IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20100172
Private (E-2) **TIMOTHY E. BENNITT,** United States Army, Appellant	)	USCA Dkt. No. 12-0616/AR

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	FINAL BRIEF ON BEHALF OF APPELLANT ON SPECIFIED ISSUE
v.	
	Army Misc. Dkt. No. 20100172
Private (E-2) **Timothy E. Bennitt,** United States Army, Appellant	USCA Dkt. No. 12-0616/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Specified Issue

IN SPECIFICATION 2 OF CHARGE I APPELLANT IS CHARGED WITH UNLAWFULLY KILLING LEAH KING WHILE AIDING AND ABETTING MS. KING'S WRONGFUL USE OF OXYMORPHONE, WHICH IS ALLEGED TO BE AN "OFFENSE" DIRECTLY AFFECTING THE PERSON OF MS. KING. MUST MS. KING'S USE OF OXYMORPHONE BE AN "OFFENSE" TO BE LEGALLY SUFFICIENT TO SUPPORT THE FINDING OF GUILTY UNDER ARTICLE 119(b)(2)?

Additional Statement of the Case

On September 19, 2012, this Honorable Court granted appellant's petition for review. On October 19, 2012, appellant filed his final brief with this Court. The government responded on November 19, 2012. On February 5, 2013, this Court specified the additional issue presented herein.

Additional Statement of Facts

The military judge convicted Private (PV2) Timothy E. Bennitt of the following offense under Article 119(b)(2), UCMJ, incorporating Article 77(a)(1), UCMJ:

> In that Private (E-2) Timothy Bennitt, U.S. Army, did, at or near Fort Lewis, Washington, between on or about 14 February 2009 and 15 February 2009, while perpetrating an offense directly affecting the person of Ms. Leah King, to wit: wrongful use of Oxymorphone, a Schedule II controlled substance, unlawfully kill Ms. King by aiding and abetting her wrongful use of Oxymorphone.

(JA 34, 109).

The government bore the burden of proving beyond a reasonable doubt that the following occurred:

> (1) the specific intent to facilitate the crime [of wrongful use] by another;
>
> (2) guilty knowledge on the part of the accused;
>
> (3) that [the] offense [of wrongful use] was being committed by [Ms. Leah King]; and
>
> (4) that the accused assisted or participated in the commission of the offense [of wrongful use].

United States v. Pritchett, 31 M.J. 213, 217 (C.M.A. 1990), *quoted in United States v. Vela*, 71 M.J. 283, 286 (C.A.A.F. 2012). Congress defined the offense of wrongful use as "[a]ny person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a

court-martial may direct." *Manual For Courts-Martial, United States* (2008 ed.) [hereinafter *MCM*], pt. IV, ¶ 37a(a).

Summary of Argument

In 1984, the Court of Military Appeals (CMA) held that distribution of narcotics that later leads to death does not constitute an offense "directly affecting the person" under Article 119(b)(2), UCMJ. *United States v. Sargent*, 18 M.J. 331 (C.M.A. 1984); *United States v. Dillon*, 18 M.J. 340 (C.M.A. 1984). The acts of PV2 Bennitt merely amount to distribution, thus his offense did not directly affect the person of Ms. King, and he cannot be held liable under Article 119(b)(2), UCMJ.

In addition, PV2 Bennitt's conviction is legally insufficient because he did not aid and abet a criminal act of Ms. King. Ms. King's use of Oxymorphone was not a criminal act because (1) she is not subject to the UCMJ, which prohibits such use, and (2) her use did not otherwise violate federal or state law. Without the completed substantive criminal act by Ms. King, there was no "offense" for PV2 Bennitt to aid and abet.

Argument

Standard of Review

The issue of legal sufficiency is reviewed de novo. *United States v. Green*, 68 M.J. 266, 268 (C.A.A.F. 2010). The test for legal sufficiency requires courts to review the evidence in the light most favorable to the government. If any rational trier

of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

Law and Argument

a. Leah King's use of Oxymorphone was not an "offense" under Article 119(b)(2).

Article 119(b)(2), UCMJ, requires that a death occur "while [the accused is] perpetrating or attempting to perpetrate an offense . . . directly affecting the person." *MCM,* pt. IV, ¶ 44a(b)(2). In his final brief to this Court, PV2 Bennitt argued that his conduct was not an offense under Article 119(b)(2), UCMJ, for four primary reasons: (1) PV2 Bennitt's actions amounted to wrongful distribution of a controlled substance, which is not an "offense directly affecting the person"; (2) if aiding and abetting another's wrongful use constitutes an "offense directly affecting the person," it requires, at a minimum, that the aider and abettor physically assist with the actual injection or ingestion of the controlled substance; (3) all known examples of "offenses directly affecting the person" involve a perpetrator separate and apart from the victim; and (4) Congress did not intend for PV2 Bennitt's actions of providing narcotics to Ms. King to constitute an offense under Article 119(b)(2), UCMJ.

