

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JON-AUSTIN RAY
United States Air Force

ACM S31431

13 February 2009

Sentence adjudged 06 November 2007 by SPCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Mark L. Allred (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 7 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major David P. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Nicole P. Wishart.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Senior Judge:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of attempting to wrongfully manufacture psilocybin mushrooms; one specification of conspiring to wrongfully manufacture psilocybin mushrooms; one specification of fraudulent enlistment;¹ and two specifications of engaging in conduct prejudicial to the good order and discipline of the

¹ This specification is based upon false information regarding the appellant's pre-service drug usage.

armed forces, namely by wrongfully possessing and wrongfully using methylone,² in violation of Articles 80, 81, 83, and 134, UCMJ, 10 U.S.C. §§ 880, 881, 883, 934. The adjudged and approved sentence consists of a bad-conduct discharge, seven months confinement, and a reduction to E-1.³

The issue on appeal is whether the appellant's pleas to wrongful possession and use of methylone were improvident.⁴ Finding no error, we affirm.

Background

The appellant stipulated that between 1 November 2006 and 2 February 2007, he purchased vials of "Fair Dinkum Aromatherapy Mandarin," hereinafter Fair Dinkum, from a local business in Okinawa City, Okinawa, Japan. Fair Dinkum contains methylone. On five occasions during the same time period, the appellant ingested vials of Fair Dinkum in an attempt to experience hallucinations. On 2 February 2007, agents with the Air Force Office of Special Investigations (AFOSI) searched the appellant's dormitory room and seized two vials of Fair Dinkum from the appellant's room.⁵

During his *Care*⁶ inquiry, the appellant testified that: (1) he knew it was wrongful to possess and use methylone; (2) he possessed methylone for the sole purpose of being able to take a drug that would give him hallucinogenic effects and thereby make him incapacitated for military service; (3) he used methylone with other service members; (4) he saw the effects the drug had on other members; (5) the methylone was found in his dormitory room behind the ceiling tiles; (6) he had no justification for possessing the methylone and did not believe he was entitled to possess the methylone; (7) it was wrong to possess the methylone, because the drink⁷ had a similar effect as mushrooms; (8) the effect was that of causing hallucinations; (9) his possession of methylone was prejudicial to good order and discipline because "by possessing the methylone I possessed the substance which produced hallucinogenic effects which might impair my senses and perception of reality so that I would be unable to properly and effectively fulfill my duties;" (10) he knew that the effects could last up to eight hours; and (11) his use of methylone was prejudicial to good order and discipline because he was on duty "24 hours a day" and he would not be able to do his duty because of his methylone use.

² Methylone, properly 3,4-methylenedioxymethcathinone, is an analogue of ecstasy. Ecstasy, properly 3,4-methylenedioxymethamphetamine, is a schedule I controlled substance. *See* Schedules of Controlled Substances, 21 U.S.C. § 812 (2008). Under federal law, methylone is treated as a schedule I controlled substance if it is intended for human consumption. *See* Treatment of Controlled Substance Analogues, 21 U.S.C. § 813 (2008).

³ The appellant and the convening authority had a pretrial agreement wherein the convening authority agreed to withdraw a specification of distribution of methylone to another military member and refer the case to a special court-martial if the appellant pled guilty to the other charges and specifications.

⁴ More specifically, the appellant avers there was no evidence that his possession and use were wrongful, and no evidence that his possession and use were prejudicial to the good order and discipline of the armed forces.

⁵ The vials were found behind ceiling tiles in the appellant's room.

⁶ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

⁷ The vials contained a liquid which the appellant drank.

