UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TORRANCE T. PATTERSON
United States Air Force

ACM 34660

24 March 2003

Sentence adjudged 3 July 2001 by GCM convened at Little Rock AFB, Arkansas Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 40 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattillo, Lieutenant Colonel Lance B. Sigmon, and Major Adam Oler.

Before

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A military judge, sitting alone as a general court-martial, found the appellant guilty, according to his pleas, of unauthorized absence from his place of duty for four days, in violation of Article 86, UCMJ, 10 U.S.C. § 886, wrongful use of methamphetamine, wrongful manufacture of 4.169 grams of methamphetamine with intent to distribute, and wrongful possession of 4.169 grams of methamphetamine with intent to distribute, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, willful disobedience of the order of a superior commissioned officer, in violation of Article 90, UCMJ, 10 U.S.C. § 890, battery upon Mrs. Barbara Rowland, in violation of Article 128, UCMJ, 10 U.S.C. § 928, and breaking restriction on divers occasions, in violation of Article 134, 10 U.S.C. § 934. The military judge sentenced the appellant to a

dishonorable discharge, confinement for 4 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence, but reduced the confinement to 40 months pursuant to the terms of a pretrial agreement.

The appellant contends that the conviction for possessing methamphetamine with intent to distribute cannot stand because it was a lesser included offense of manufacturing methamphetamine with intent to distribute. He also argues that he is entitled to additional credit for pretrial confinement because the government did not remove him from his voluntary commitment at a mental health treatment facility and transport him to his pretrial confinement review. Finally, the appellant, citing *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), argues that his sentence was inappropriately severe. We find some merit to these arguments, take corrective action, and affirm.

Multiplicity

The appellant lived in an apartment near Little Rock Air Force Base (AFB), Arkansas. On 19 March 2001, the apartment manager entered the apartment to inspect and found the appellant glassy-eyed and incoherent. The apartment complex's courtesy officer discovered the appellant and his friend, Steve Rowland, in a bedroom, with a narcotics pipe in the ashtray. The subsequent investigation by civilian police revealed a methamphetamine laboratory in the appellant's bathroom and 4.169 grams of methamphetamine in the apartment. The Air Force Office of Special Investigations (AFOSI) interviewed the appellant, who confessed to allowing Steve Rowland to set up a laboratory in his bathroom to manufacture methamphetamine for distribution. The appellant consented to a urinalysis, which was positive for methamphetamine.

The United States charged the appellant, inter alia, with wrongfully manufacturing 4.169 grams of methamphetamine on or about 19 March 2001 with the intent to distribute, and also with wrongfully possessing the same 4.169 grams of methamphetamine on the same date with intent to distribute. The prosecution proceeded on the theory that the appellant was guilty as a principal under Article 77, UCMJ, 10 U.S.C. § 877, because he aided and abetted Steve Rowland's manufacture and possession of the methamphetamine.

The appellant pled guilty to both the manufacture and possession of the methamphetamine with intent to distribute. The providence inquiry established that the appellant aided and abetted Steve Rowland in both manufacturing and possessing the drug, and that both specifications related to the same quantity of drug. Trial defense counsel raised no objection to the charges.

After completing the providence inquiry, the military judge sua sponte raised the issue whether the specifications alleging the manufacture and possession of methamphetamine with intent to distribute were multiplicious. The military judge

observed, "If you look at the manual, a lesser included offense of manufacture is possession. I mean common sense tells you that when you manufacture something, a product of that is going to result in possession." Trial counsel argued that each offense contained a different element therefore they were separately chargeable. Trial defense counsel made no argument. The military judge did not dismiss the specification alleging possession with intent to distribute, but treated it as multiplicious for sentencing purposes.

The appellant now asserts the military judge erred by not dismissing the specification of possession of methamphetamine with intent to distribute, citing the *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶37d(4)(a) (2002 ed.). The government argues that the appellant committed separate acts to aid and abet the manufacture and possession of the drug, therefore he is liable for two separate crimes.

