UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN D. FREDENBURG
United States Air Force

ACM 35880

21 November 2005

Sentence adjudged 17 December 2003 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Lance B. Sigmon (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Brandon A. Burnett, Major Terry L. McElyea, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

The appellant was tried by general court-martial convened at Moody Air Force Base, Georgia, on 16 and 17 December 2003. In accordance with his pleas, the military judge found him guilty of attempting to manufacture methamphetamine, conspiracy to distribute ecstasy, divers possession of approximately 6,000 grams of ecstasy, divers distribution of approximately 1,900 grams of ecstasy, divers use of ecstasy, distribution of cocaine, possession of methamphetamine, importing cocaine and ecstasy into the United States, and traveling in interstate commerce with intent to distribute ecstasy on divers occasions, in violation of Articles 80, 81, 112a, and 134, UCMJ, 10 U.S.C. §§ 880, 881, 912a, 934. He was sentenced to a dishonorable discharge, confinement for 10 years,

forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

Providency of the Plea

The appellant's conviction of possession of ecstasy on divers occasions was based on his purchase and continuous possession of 20,000 pills. He argues on appeal that his conviction for possession of these pills on divers occasions should not be affirmed because he did not providently plead to possessing ecstasy on more than one occasion. We agree and take corrective action.

The appellant purchased 20,000 ecstasy pills in Germany, hid them in his household goods, and had them shipped back to the United States. When the drugs arrived at his home, the appellant took them to his bank and locked them in a safe deposit box. He periodically returned to the bank and removed any number of pills from the safe deposit box when he needed them for personal use or to sell them to various individuals. The original collection of 20,000 pills dwindled in this manner over the course of time, up until the day he was arrested. No evidence was presented to indicate that he, at any time, added to his stockpile or possessed other ecstasy pills that were not originally among the 20,000 he purchased.

We find, under the specific circumstances of this case, that there was only one continuous and exclusive possession of a large quantity of ecstasy pills. *See United States v. Wheeler*, ACM S30433 (A.F. Ct. Crim. App. 5 May 2005) (unpub. op.); *United States v. Dees*, ACM 34841 (A.F. Ct. Crim. App. 13 Dec 2002) (unpub. op.). Accordingly, as to Specification 1 of Charge III, we affirm the findings, excepting the words "on divers occasions."

Sentence Reassessment

Having taken corrective action on the findings we must assess the impact, if any, on the sentence. We must either return the case for a sentence rehearing or reassess the sentence. In *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986), our superior court held that we may reassess the sentence if we can reliably determine the sentence absent the error.

The appellant requests appropriate relief through reassessment of his sentence. He does not, however, present a theory in regard to how the error in his case might have had a prejudicial impact upon the sentence imposed by the military judge. The inclusion of the words "on divers occasions" did not increase the maximum punishment the appellant faced at trial or change in any way the substantive evidence that formed the basis for the findings of guilt or the sentence. The extensive stipulation of fact and the military judge's inquiry established the operative facts clearly. The military judge, who served as

the sentencing authority, was clearly familiar with these facts prior to deliberating on the sentence. Further, we note that the possession specification in question was one of ten very serious drug related offenses faced by the appellant. Testimony during the sentencing phase revealed that the amount of ecstasy possessed by the appellant classified him as "the largest ecstasy case in OSI [Office of Special Investigations] history." Given the circumstances of this case, we are confident that we can determine the appropriate sentence without ordering a rehearing. Reassessing the sentence on the basis of the error noted, the entire record, and applying the principles set forth in *Sales*, this Court is convinced beyond a reasonable doubt that the military judge would have imposed a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. *See United States v. Doss*, 57 M.J. 182 (C.A.A.F. 2002).

Conclusion

The approved findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court