

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
LIND, KRAUSS, and PENLAND
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist KEITH D. WILLIAMS, JR.
United States Army, Appellant

ARMY 20130438

Headquarters, Combined Joint Task Force-101
Michael J. Nelson, Military Judge
Colonel Jeff A. Bovarnick, Staff Judge Advocate

For Appellant: Colonel Kevin Boyle, JA; Major Amy E. Nieman, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Major A.G. Courie III, JA; Captain Benjamin W. Hogan, JA; Captain Carling M. Dunham, JA (on brief).

23 March 2015

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

PENLAND, Judge:

A military judge sitting as a general court-martial convicted appellant, pursuant to his pleas, of one specification of conspiracy to wrongfully distribute a controlled substance; one specification of violating a lawful general order; one specification of wrongful possession of a controlled substance with the intent to distribute while receiving special pay under 37 U.S.C. § 310 (2012); and one specification of wrongful distribution of a controlled substance while receiving special pay under 37 U.S.C. § 310 in violation of Articles 81, 92, and 112a, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. §§ 881, 892, 912a (2012). The military judge sentenced appellant to a bad-conduct discharge, nine months confinement, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

We review appellant's case pursuant to Article 66, UCMJ. Appellant raises one assignment of error which merits discussion but no relief. Upon our review of

the record, we also find a substantial basis in law and fact to question appellant's pleas of guilty to any criminal conduct at or near Combat Outpost Terezayi. We will provide relief in our decretal paragraph.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant deployed with his unit to Forward Operating Base (FOB) Salerno in September 2012. His co-conspirator, Private First Class (PFC) Anderson, served at Combat Outpost (COP) Terezayi. In December 2012, communicating through social media, appellant agreed to help PFC Anderson distribute hashish; appellant's role involved selling hashish on FOB Salerno and splitting the proceeds with PFC Anderson. Pursuant to this agreement, PFC Anderson brought what appellant described as a ping pong ball-sized amount of hashish to him at FOB Salerno in the beginning of February 2013. Private First Class Anderson delivered the hashish in an assault pack. Appellant kept the hashish in the pack in his room at the foot of his bed. Around the middle of the same month, another soldier, Specialist (SPC) M, asked appellant if he could have some hashish. Appellant responded "yes" and directed SPC M to the assault pack. SPC M took some of the hashish from the pack and left. At the end of February 2013, COP Terezayi closed and PFC Anderson returned to FOB Salerno. Appellant returned the remaining hashish to him and withdrew from the conspiracy to distribute it.

Also in February 2013, PFC Anderson brought a mixture of fruit juice and alcohol to appellant, telling him to sell it at FOB Salerno. Later, while drinking the alcoholic beverage at FOB Salerno, appellant shared it with SPC M.

Appellant was charged with the following offenses:

CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 81.

[THE] SPECIFICATION: In that [appellant], did, at or near Forward Operating Base Salerno, Afghanistan, between on or about 20 December 2012 and on or about 12 March 2013, conspire with Private First Class Jesse M. Anderson to commit an offense under the Uniform Code of Military Justice, to wit: wrongful distribution of some amount of hashish, a substance containing tetrahydrocannabinols, a Schedule I controlled substance, and in order to affect the object of the conspiracy the said [appellant] and Private First Class Jesse M. Anderson did wrongfully distribute some amount of hashish.

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 92.

[THE] SPECIFICATION. In that [appellant], did, at or near Combat Outpost Terezayi and at or near Forward Operating Base Salerno, Afghanistan, between on or about 20 December 2012 and on or about 12 March 2013, violate a lawful general order, to wit: paragraph 2c, Central Command General Order Number 1B, dated 13 March 2006, by wrongfully possessing, selling and transferring alcohol.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 112A.