"Multiplicity" is a concept derived from the Double Jeopardy Clause of the Constitution, prohibiting individuals from being twice punished for a single offense. *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *United States v. Erby*, 46 M.J. 649 (A.F. Ct. Crim. App. 1997). Of course, the legislature is free to define crimes so that a single act may constitute several offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). The question for the court in such cases is whether Congress intended the offenses to be separate for punishment purposes. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). "[B]ut once the legislature has acted courts may not impose more than one punishment for the same offense." *Brown*, 432 U.S. at 165. Conviction for both a greater offense and a lesser included offense violates the Double Jeopardy Clause. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In order to determine the intent of Congress, courts have employed a wide variety of tests, including the "elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), the "means" test of *United States v. Johnson*, 26 M.J. 415, 419 (C.M.A. 1988), and the "fairly embraced" test of *United States v. Baker*, 14 M.J. 361, 367-68 (C.M.A. 1983), *overruled by Teters*, 37 M.J. at 376. However, when considering whether possession of a drug is a separate offense from the use, distribution, or manufacture of that same drug, the courts seem to apply a simple common-sense test. As succinctly stated by the military judge in this case, "common sense tells you that when you manufacture something, a product of that is going to result in possession." *See generally United States v. Savage*, 50 M.J. 244, 245 (1999); *United States v. Brown*, 19 M.J. 63, 64 (C.M.A. 1984); *United States v. Zubko*, 18 M.J. 378, 385-86 (C.M.A. 1984).

Rule for Courts-Martial (R.C.M.) 907(b)(3) provides, "A specification may be dismissed upon timely motion by the accused if: . . . (B) The specification is multiplicious with another specification . . . ." The non-binding Discussion to the rule explains "A specification is multiplicious with another if it alleges the same offense, or an offense necessarily included in the other."

R.C.M. 905(e) provides that failure to raise motions or objections before trial is adjourned constitutes waiver. Our case law holds that multiplicity claims are waived by failure to make a timely motion to dismiss, unless they rise to the level of plain error. *United States v. Britton*, 47 M.J. 195, 198 (1997). An appellant may demonstrate plain error in multiplicity issues by showing that the specifications are "facially duplicative." *United States v. Heryford*, 52 M.J. 265, 266 (2000); *United States v. Lloyd*, 46 M.J. 19, 23 (1997). To determine whether the specifications at issue are facially duplicative, we review the language of the specifications and the facts presented in the record of trial. *United States v. Harwood*, 46 M.J. 26, 28-29 (1997).

Reviewing the specifications and the facts presented on the record, it is clear that the specification alleging the wrongful manufacture of methamphetamine and the specification alleging the wrongful possession of methamphetamine involved the same 4.169 grams of methamphetamine at the same time and place. The appellant made it clear that the possession was incident to the manufacture. Significantly, the appellant was considered as an aider and abettor to both specifications.

The government argues that because the appellant acted as an aider and abettor–rather than as a perpetrator–a separate act formed the basis of each specification. While this argument has some appeal, it has been rejected by the Supreme Court of the United States and our superior court. *See Milanovich v. United States*, 365 U.S. 551 (1961); *United States v. Cartwright*, 13 M.J. 174, 175-76 (C.M.A. 1982).

We find that the specifications at issue were facially duplicative, that is, factually the same. *Britton*, 47 M.J. at 198. The possession offense was a lesser included offense of manufacturing methamphetamine. Finding the appellant guilty of both the greater offense and the lesser included offense was plain error. *Ball v. United States*, 470 U.S. 856, 864-65 (1985). Therefore, the finding of guilty of Specification 3 of Charge II, alleging possession of 4.169 grams of methamphetamine with intent to distribute, is set aside.

Having set aside the specification, we must determine whether the error had any impact on the sentence. In this case, the military judge determined that the specification was multiplicious for sentencing purposes. Therefore we conclude that the error had no effect on the sentence.

Credit for Pretrial Confinement

The appellant also contends that the military judge erred in not granting him additional credit for illegal pretrial confinement. Specifically, the appellant requests an additional 34 days of credit for pretrial confinement because the appellant was not personally present at the pretrial confinement review. We find no error.

On 19 March 2001, the same day the methamphetamine laboratory was discovered in the appellant's off-base apartment, civilian authorities took him into pretrial confinement. Ultimately, civilian authorities decided to turn the case over to the Air Force and released the appellant on Saturday, 24 March 2001. The appellant did not show up for duty on Monday, 26 March 2001, apparently in fear that he would be placed in military confinement. Air Force investigators traced him to the home of a friend, and apprehended him there on 30 March 2001.

