UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CLINTON C. THORNTON
United States Air Force

ACM 35563

1 August 2005

Sentence adjudged 21 February 2003 by GCM convened at RAF Lakenheath, United Kingdom. Military Judge: Linda S. Murnane.

Approved sentence: Bad-conduct discharge, confinement for 30 days, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

In accordance with his pleas, the appellant was convicted at a general court-martial of one specification of wrongful use of marijuana in the form of hashish, and two specifications of wrongful use of ecstasy in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by a panel of officer and enlisted members to a bad-conduct discharge, confinement for 30 days, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

Before us, the appellant claims for the first time that his conviction as to one specification was erroneous because that specification was "facially duplicative" of another. He further contends that his approved sentence to forfeiture of all pay and allowances was unlawful because he was not in confinement when the convening authority took action. Finding no merit in either contention, we affirm.

The appellant was originally charged with one specification of wrongful use of marijuana in the form of hashish on divers occasions, one specification of wrongful divers use of ecstasy, and one specification alleging a single wrongful use of cocaine. The first two specifications alleged the appellant's uses were at or near Newmarket, United Kingdom; the third specification alleged a use at a different location, near Cambridge, United Kingdom.

The appellant pled guilty to the first two specifications as charged, but pled guilty to the third specification by excepting the word "cocaine" and substituting the words "3,4 methylenedioxymethamphetamine (MDMA), also known as Ecstasy, a schedule I controlled substance." The government elected to attempt to prove the third specification as charged--that is, to attempt to prove the appellant used cocaine. The officers and enlisted members of his court-martial convicted him in accordance with his pleas.

Prior to seating the members, the military judge opined that if the appellant were convicted strictly in accordance with his pleas, then Specifications 2 and 3 would be "multiplicious for findings purposes." The divers uses alleged in Specification 2 would subsume the single use of Specification 3, which was alleged to have occurred during the same period. Following entry of findings, the military judge followed through on this line of reasoning and instructed the members that Specifications 2 and 3 would "be considered as a single offense." The members were told that the maximum punishment that could be awarded the appellant included only seven years of confinement, rather than twelve.

The parties appear to have overlooked, or to have placed little import in, the fact that Specifications 2 and 3 alleged uses at different places, as well as different drugs. This may be due to the fact that the staff judge advocate, in testimony on an unrelated motion, highlighted the significance of the fact that the appellant was originally charged with using three kinds of illegal drugs rather than two. Whatever the basis for the trial participants' analysis, the fact remains that each specification alleged separate criminal acts, separately punishable; they were not multiplicious as originally charged, nor were they multiplicious as pled by the appellant. *See United States v. Teters,* 37 M.J. 370 (C.M.A. 1993).[1]

[1] Although all of the appellant's ecstasy uses in the Newmarket region were grouped together in a single specification, the government was under no obligation to similarly aggregate his use near Cambridge, and we decline to speculate whether the government would have done so but for the erroneous belief that that use was of

The appellant nonetheless complains that the convening authority's action approving the findings of guilty as to all three specifications was erroneous because the military judge's rulings "acted to dismiss" Specification 3. In fact, however, the military judge did not dismiss that specification, and on these facts she had no obligation to do so. The convening authority did not err.

The appellant also complains that the convening authority should not have approved forfeiture of all pay and allowances in his case. Although forthrightly conceding that forfeiture of all pay and allowances were authorized and within the jurisdictional authority of his general court-martial, the appellant alleges that he had already been released from confinement when the convening authority took action. Citing Rule for Courts-Martial 1107(d)(2), Discussion, and Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, ¶ 9.8.1 (2 Nov 1999), the appellant argues he should be required to give up no more than two-thirds of his pay per month.

We are unconvinced by the appellant's argument. The Rule and AFI provisions cited by the appellant serve to limit forfeitures the convening authority can approve only in those cases where no confinement was adjudged. Where, as here, confinement is part of the approved sentence, forfeiture of all pay and allowances may also be approved. Actual collection of post-confinement forfeitures may be limited to two-thirds pay per month, but the appellant has not alleged that he was ever required to forfeit more than this amount. In the absence of any alleged harm, we see no purpose to be served by ordering any relief.

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.

OFFICIAL

ANGELA M. BRICE
Clerk of Court

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cocaine. In any event, because the offenses were treated as multiplicious during the sentencing phase of the trial, the appellant is entitled to no sentence relief. *See United States v. Frelix-Vann,* 55 M.J. 329 (C.A.A.F. 2001).