SPECIFICATION 1: In that [appellant], did, at or near Combat Outpost Terezayi and at or near Forward Operating Base Salerno, on divers occasions, between on or about 20 December 2012 and on or about 12 March 2013, wrongfully possess some amount of hashish, a substance containing tetrahydrocannabinols, a Schedule I controlled substance, with intent to distribute the said controlled substance, while receiving special pay under 37 USC Section 310.

SPECIFICATION 2: In that [appellant], did, at or near Combat Outpost Terezayi and at or near Forward Operating Base Salerno, Afghanistan, on divers occasions, between on or about 20 December 2012 and on or about 12 March 2013, wrongfully distribute some amount of hashish, a substance containing tetrahydrocannabinols, a Schedule I controlled substance, while receiving special pay under 37 USC Section 310.

Toward the end of the providence inquiry regarding appellant's guilty pleas, the military judge asked whether either party desired additional inquiry. The government responded:

We would request some additional inquiry as to whether any offenses happened at COP Terezayi on a theory of vicarious liability. If you look in the Stipulation of Fact . . . you can see the accused agreed to some distribution with his co-conspirator. And we'd ask for that on both, the Charge II -- the Specification of Charge II as well as Charge III, as it relates to COP Terezayi, Your Honor.

The military judge asked the government whether it believed vicarious criminal liability was relevant to Charges II and III, and the government responded that it applied to both. With respect to Charge II, the government stated:

The government has some concern about the sufficiency of the evidence as to Possession of Alcohol at COP Terezayi as it is in the Specification, and I believe that . . . may be satisfied by some inquiry as to whether there was conspiracy to do such as thing or whether possession occurred at COP Terezayi, a further incident of conspiracy such that the accused himself would be liable as a principal for that possession.

After the military judge noted that appellant was not charged with an alcohol-related conspiracy, the government responded that appellant could be found guilty of criminal offenses committed by a co-conspirator in furtherance of their criminal enterprise.

Without explaining the legal principles related to vicarious, co-conspirator criminal liability to appellant, the military judge asked appellant about PFC Anderson's distribution of hashish to another soldier. Appellant told the military judge that PFC Anderson had distributed hashish to SPC S at COP Terezayi in January or February of 2013. The judge asked appellant how he knew this information, and appellant stated that PFC Anderson had told him. The military judge did not specifically ask for and appellant did not offer additional information regarding PFC Anderson's alcohol-related misconduct at COP Terezayi.

Consistent with appellant's pleas, the military judge found appellant guilty of all offenses except the words "selling" in The Specification of Charge II and "on divers occasions" in Specifications 1 and 2 of Charge III.

LAW AND ANALYSIS

Multiplicity and Unreasonable Multiplication of Charges

Appellant argues that Specification 1 of Charge III (possession of hashish with the intent to distribute) constitutes an unreasonable multiplication of charges with Specification 2 of Charge III (distribution of hashish) and requests we set aside Specification 1 of Charge III. We also note that in certain cases, possession of a controlled substance with the intent to distribute may be a lesser-included offense of distribution of the controlled substance, which would render one of the convictions multiplicitous. *See United States v. Savage*, 50 M.J. 244 (C.A.A.F. 1999). Whether the specifications and resulting convictions are examined for an unreasonable

multiplication of charges or multiplicity, we hold relief is not warranted under the facts of this case.

The record reflects no litigation at trial regarding whether Specifications 1 and 2 of Charge III constituted an unreasonable multiplication of charges for findings or sentence or whether conviction of both offenses was multiplicitous. “[A]ppellate consideration of multiplicity claims is effectively waived by unconditional guilty pleas, except where the record shows that the challenged offenses are ‘facially duplicative.’” *United States v. Lloyd*, 46 M.J. 19, 23 (C.A.A.F. 1997) (citing *United States v. Broce*, 488 U.S. 563, 575 (1989)); *see also United States v. Campbell*, 68 M.J. 217, 219-20 (C.A.A.F. 2009). We interpret this to mean that an unconditional guilty plea, without an affirmative waiver, results in a forfeiture of multiplicity issues absent plain error. *See United States v. St. John*, 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013); *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (noting military courts consistently fail to distinguish between the terms “waiver” and “forfeiture”). An appellant may show plain error and overcome forfeiture by proving the specifications are facially duplicative. *St. John*, 72 M.J. at 687 n.1. Facially duplicative means the factual components of the charged offenses are the same. *Lloyd*, 46 M.J. at 23 (citing *Broce*, 488 U.S. at 575). If an offense is a lesser-included offense of another, the offenses are facially duplicative. *See St. John*, 72 M.J. at 688-89; *see also United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