The appellant's commander ordered him into pretrial confinement. The government conducted a review of the appellant's pretrial confinement on 2 April 2001. The pretrial confinement review officer (PCRO), Lieutenant Colonel (Lt Col) Charles Campbell, found probable cause for continued pretrial confinement and that the appellant should be confined.

On 10 May 2001, the appellant's commander preferred charges against the appellant for the methamphetamine offenses and his absence without leave from 24 to 30 March 2001. The next day, the commander ordered the appellant released from pretrial confinement. Instead, the commander restricted the appellant to the limits of Little Rock AFB, and ordered him to have no contact with Steve Rowland, the alleged owner and operator of the methamphetamine laboratory.

On several occasions the appellant left Little Rock AFB to visit Steve Rowland, in direct violation of his commander's orders. On 27 May 2001, the appellant again left the base to visit Steve Rowland at his mother's house, in an attempt to get Mr. Rowland to go away with him. Mr. Rowland's mother, Mrs. Barbara Rowland, would not allow the appellant to enter the home. The appellant forcibly shoved the door in, striking and bruising Mrs. Rowland and knocking her to the floor. Mrs. Rowland called the local police and the appellant fled.

Security forces apprehended the appellant on Little Rock AFB the next night, 28 May 2001. His commander again ordered him into pretrial confinement. On 29 May 2001, the appellant punched out the security window in his cell, injuring his hand. The guards took him to the clinic on base for medical attention. At the clinic he spoke to a mental health care provider, who recommended a psychiatric evaluation. The Air Force clinic was unable to provide the medical or psychiatric care the appellant needed. Military authorities then took the appellant to a civilian medical facility for treatment of his hand. Thereafter, they took the appellant to Pinnacle Point, a civilian psychiatric hospital. The appellant voluntarily admitted himself to the psychiatric hospital.

The government scheduled the pretrial confinement review for the next day, 30 May 2001, and informed the detailed defense counsel. The defense counsel spoke to the appellant at the psychiatric facility, and advised him of the scheduled review. According

to the appellant's later testimony, he told his defense counsel that he wanted to be present at the review, and that he would take a delay for that purpose.

Lt Col Campbell, the PCRO, conducted the pretrial confinement review on 30 May 2001. The detailed defense counsel was present; the appellant was not. The defense counsel objected to conducting the review in the absence of the appellant, and declared that he would move for credit for illegal pretrial confinement at trial. Apparently the defense counsel refused to participate in the review in any way, except to repeat his objection. The defense counsel did not request a delay, or ask to submit the appellant's comments in writing, or suggest that the review be conducted at the psychiatric hospital. The PCRO found that it was not practicable to have the appellant personally present. The PCRO found probable cause for continued confinement, and again recommended it.

The appellant was diagnosed as having a major depressive disorder. While in the civilian psychiatric hospital, the defense counsel requested a sanity board to evaluate the appellant's mental competence. The appellant was transferred to a Veteran's Administration Hospital for the examination and stayed there until 15 June 2001. Thereafter, he was returned to military pretrial confinement, where he remained until trial on 3 July 2001.

The defense counsel did not request reconsideration of the pretrial confinement decision at any time (*see* R.C.M. 305(i)(2)(D)), nor did he seek review of the decision by the military judge after the referral of charges (*see* R.C.M. 305(j)). At trial, the defense counsel moved for 3-for-1 credit for illegal pretrial confinement.

The military judge heard evidence on the motion. Captain (Capt) Catherine Fahling, the chief of military justice, testified that she learned of the appellant's violent outburst at the confinement facility and that the appellant had been admitted as an in-patient to the psychiatric hospital due to major depression and suicidal ideations. Captain Christopher May, the government representative at the pretrial confinement review, indicated by affidavit that he learned the appellant was "under suicide watch" at Pinnacle Pointe Hospital, therefore it was not practicable to bring the appellant to the review.