After discussing with counsel⁸ the issue of “conduct prejudicial to good order and discipline,” specifically citing the unpublished case of *United States v. West*,⁹ the military judge made specific findings of fact on the “prejudicial to good order and discipline” element.¹⁰ Specifically he found the appellant’s possession and use of methylone was prejudicial to good order and discipline because: (1) methylone is a substance similar to ecstasy; (2) the appellant possessed and used methylone on base in his dormitory room where the drug was concealed; (3) the appellant used with other military members; (4) the appellant was incapacitated because of his use of methylone, and he had experienced the effects lasting up to eight hours; (5) he saw these effects on the members with whom he used and possessed methylone; (6) there was no legitimate purpose for the appellant’s possession and use of methylone; and (7) the use and possession “could only [have been] for the wrongful and inappropriate purpose of debilitation, hallucinations, euphoria, and so forth.”

Discussion

In determining whether a guilty plea is provident, the test is whether there is a “substantial basis in law and fact for questioning the guilty plea.” *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). “In order to establish an adequate factual predicate for a guilty plea, the military judge must elicit ‘factual circumstances as revealed by the accused himself [that] objectively support that plea[.]’” *Id.* at 238 (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). “[A] military judge must explain the elements of the offense and ensure that a factual basis for each element exists.” *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004) (citing *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996)). We review a military judge’s decision to accept a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996) (citing *United States v. Gallegos*, 41 M.J. 446 (C.A.A.F. 1995)).

Conduct is prejudicial to good order and discipline if it causes a reasonably direct and obvious injury to good order and discipline. *Manual for Courts-Martial, United States*, Part IV, ¶ 60.c.(2)(a) (2005 ed.).¹¹

In the case *sub judice*, sufficient evidence exists to support the military judge’s findings that the appellant’s possession and use of methylone were wrongful. The fact that the appellant admitted he possessed and used the methylone in an attempt to experience hallucinations and that the methylone is a substance analogous to 3,4-

⁸ Trial defense counsel specifically agreed that the appellant’s pleas were provident to the use and possession and that methylone was similar to schedule I drugs.

⁹ ACM S30256 (A.F. Ct. Crim. App. 23 Sep 2004) (unpub. op.).

¹⁰ He did not, nor was he required to, make findings as to the wrongfulness of the appellant’s actions.

¹¹ The 2008 edition has the same requirement, but the 2005 edition was controlling at the time of the appellant’s court-martial.

methylenedioxymethamphetamine, a schedule I controlled substance, supports that the possession and use of it were, as the appellant admitted, without legal justification or authorization. The military judge did not err in finding the appellant's possession and use of methylone to be wrongful.

Additionally, the military judge did not err when he found the conduct to be prejudicial to good order and discipline. An "admission regarding impairment of mental faculties reflected his understanding that he had engaged in conduct that would undermine his capability and readiness to perform military duties – a direct and palpable effect on good order and discipline." *United States v Erickson*, 61 M.J. 230, 232 (C.A.A.F. 2005).

After reviewing the entire record of trial,¹² and the post-trial submissions by counsel, we conclude the appellant's pleas were provident, and the military judge did not abuse his discretion in accepting those pleas.

Conclusion

The approved findings and sentence 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 approved findings and sentence are

AFFIRMED.

JACKSON, Judge (concurring in part, dissenting in part):

While I concur with the majority's findings that the appellant's possession and use of methylone was wrongful,¹³ I respectfully dissent from its findings that the appellant's possession and use of methylone was prejudicial to good order and discipline. I would set aside the appellant's findings of guilty on the methylone specifications and reassess the sentence. The basis for my dissent is that I believe there is an inadequate showing in the record that the appellant's possession and use of methylone *was* prejudicial to good order and discipline. As such, there is a substantial basis in law and fact to question the appellant's pleas on these specifications, and his pleas to these specifications should not have been accepted. *United States v. Hardeman*, 59 M.J. 389, 391 (C.A.A.F. 2004)

¹² The Court can consider the entire record when determining the providency of the guilty plea. *United States v. Redlinski*, 58 M.J. 117, 119 (C.A.A.F. 2003).

¹³ I concur with the majority's finding of wrongfulness because under the facts of this case, and with due consideration to Treatment of Controlled Substance Analogues, 21 U.S.C. § 813 (2008), methylone is treated as a controlled substance and the appellant had no legal justification or authorization to possess and use methylone.