In assessing whether one offense is a lesser-included of another, this court applies the elements test, wherein one compares the elements of each offense. *See St. John*, 72 M.J. at 687 (citing *United States v. Jones*, 68 M.J. 465, 468, 470 (C.A.A.F. 2010)). This test does not require “that the ‘offenses at issue employ identical statutory language.’” *Id.* at 687-88 (quoting *United States v. Alston*, 69 M.J. 214, 216 (C.A.A.F. 2010)). Rather, the court will review the language of the specification to determine “if the lesser-included offense would necessarily be proven by proving the elements of the greater offense.” *Id.* at 688 (citing *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012)).

Appellant has not demonstrated that Specifications 1 and 2 of Charge III are facially duplicative. The providence inquiry and stipulation of fact establish that appellant’s conviction for possession of hashish with the intent to distribute is not a lesser-included offense of his conviction for distribution of hashish. The facts of this case mirror those in *United States v. Heryford*, 52 M.J. 265 (C.A.A.F. 2000) and *United States v. Young*, 64 M.J. 404 (C.A.A.F. 2007). In *Heryford*, appellant possessed with the intent to distribute a controlled substance for two days at his off-base residence before bringing it on-base and distributing it. 52 M.J. at 266. Our superior court held that where appellant possessed the controlled substance with the intent to distribute for two days prior to the actual distribution, during which appellant was “at liberty to use it himself, destroy it, or distribute all or any part of

it to anyone[.]” a finding of possession independent of distribution was permitted. *Id.* at 267. Similarly, our superior court has also held “an accused may be separately convicted and punished for distributing a portion of a quantity of drugs and for possessing that portion he retains.” *Young*, 64 M.J. at 408. In *Young*, the evidence established appellant “was convicted of distributing one quantity of [the controlled substance] and thereafter retaining (possessing [with the intent to distribute]) a distinct remaining quantity.” *Id.* Since the portion of the controlled substance appellant was charged with possessing was not the same portion of the controlled substance he was charged with distributing, the offenses did not stand as greater and lesser-included offenses, and both findings of guilt could stand. *Id.*

In appellant’s case, he possessed the hashish in a zone of combat operations with the intent to distribute in early February 2013. Sometime in mid-February 2013, appellant distributed a portion of the illegal drug to a fellow soldier in that combat zone. Appellant retained the remaining quantity of hashish in his room until the end of February 2013, when he returned it to PFC Anderson. Following both *Heryford* and *Young*, Specification 1 of Charge III (possession with the intent to distribute) is not a lesser-included offense of Specification 2 of Charge III (distribution) because appellant possessed the hashish with the intent to distribute for approximately half a month before distributing it, and he retained the remaining hashish for approximately another half-month before returning it to PFC Anderson.

We now turn to appellant’s argument of unreasonable multiplication of charges. After review of the factors under *United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001), we hold that Specifications 1 and 2 of Charge III do not constitute an unreasonable multiplication of charges.

Providence Inquiry Regarding Criminal Conduct
“at or near Combat Outpost Terezayi”

We review a military judge’s decision to accept a guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). A guilty plea will only be set aside if we find a substantial basis in law or fact to question the plea. *Id.* (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The court applies this “substantial basis” test by determining whether the record raises a substantial question about the factual basis of appellant’s guilty plea or the law underpinning the plea. *Id.*; see also UCMJ art. 45(a); Rule for Courts-Martial 910(e).