The appellant testified that he voluntarily admitted himself to the civilian psychiatric hospital, but did not believe he could leave. He testified that, after the review, he learned from unidentified nurses that, "if anyone from my–from the base came to get me that they would definitely release me, they had no choice but to release me to someone from the base." The military judge asked the appellant what he wanted to present to the PCRO, and the appellant replied, "I wanted to be able to give him my version of the events that happened in hopes to not be put back in pretrial confinement . . . ." The military judge denied the motion for additional credit, finding that the PCRO did not abuse his discretion in determining that it was not practicable to produce the appellant under the circumstances. Nonetheless, the military judge ruled the appellant was entitled

to day-for-day credit for all the time he spent before trial in civilian confinement, in military confinement, and voluntarily admitted to hospitals–a total of 84 days.

The appellant renews the argument before this Court. He maintains that because he was in pretrial confinement status it was the obligation of the government to produce him for the pretrial confinement review, unless it was "impossible" to do so.

Under R.C.M. 305(j)(1), a military judge reviews the decision of a PCRO for an abuse of discretion. Our superior court holds that the proper application of credit for lawful and unlawful pretrial confinement is a question of law, reviewed de novo on appeal. *United States v. Spaustat*, 57 M.J. 256, 260 (2002).

R.C.M. 305(i)(2)(A)(i) provides, "The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable." The rule does not define the term, "practicable." *Black's Law Dictionary* 1172 (6th ed. 1990) defines practicable as "that which may be done, practiced, or accomplished; that which is performable, feasible, possible . . . ." The current regulation, Air Force Instruction 51-201, *Administration of Military Justice* (2 Nov 1999), provides no guidance, but a previous version of the regulation interpreted the language to mean, "the prisoner and the prisoner's counsel should be allowed to attend the review unless overriding circumstances or time constraints dictate otherwise." *United States v. Butler*, 23 M.J. 702, 704 (A.F.C.M.R. 1986) (quoting Air Force Regulation 111-1, *Administration of Military Justice*, ¶ 3-24d(2) (1984)).

The history of the *Manual* provision requiring a review of pretrial confinement is helpful. At first there was no requirement for such a review. *Manual for Courts-Martial, United States*, ¶ 19-22 (1951 ed.). The (then) Court of Military Appeals created the requirement in *Courtney v. Williams*, 1 M.J. 267 (C.M.A. 1976). Citing *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), the Court concluded that the Fourth Amendment to the Constitution required that a neutral and detached magistrate must determine whether there was probable cause to detain a service member before trial.[1] *Courtney*, 1 M.J. at 270. Significantly, the Supreme Court in *Gerstein* held that the probable cause determination need not be accomplished through an adversarial proceeding, so that the normal safeguards, such as the right to counsel, confrontation, cross-examination, and compulsory process for witnesses, were not required.

The requirements set forth in *Courtney* were adopted in military practice, and subsequently incorporated into R.C.M. 305 of the *Manual for Courts-Martial*, 1984. As noted above, R.C.M. 305 provides that the prisoner and counsel shall be allowed to appear before the reviewing officer "if practicable." Clearly the pretrial confinement

[1] In fact, the Court went beyond *Gerstein v. Pugh*, and held that the magistrate must also determine whether the service member *should* be held in pretrial confinement. *Courtney*, 1 M.J. at 271.

review envisioned by R.C.M. 305 was intended to be non-adversarial–as the drafters noted, "the review may be conducted entirely with written documents, without the prisoner's presence when circumstances so dictate . . . ." *MCM*, A21-16 (1984 ed.). The history of this section, and the Constitutional law upon which it is based, suggest that the phrase "if practicable" envisions a standard less strict than the "impossibility" standard argued by the appellant.

In other uses within the *Manual for Courts-Martial*, the term "practicable" is construed to mean something that can be accomplished reasonably under the circumstances. For example, Article 33, UCMJ, 10 U.S.C. § 833, requires that the commanding officer forward the charges against one in confinement to the general court-martial convening authority within eight days "if practicable," but also provides, "If that is not practicable, he shall report in writing to that officer the reasons for delay." In *United States v. Maresca*, 28 M.J. 328, 332 (C.M.A. 1989), the Court held that the R.C.M. 308(a) requirement that charges be served "as soon as practicable" meant as soon as "the accused can reasonably be found and informed thereof." *See also* William Winthrop, *Military Law and Precedents*, 157 (2d. ed. 1920 Reprint) (noting that charges should be served simultaneously with the arrest, "or as soon after arrest as is reasonably practicable"). Article 36, UCMJ, 10 U.S.C. § 836, provides that the rules promulgated by the President shall apply legal principles and evidentiary rules generally recognized in United States district courts, "so far as he considers practicable." Article 38(b)(7), UCMJ, 10 U.S.C. § 838(b)(7) requires that regulations concerning the availability of defense counsel shall be uniform, "to the maximum extent practicable," while "recognizing the differences in the circumstances and needs of the various armed forces." Also, several rules regarding discovery provide that disclosure of documents and information should occur "as soon as practicable." R.C.M. 701(a)(1) and (6).