(citing *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991); *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)).

During his *Care*¹⁴ inquiry, the appellant testified that his possession of methylene was prejudicial to good order and discipline because the substance “produced hallucinogenic effects which *might* impair [his] senses and perception of reality so that [he] *would be unable* to properly and effectively fulfill [his] duties,” and “[i]t would be just as bad as possessing any other drug with the same effects.” (Emphasis added). While the military judge did not ask the appellant to articulate why his use of methylene was prejudicial to good order and discipline, the appellant did testify that he was on duty “24 hours a day” and *if* he had been called onto duty he *would not* be able to do his duty because of his methylene use.

For an act to be prejudicial to good order and discipline it must have a “direct and palpable” effect upon good order and discipline. *Manual for Courts-Martial, United States*, Part IV, ¶ 60.c.(2)(a) (2005 ed.).¹⁵ While the drafters do not define the terms “direct,” “palpable,” and “effect,” the standard English definitions of these terms are “proximate,” “obvious,” and “result or outcome.” *Black’s Law Dictionary* 459, 1110, 514 (6th ed. 1990). Colonel William Winthrop tells us that to be cognizable as an act prejudicial to good order and discipline, the act “must have been committed under such circumstances as to *directly offend* against the government and discipline of the military state.” William Winthrop, *Military Law and Precedents*, 723-724 (2d ed. 1920 reprint) (emphasis added).

Our superior court has held that to be punishable as an act prejudicial to good order and discipline, there must be *a connection* between the act and the military mission or military environment. *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008) (holding that “in order to meet the second element for conduct charged under a prejudice of good order and discipline theory, [the prosecution must] show a reasonably direct and palpable connection between [the] appellant’s [conduct, in that case his speech,] and the military mission.” (Internal quotations omitted)). Our superior court has also held that the term “prejudice” under the article means “injuriously affecting.” *United States v. Snyder*, 4 C.M.R. 15, 17-18 (C.M.A. 1952). Our Army brethren have held that “[t]he requirement for ‘direct and palpable’ prejudice to good order and discipline means that the conduct ‘ . . . must have a *direct and immediate adverse impact* on discipline’” *United States v. Warnock*, 34 M.J. 567, 569-570 (A.C.M.R. 1991) (emphasis added).

The sum of all of this is that for an act to be prejudicial to good order and discipline, it is simply not enough for the act to *potentially affect* good order and discipline. The act must *actually negatively affect or have a deleterious impact* on good

¹⁴ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

¹⁵ The 2008 edition of the *Manual for Courts-Martial* enunciates the same requirement. I make reference to the 2005 edition because it was controlling at the time of the appellant’s court-martial.

order and discipline. In the case at hand, there is no evidence in the record that the appellant's possession and use of methylone, as wrong as it may have been, *actually and negatively affected* good order and discipline.

The fact that the appellant would have been unable to perform his duties *if* he had been called onto duty is not sufficient. There is no evidence, despite the appellant's use of the trite phrase that military members are on-duty 24 hours a day, that he was actually on duty when he possessed and used the methylone. Nor was there a showing of a connection between the appellant's possession and use of methylone and his unit's mission. Moreover, the record is simply devoid of any evidence that the appellant's possession and use of methylone, albeit on base and with other service members,¹⁶ negatively impacted other service members, military units, or the military mission.

In short, the appellant did not reveal sufficient factual circumstances to support a finding that his possession and use of methylone actually affected good order and discipline. The military judge abused his discretion in accepting the appellant's plea to these specifications. Accordingly, I would set aside the appellant's finding of guilty on these specifications and reassess the sentence. For the aforementioned reasons, I respectfully dissent.

OFFICIAL




CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court

¹⁶ While the appellant testified that he used methylone with other service members, it is arguably unclear from the record whether the appellant was referring to the uses for which he was tried or if he was referring to other uses.