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

**Before
C.L. REISMEIER, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DONTE R. LARRY
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200900615
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 5 June 2009.

Military Judge: LtCol David Jones, USMC.

Convening Authority: Commanding Officer, Headquarters
Battalion, 3d Marine Division (-)(REIN), Okinawa, Japan.

Staff Judge Advocate's Recommendation: LtCol W.H. Ferrell
III, USMC.

For Appellant: Maj Sean B. Patton, USMC.

For Appellee: LCDR Gregory R. Dimler, JAGC, USN; LT
Timothy Delgado, JAGC, USN.

18 May 2010

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A panel of members with enlisted representation sitting as a special court-martial convicted the appellant, contrary to his pleas, of conspiracy to violate a lawful general order, violation of a lawful general order, making a false official statement, wrongful possession of "Spice" with intent to distribute, and solicitation of another to distribute "Spice," in violation of Articles 81, 92, 107, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, 907, and 934. The members sentenced the appellant to six months confinement and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises three assignments of error: (1) that the finding of guilty to Charge IV, Specification 1 is legally insufficient; (2) that the military judge erred when he improperly instructed the members on the elements under Charge IV, Specification 2; and (3) that the Government engaged in an unreasonable multiplication of charges in charging wrongful distribution and wrongful possession based on the same transaction. We disagree with all three assignments of error.

Factual Background

Spice is an herbal incense that can be smoked to produce a high similar to marijuana. Record at 171. CW, a Marine corporal and "confidential/cooperating witness," worked with NCIS in an investigation into the trafficking of illegal substances on Camp Courtney in Okinawa, Japan. *Id.* at 129. CW testified that in a barracks bathroom in December 2007, the appellant showed him approximately 20 to 25 packets of Spice, and gave him one packet to sell for profit. *Id.* at 123-27. CW notified NCIS agents, who gave him a concealed recording device and money to return to the appellant. *Id.* at 127-36, 145. CW went to the appellant's barracks room and gave him fifty dollars for the packet of Spice while secretly recording a conversation with the appellant about Spice trafficking, including the appellant's conspiracy with other unnamed individuals. *Id.* at 130-35, 159-61; Prosecution Exhibit 2.

Legal Sufficiency on Possession with Intent to Distribute

The appellant argues that because "wrongful" was included in the language of the charge and in the military judge's instructions, and possession of Spice was not illegal or prohibited, the finding of guilty was legally insufficient. Appellant's Brief of 18 Feb 2010 at 8. The actual charge and instruction, however, were not simply possession of Spice, but wrongful¹ possession of Spice with the intent to distribute, conduct which was prejudicial to good order and discipline. Record at 249-50; Charge Sheet. The issue is not whether the mere possession of Spice was prohibited or illegal in a general sense, but rather whether possession with intent to distribute the substance is a violation of Article 134.

Although Spice is not listed as a controlled substance under Article 112a, UCMJ, possession of Spice with intent to distribute can be charged under Article 134. "There is nothing on the face of the statute creating Article 112a or in its legislative history suggesting that Congress intended to preclude the armed forces from relying on Article 134 to punish wrongful use by military personnel of substances, not covered by Article 112a, capable of producing a mind-altered state." *United States v.*

¹ The military judge defined "wrongful" as "without legal justification or authorization." Record at 250.

Erickson, 61 M.J. 230, 233 (C.A.A.F. 2005). The military judge instructed the members that not every possession of a substance with the intent to distribute constitutes an offense under the UCMJ, and that the Government must prove beyond a reasonable doubt that the conduct was prejudicial to good order and discipline in the armed forces. Record at 251. While in a barracks on a military installation with another Marine, the appellant displayed a handful of packets of the herbal incense Spice, distributed one packet, and discussed future Spice trafficking. *Id.* at 122-27; PE 2. NCIS Special Agent Cote has been involved in over 50 investigations dealing with Spice in Okinawa, and testified how he was investigating the use and distribution of Spice at Camp Courtney because it posed "a huge problem for the military" and "was being widely abused by military members." *Id.* at 171-72.

Considering the evidence in a light most favorable to the Government, a reasonable factfinder could have found beyond a reasonable doubt that the appellant's wrongful possession of Spice with intent to distribute was prejudicial to good order and discipline in the armed forces. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). The finding of guilty to Charge IV, Specification 1 was therefore legally sufficient.

