

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

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**LATOYA A. PIPPINS
GUNNER'S MATE THIRD CLASS (E-4), U.S. NAVY**

**NMCCA 201000367
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 10 March 2010.

Military Judge: CDR Sherry King, JAGC, USN.

Convening Authority: Commanding Officer, USS JOHN C STENNIS
(CVN 74).

Staff Judge Advocate's Recommendation: LCDR M.B. Kurek,
JAGC, USN.

For Appellant: CAPT Patricia A. Leonard, JAGC, USN.

For Appellee: Mr. Brian K. Keller, Esq.

19 October 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:

The appellant was convicted, pursuant to her pleas, of eight specifications of violating Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a, by variously using, possessing, introducing with intent to distribute, and distributing N-benzylpiperazine ("BZP") between July and October of 2009. The military judge, sitting as a special court-martial, sentenced her to confinement for six months, reduction to pay grade E-1, forfeiture of \$1400.00 pay per month for six months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

This case was submitted without assignment of error. Having completed our statutory review, this court finds two errors that require correction, which we address below. 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.

Multiplication of Charges

Specifications 1, 2, 5, 6, and 7 allege possession, use, and distribution of BZP between July and October 2009. Specifications 8 and 9 allege introduction with intent to distribute and distribution of BZP on 3 September 2009. No evidence in the record indicates that the drugs used and distributed in Specifications 2, 5, 6, and 7 were greater than those possessed in Specification 1.

At trial, defense counsel submitted an oral motion to the court to consider as multiplicitious for sentencing the possession with the distribution and use specifications (Specifications 1, 2, 5, 6, and 7) as well as the introduction with intent to distribute and the distribution on 3 September 2009 (Specifications 8 and 9). The Government had no objection. The military judge agreed, stating she would sentence appellant for only six specifications, but would consider all of appellant's actions during the offenses. Record at 85.

The issue of multiplicity is a matter for findings. *United States v. Gatlin*, 60 M.J. 804, 807 (C.A.A.F. 2004). A review of multiplicity in this case centers on whether the appellant's possession of BZP is in the same act or course of conduct with her use and distribution of BZP. See *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007); *United States v. Teters*, 37 M.J. 370, 373 (C.M.A. 1993). Possession is a lesser included offense of both use and, under the facts of this case, distribution. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 37d. See also *United States v. Zubko*, 18 M.J. 378, 385-86 (C.A.A.F. 1984).

During the providence inquiry and in the stipulation of fact, the appellant admitted the drugs she used and distributed were the same drugs she possessed. The possessions were for the sole purpose of the subsequent distributions and uses of the drug. Record at 30-32; Prosecution Exhibit 1.

Where one specification is a lesser included offense of another, the appropriate remedy is dismissal of the lesser included offense. *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999). We conclude that the possession specification may not be affirmed and provide appropriate relief in our decretal paragraph.

Excessive Forfeitures

The maximum forfeitures that may be adjudged by special courts-martial may not exceed two-thirds pay per month for one year. Art. 19, UCMJ. If the sentence includes a reduction in grade, the maximum forfeiture is based on the grade to which reduced. RULE FOR COURTS-MARTIAL 1003(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Accordingly, the appellant's forfeitures should have been computed based on the pay grade of E-1 to which she was reduced. The maximum amount of forfeitures that could have been adjudged and approved was \$964.00 pay per month for 12 months. We will correct this error in our decretal paragraph.

Sentence Reassessment

Having found Specification 1 multiplicitous for findings, we must reassess the sentence. Applying the analysis set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986) and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), and after carefully considering the entire record, to include the judges ruling on the multiplicitous for sentencing motion, we are satisfied beyond a reasonable doubt that, even if error had not occurred, the military judge would not have adjudged a sentence less than that approved by the convening authority in this case. The appellant is not entitled to any further sentencing relief.

Conclusion

Accordingly, the finding of guilty as to Specification 1 is set aside, and Specification 1 of the Charge is dismissed. The remaining findings are affirmed. We affirm the sentence as approved below except for that portion of the adjudged forfeitures in excess of \$964.00 pay per month for six months.

For the Court

R.H. TROIDL
Clerk of Court