We recognize that a conspirator may be found criminally liable as a principal for his co-conspirator’s misconduct even if the government does not charge the underlying conspiracy. See UCMJ art. 77; *United States v. Browning*, 54 M.J. 1, 7 (C.A.A.F. 2000) (“Although Article 77 does not specifically deal with the vicarious liability of a coconspirator, we believe that the language of Article 77(1) is broad

enough to encompass it.” (quoting *United States v. Jefferson*, 22 M.J. 315, 324 (C.M.A. 1986)) (internal quotation marks omitted). Appellant provided a factual predicate to support vicarious criminal liability for PFC Anderson’s hashish distribution at COP Terezayi, but more was required. “The providence of a plea is based not only on [appellant’s] understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts.” *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014) (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008)) (internal quotation marks omitted). The dialogue between the military judge and trial counsel evinced their complete understanding of a relatively sophisticated theory of criminal liability, but the military judge did not ensure that appellant understood it. This “discussion between trial counsel and the military judge ‘provides no substitute for the requisite interchange between the military judge and the accused.’ Accordingly, trial counsel’s understanding of [his] own case theory does not render the plea provident.” *Id.* at 388 (quoting *United States v. Hartman*, 69 M.J. 467, 469 (C.A.A.F. 2011)). We conclude that appellant did not understand how the law of vicarious liability related to his admissions regarding PFC Anderson’s hashish-related activities at COP Terezayi, rendering his pleas of guilty to Specifications 1 and 2 of Charge III improvident with respect to that location. *See Medina*, 66 M.J. at 26 (citing *United States v. Care*, 18 U.S.C.M.A. 535, 538-39, 40 C.M.R. 247, 250-51 (1969)).

We further conclude that there is a substantial basis to question appellant’s plea of guilty to Charge II and its Specification with respect to the portion of the specification alleging appellant possessed and transferred alcohol at or near Combat Outpost Terezayi. *See Inabinette*, 66 M.J. at 322. The stipulation of fact and the providence inquiry establish only that appellant possessed and transferred alcohol at or near Forward Operating Base Salerno.

CONCLUSION

We affirm only so much of the findings of guilty of the Specification of Charge II and Specifications 1 and 2 of Charge III as provide:

CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 92.

[THE] SPECIFICATION: In that Specialist Keith D. Williams Jr., U.S. Army, did, at or near Forward Operating Base Salerno, Afghanistan, between on or about 20 December 2012 and on or about 12 March 2013, violate a lawful general order, to wit: paragraph 2c, Central Command General Order Number 1B, dated 13 March 2006, by wrongfully possessing and transferring alcohol.

CHARGE III: VIOLATION OF THE UCMJ, ARTICLE 112A.

SPECIFICATION 1: In that Specialist Keith D. Williams Jr., U.S. Army, did, at or near Forward Operating Base Salerno, Afghanistan, between on or about 20 December 2012 and on or about 12 March 2013, wrongfully possess some amount of hashish, a substance containing tetrahydrocannabinols, a Schedule I controlled substance, with intent to distribute the said controlled substance, while receiving special pay under 37 USC Section 310.

Specification 2: In that Specialist Keith D. Williams Jr., U.S. Army, did, at or near Forward Operating Base Salerno, Afghanistan, between on or about 20 December 2012 and on or about 12 March 2013, wrongfully distribute some amount of hashish, a substance containing tetrahydrocannabinols, a Schedule I controlled substance, while receiving special pay under 37 USC Section 310.

The remaining findings of guilty are AFFIRMED.

Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986) and *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we are confident the military judge would have adjudged the same sentence absent the errors. The approved sentence is AFFIRMED. All rights, privileges, and property, of which appellant has been deprived by virtue of the portion of the findings set aside by this decision, are ordered restored.

Senior Judge LIND and Judge KRAUSS concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Malcolm H. Squires, Jr.", is written over a light blue horizontal line.

MALCOLM H. SQUIRES, JR.
Clerk of Court