Instruction to Members on Article 134 Solicitation

The appellant argues that the military judge's instructions "omitted one-third of the elements the [G]overnment was required to prove beyond a reasonable doubt." Appellant's Brief at 11. The appellant concedes that the military judge instructed the members on intent, but asserts that intent was not identified as an element and was not "connected" to the other two elements. *Id.* at 5, 9-11. The military judge first instructed the members on the "solicitation" and "prejudicial to good order and discipline" elements, and then defined two terms. Record at 252-53. Immediately thereafter, the military judge stated that the solicitation must be a serious request, and that it must be proven beyond a reasonable doubt that the accused intended CW to commit every element of the offense of distributing Spice. *Id.* at 253. The military judge reiterated three more times that the accused must have intended the offense be committed, and also instructed that the members must be convinced beyond a reasonable doubt that the accused's statement constituted a serious request or suggestion that the offense be committed. *Id.* at 254-55.

Whether the members were properly instructed is a question of law which we review de novo. *United States v. Hibbard*, 58 M.J. 71, 75 (C.A.A.F. 2003). The military judge is required to instruct the members on findings and shall include a description of the elements of each offense charged. Art. 51(c), UCMJ; RULE FOR COURTS-MARTIAL 920(e)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Where the military judge provides instructions on the pertinent elements, and the issue is whether the military judge erred by not providing greater specificity or

amplification, any such deficiency is waived by defense counsel's failure to object, R.C.M. 920 (f), unless the instructions were "so incomplete as to constitute plain error," *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003). Regarding omitted instructions on the elements of an offense, and also to instructions that are defective because they incorrectly describe elements or presume elements, harmless error analysis can be applied. *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008).

Although the instructions would have been clearer if all three elements had been enumerated and read consecutively without any intervening definitions, the intent instruction was not an "afterthought," and the intent element was not "omitted." Appellant's Brief at 5, 9-11. Given the way in which the military judge presented the instruction as to the solicitation offense to the members, there is no way members would have perceived that the military judge was distinguishing between two "elements" and something else that had to be proven by the Government. In fact, the military judge did not refer to any of the three elements as "elements" for this specification, but properly instructed the members that in order to find the accused guilty of the offense, they must be convinced beyond a reasonable doubt that the accused wrongfully solicited CW to distribute Spice, that the conduct was to the prejudice of good order and discipline, and that the accused intended CW to commit every element of the offense of distributing Spice. Record at 252-55. The military judge instructed the members on all of the pertinent elements, the defense did not object, and the instructions were not "so incomplete as to constitute plain error." *Simpson*, 58 M.J. at 378. The appellant has, therefore, not met his burden with respect to this assignment of error.

Unreasonable Multiplication of Charges

The appellant next argues that the Government engaged in an unreasonable multiplication of charges (UMC) in charging the wrongful sale (Article 92) and possession (Article 134) of Spice based on one transaction. Appellant's Brief at 12. What is substantially one transaction should not be made the basis for UMC against one person. R.C.M. 307(c)(4). Unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). We use a five-part test for determining whether the Government has unreasonably multiplied charges. *Id.* at 95 (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001)). Charge II and Charge IV, Specification 1 do not represent UMC, as all five *Quiroz* factors weigh in favor of the Government:

(1) The accused did not object at trial.

(2) Each charge and specification is aimed at distinctly separate criminal acts. "[A]n accused may be separately convicted and punished for distributing a portion of a quantity of drugs and for possessing that portion he retains." *United States v.*

Young, 64 M.J. 404, 408 (C.A.A.F. 2007). The accused distributed one of the packets of Spice to CW, but retained and continued to possess 20-25 other packets with the intent to distribute. Record at 124.

(3) The number of charges and specifications do not misrepresent or exaggerate the appellant's criminality, but reflect the entirety of the appellant's criminal conduct and target separate criminal acts. Charging as separate crimes "was a fair and reasonable exercise of prosecutorial discretion." *Pauling*, 60 M.J. at 95.

(4) The number of charges and specifications did not unreasonably increase the appellant's punitive exposure. The military judge found the two specifications multiplicitous for sentencing purposes and instructed the members to consider them as one offense in determining a sentence. Record at 344; *Pauling*, 60 M.J. at 96. The forum was also at a special court-martial, further limiting the appellant's punitive exposure.

(5) There was no evidence in the record of prosecutorial overreaching or abuse in the drafting of the charges.

Conclusion

We have carefully examined the briefs of the parties and the record of trial. 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. Arts. 59(a) and 66(c), UCMJ. We affirm the findings and sentence as adjudged and approved.

For the Court

R.H. TROIDL
Clerk of Court