

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
TOZZI, CAMPANELLA, and CELTNIIEKS
Appellate Military Judges

UNITED STATES, Appellee
v.
Private E1 CATHERINE J. QUARLES
United States Army, Appellant

ARMY 20140688

Headquarters, III Corps and Fort Hood
Patricia Lewis and Rebecca K. Connally, Military Judges
Colonel Tania M. Martin, Staff Judge Advocate

For Appellant: Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA.

For Appellee: Major Daniel D. Derner, JA.

24 August 2015

SUMMARY DISPOSITION

CAMPANELLA, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to her pleas, of one specification of conspiracy to manufacture spice in violation of a lawful general order, one specification of conspiracy to distribute spice in violation of a lawful general order, one specification of conspiracy to distribute mushrooms containing psilocybin (a controlled substance), five specifications of violating a lawful general order, and one specification of solicitation in violation of Articles 81, 92 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 892, and 934 (2006) [hereinafter UCMJ]. Contrary to her pleas, the military judge convicted appellant of three additional specifications of violating a lawful general order by distributing spice in violation of Article 92, UCMJ. The military judge sentenced appellant to a bad-conduct discharge and eighteen months confinement. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence as provided for sixteen months confinement and a bad-conduct discharge.

This case is before us for review pursuant to Article 66, UCMJ. Appellant's counsel submitted a merits pleading to this court and appellant personally raises one issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). We find the issue raised by appellant personally to be without merit. We also find one additional matter that requires discussion and relief.

BACKGROUND

On or about 1 September 2012, appellant and her husband entered into an agreement to manufacture and distribute "spice," a synthetic cannabinoid. They subsequently made and sold spice around Fort Hood. Appellant stated the couple needed the money to pay bills.

Appellant and her husband also agreed to distribute "mushrooms" containing psilocybin, a Schedule I controlled substance. Appellant's husband grew the mushrooms at their shared home on post. While the government produced no evidence that an actual exchange was ever consummated, appellant admitted she and her husband did attempt to sell the mushrooms to soldiers.

Regarding conspiracy to manufacture spice, appellant stated during the providence inquiry:

Sometime around 1 September 2012, at our home on Fort Hood, Texas, I entered into an agreement with my husband, [JQ], to assist him with manufacturing spice.

Appellant then described her involvement in concocting the spice. When the military judge turned to the conspiracy to distribute spice, appellant stated:

Sometime around 1 September 2012, at our home on Fort Hood, Texas, I agreed to help him distribute spice. He told me we could make a lot of money selling it cheaper than the smoke shack that was off of Rancier and we needed the money to pay our bills, so I agreed.

The military judge then turned to the conspiracy to distribute mushrooms and asked appellant to explain in her own words why she believed she was guilty. Appellant responded:

Sometime around 1 September 2012, at our home on Fort Hood, Texas, I entered into an agreement with my husband to assist him with attempting to distribute the mushrooms. *I believe it was the same discussion and for the same reason as spice.*

(emphasis added).*

LAW AND DISCUSSION

A conspiracy exists when one “enters into an agreement with” another and “performs an overt act for the purpose of bringing about the object of the conspiracy.” *Manual for Courts-Martial, United States* (2008 ed.), Part IV, ¶ 5.b. As we noted in *United States v. Finlayson*, 58 M.J. 824, 826-27 (Army Ct. Crim. App. 2003):

“[C]onspiracy is a partnership in crime.” *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). The essence of a conspiracy is in the “agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it.” *United States v. Bayer*, 331 U.S. 532, 542 (1947); *see Braverman v. United States*, 317 U.S. 49, 53 (1942). As such, it is ordinarily the agreement that forms the unit of prosecution for conspiracy, “even if it contemplates the commission of several offenses.” Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 683 (3rd ed. 1982) (citing *Braverman*, 317 U.S. at 53); *see United States v. Pereira*, 53 M.J. 183, 184 (C.A.A.F. 2000) (finding single conspiracy to commit murder, robbery, and kidnapping); *cf. United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 & n.3 (1952) (introducing concept of “unit of prosecution”).

....

