UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CURTIS D. ROWE
United States Air Force

ACM 34546

16 January 2002

Sentence adjudged 13 February 2001 by GCM convened at Ramstein Air Base, Germany. Military Judge: Rodger A. Drew Jr. (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 11 months, forfeiture of $695.00 pay per month for 11 months, and reduction to E-1.

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Lieutenant Colonel Lance B. Sigmon and Captain Matthew J. Mulbarger.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant was convicted, in accordance with his pleas, of wrongfully possessing, distributing, and using 3,4-methylenedioxymethamphetamine (ecstasy), on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence included a bad-conduct discharge, confinement for 11 months, forfeiture of $695.00 pay per month for 11 months, and reduction to E-1. On appeal, he alleges that the trial judge erred by not dismissing the specification alleging possession of ecstasy. We affirm the findings and sentence.

The appellant was charged with possessing, distributing, and using ecstasy on divers occasions between 1 May and 31 August 2000. During the guilty plea inquiry on the specification alleging possession, he told the judge that at any single time he possessed up to six pills of ecstasy, two to three times a week. The appellant said he kept the ecstasy on his person or in a closet in his house. He also admitted to distributing ecstasy twice. Finally, he indicated that he used four to eight pills of ecstasy at least twice a week.

During the discussion of the maximum punishment, the judge, sua sponte, inquired whether the specification for possession was multiplicious with the specifications for distribution and use. The prosecution argued that based on the appellant's statements during the guilty plea inquiry, it was not. The judge then asked the appellant if he thought his possession was "separate and apart" from the use and distribution. After consulting with counsel, the appellant replied, "Your Honor, my possession was for my own use. And if I did have some on me when I was out and friends wanted one, then I would give them one." The prosecution pointed out that this was not consistent with the appellant's prior statements to the judge. The judge then questioned the appellant about storing the ecstasy in his closet at home. The appellant admitted that on occasion he would have some ecstasy in his closet for one or two days when he was not using or distributing it. Defense counsel then offered, without citing any authority, that this period of possession was not sufficient for it to be regarded as a separate offense. Before a recess, the judge warned the parties that he could not accept the plea unless they agreed upon the maximum punishment. Immediately after the recess, the prosecution agreed that the specification alleging possession would not add to the maximum punishment, and the appellant agreed he could be found guilty of the offense of possession of ecstasy independently from the distribution and use of ecstasy.

Analysis

Our review of the evidence discloses that the appellant's plea to wrongful possession of ecstasy, on divers occasions, over a four-month period is legally and factually sufficient. The appellant told the judge he knew he was possessing ecstasy and that he had exclusive control over the pills that he either carried on his person, or stored in his home. Furthermore, he admitted there were periods when his possession of ecstasy was not incident to his use or distribution of the drug.

The appellant admitted that he could be found guilty of possession of ecstasy, as an offense independent of his distribution and use of this same substance. We agree. Therefore, although he benefited from the judge's decision that the offense of possession was multiplicious for sentencing with his other offenses, we do not find the judge erred in failing to dismiss the specification. *United States v. Quiroz*, 55 M.J. 334, 339 (2001); *United States v. Deloso*, 55 M.J. 712, 715 (A.F. Ct. Crim. App. 2001).

The 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court