We find that the PCRO did not abuse his discretion in finding that the appellant's presence was not practicable. We also find that the appellant's attendance was not practicable, under the circumstances. At the time of the pretrial confinement review, the appellant had twice avoided military control for fear of pretrial confinement. He had assaulted Mrs. Rowland when she tried to close the door on him. When placed into pretrial confinement after apprehension, he acted out violently, injuring his hand. The military clinic on Little Rock AFB indicated they did not have the resources to handle the appellant, and civilian mental health care providers determined he was in immediate need of in-patient mental health treatment. At no time did the defense counsel indicate the appellant's desire to attend the review; the appellant's voluntary admission to the psychiatric hospital suggests that he wanted to be there instead of in military custody. Finally, the appellant was represented by counsel, who was available to critically review the probable cause determination, and could have assisted in protecting the appellant's interests. To have the appellant present would have required that armed personnel remove him, in restraints, from the psychiatric hospital, and bring an unstable, violent individual to the base which did not have the resources to handle him, for a review of the

very subject that caused his violent outbursts. Under all these circumstances, we conclude that securing the appellant's presence was not practicable.

Although perhaps unnecessary, we also find a more fundamental basis for denying the appellant's claim of error. The appellant's argument rests upon the proposition that the appellant was in pretrial confinement at the time of the review. Under normal circumstances, that would be true. But it was not so in this case.

Confinement is defined as the physical restraint of a person. Article 9, UCMJ, 10 U.S.C. § 809. The appellant was physically confined by the military when he was apprehended and ordered into pretrial confinement. The confinement continued while he was escorted for medical treatment. However, the unrefuted testimony at trial was that he voluntarily admitted himself to the civilian psychiatric hospital. Normally, a person in confinement is not at liberty to elect where they will reside, even to voluntarily admit themselves into a hospital. Apparently military authorities allowed him to do so in this case to get immediate treatment. While a commander can order a service member into a civilian facility for treatment, *Short v. Chambers*, 33 M.J. 49 (C.M.A. 1991), there is no indication any commander did so in this case. While voluntarily admitted to the psychiatric hospital, the appellant was free to leave at any time, unless the hospital found a basis for involuntarily commitment and initiated action immediately. *See generally* ARK. CODE ANN. § 20-24-204 (Michie 1987). We also note that, if the appellant did not consent to leaving the civilian hospital, the government may have been required to obtain a warrant to enter the civilian facility to remove the appellant forcibly. *See generally* 3 Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, § 6.1 (3d ed. 1996).[2] In any event, the appellant was not within the physical control of the military during the time he was voluntarily admitted to the civilian facility. Thus, appellant's argument that the government had the sole responsibility to produce him for the pretrial confinement review is unfounded under the unique circumstances of this case.

Sentence Appropriateness

Citing *Grostefon*, 12 M.J. 431, the appellant asserts that his sentence to a dishonorable discharge is inappropriately severe. We considered carefully all the facts and circumstances of this case, including all matters submitted in sentencing and for clemency. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We find this assignment of error to be without merit.

[2] Because the appellant's admission to the civilian psychiatric hospital was voluntary, it is questionable whether he was entitled to credit for pretrial confinement during his stay. *United States v. Ruppel*, 45 M.J. 578, 585 (A.F. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 247, 251-53 (1998). However, where the government conceded the matter and the military judge awarded the credit, we will not disturb it.

Conclusion

The finding of guilty of Specification 3 of Charge II is set aside. The remaining approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the remaining approved findings and the sentence are

AFFIRMED.

OFFICIAL

DIERDRE A. KOKORA, Major, USAF
Chief Commissioner