Whether a single conspiracy or multiple conspiracies existed in a given circumstance is a question of fact determined by reference to the totality of the circumstances. *See United States v. Fields*, 72 F.3d 1200, 1210 (5th Cir. 1996); 16 AM. JUR. 2D *Conspiracy* § 11

* During the providence inquiry, appellant stated that the agreement took place “[s]ometime around 1 September 2012.” Subsequently, appellant stated that she received a text from someone interested in purchasing mushrooms on 5 October 2012. The military judge later asserted, consistent with the Stipulation of Fact, that the agreement took place in October 2012. Appellant agreed and stated, “The 5th of October.” Left with this inconsistency, we will err on the side of appellant’s initial testimony that the agreement to distribute mushrooms occurred at the same time as the agreement to manufacture and distribute spice – 1 September 2012.

(2002). As the United States Supreme Court noted long ago, “the character and effect of a conspiracy [are] not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.” *United States v. Patten*, 226 U.S. 525, 544 (1913).

The factors used to determine the number of conspiracies include: “(1) the objectives and (2) nature of the scheme in each alleged conspiracy; (3) the nature of the charge and (4) the overt acts alleged in each; (5) the time and (6) location of each of the alleged conspiracies; (7) the conspiratorial participants in each; and (8) the degree of interdependence between the alleged conspiracies.” *Id.* at 827.

After weighing these factors, we conclude, under the totality of the circumstances, appellant and her husband, a co-conspirator, engaged in a single conspiracy with diverse means to effectuate the objects of the conspiracy – namely, to manufacture and sell drugs. While each specified conspiracy consists of different overt acts, the objective of the conspiracy is the same – to manufacture and distribute illegal substances to make money. The three underlying drug related agreements arose from the same conversation, between the same two parties, at the same place and time, for the same purpose and their acts were interdependent. Given the specific facts of this case, we conclude appellant and her co-conspirator had a single criminal agreement to commit multiple crimes.

We are able to reassess the sentence on the basis of the error noted, and do so after conducting a thorough analysis of the totality of circumstances presented by appellant’s case and in accordance with the principles articulated by our superior court in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013). In evaluating the *Winckelmann* factors, we find no dramatic change in the penalty landscape or exposure which might cause us pause in reassessing appellant’s sentence. The maximum confinement exposure is lessened from thirty-one years to twenty-seven years. Second, appellant was sentenced by a military judge. We are confident the military judge would have adjudged the same sentence absent the error noted. Third, the gravamen of appellant’s misconduct remains unchanged. Finally, based on our experience, we are familiar with the level of sentences imposed for the remaining offenses so that we may reliably determine what sentence would have been imposed at trial.

CONCLUSION

After consideration of the entire record of trial and the matters personally raised by appellant pursuant to *Grostefon*, Specifications 1, 2, and 4 of Charge I are consolidated into a single specification, denominated The Specification of Charge I, to read as follows:

In that [appellant], U.S. Army, did at or near Fort Hood, Texas, between on or about 1 September 2012 and 10 April 2013, conspire with [JQ], to commit offenses under the UCMJ, to wit: 1) distribution and manufacture of spice, in violation of paragraph 4 of III Corps Command Policy SJA-03, Prohibited Substances, dated 12 January 2012; and 2) distribution of mushrooms containing psilocybin, a schedule I substance, in violation of Articles 92 and 112a, UCMJ, and in order to effect the object of the conspiracy [appellant] and [JQ] did purchase the necessary components of spice and combined those products to create spice, solicited others to buy spice and distributed spice to others, and attempted to sell mushrooms to others.

The finding of guilty of The Specification of Charge I, as so amended, is AFFIRMED. The findings of guilty of Specifications 2 and 4 of Charge I are set aside, and Specifications 2 and 4 are dismissed. The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *Winckelmann*, we AFFIRM the approved sentence. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of his findings set aside and dismissed by this decision, are ordered restored. *See* UCMJ arts. 58b(c), and 75(a).

Senior Judge TOZZI and Judge CELTNIIEKS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", written in a cursive style.

MALCOLM H. SQUIRES, JR.
Clerk of Court