The specified issue raises a fifth reason that this Court cannot affirm PV2 Bennitt's conviction under Article 119(b)(2), UCMJ. As charged and under Article 119(b)(2), UCMJ, an "offense" must be committed. The government alleged that offense was Ms. King's "wrongful use of Oxymorphone." (JA 34). Ms. Leah King's use of Oxymorphone does not qualify as an "offense" under Article 112a, UCMJ, and Article 119(b)(2), UCMJ, for at least two reasons.[1]

First, through Article 112a, UCMJ, Congress prohibited use of controlled substances only by "person[s] subject to this chapter . . . ." *MCM*, pt. IV, ¶ 37a(a). Ms. Leah King was a sixteen year-old civilian at the time of her use. Article 2, UCMJ, titled "Persons subject to this chapter," does not include court-martial jurisdiction over a sixteen year-old civilian. As the military did not have jurisdiction over Ms. King, her conduct was not "subject to this chapter" and her use of Oxymorphone was not an "offense" under the UCMJ for purposes of Article 112a and as incorporated into the specification under Article 119(b)(2).

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[1] In *Sargent* and *Dillon*, Chief Judge Everett stated in dicta that a seller's act of "assist[ing] the purchaser in injecting or ingesting the drug" may become an offense directly affecting the person because this assistance could be aiding and abetting use of the drug. 18 M.J. at 339; 18 M.J. at 342. Even if this Court accepts this logic, unlike here, the victims in *Sargent* and *Dillon* were servicemembers whose use was actually unlawful because they were subject to the UCMJ.

Second, Ms. King's use of Oxymorphone does not qualify as "wrongful" because her use was not prohibited by law. While the government never presented evidence as to whether PV2 Bennitt's barracks room was located on federal land under exclusive jurisdiction of the federal government or under concurrent jurisdiction with the state of Washington, use of Oxymorphone is not a crime under either federal or state law. Under federal law, Congress declared it unlawful to possess a controlled substance without a valid prescription. 21 U.S.C. § 844 (2006). There is no federal statute prohibiting the use of a controlled substance unlawfully possessed. Similarly, under Washington state law, it is unlawful to possess Oxymorphone, but it is not unlawful to use Oxymorphone unlawfully possessed. Wash. Rev. Code § 69.50.4013 (2003).[2]

The term "wrongful" is a "word of criminality." *See United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011). "The mere addition of words of criminality such as 'wrongful' to a specification does not in itself convert the specified act into an offense." *United States v. Jackson*, 16 U.S.C.M.A. 509, 511, 37 C.M.R. 129, 131 (1967). Thus, under either a straight Article 112a, UCMJ, analysis or by attempting to assimilate a federal or state statute, Ms. King's use of Oxymorphone was not

[2] There are a few states that specifically prohibit use of controlled substances. *See, e.g.*, Cal. Health & Safety Code § 11550 (2002).

wrongful because it was not unlawful. At most, Ms. King wrongfully possessed Oxymorphone under 21 U.S.C. § 844 or Wash. Rev. Code § 69.50.4013. However, like distribution, wrongful possession is not a crime "directly affecting the person"[3] and it cannot be the basis for PV2 Bennitt's Article 119(b)(2) conviction. *See Sargent*, 18 M.J. 331.

b. Private Bennitt's conduct relating to Leah King was not an "offense" through Article 77(a)(1), UCMJ.

The most basic premise for liability as a principal under Article 77(a)(1), UCMJ, requires the commission of an actual offense. The Court of Military Appeals, comparing the similarly worded 18 U.S.C. § 2, stated in *Pritchett* that "there must be a guilty principal before a second party can be found to be an aider and abetter." 31 M.J. at 217 (citing, *inter alia*, *United States v. Staten*, 581 F.2d 878, 887 (D.C. Cir. 1978)); *see also Standefer v. United States*, 447 U.S. 10, 20 n.14 (1980)(citing *Shuttlesworth v. Birmingham*, 373 U.S. 262, 265 (1963)); *United States v. Jones*, 37 M.J. 459, 460 (C.M.A. 1993)(stating that "to be guilty as an aider and abettor, the principal had to have committed the crime that he aided or abetted"). This holding is

[3] Private Bennitt asserts that he cannot be guilty of Ms. King's wrongful possession as possession is "'inevitably incident'" to distribution. *United States v. Jefferson*, 13 M.J. 779, 781 (A.C.M.R. 1982)(citation omitted); *accord Hill*, 25 M.J. at 414.

consistent with long-standing federal case law[4] and the plain language of the elements allowing a conviction through Article 77(a)(1), UCMJ—"that an offense was being committed by someone." *Pritchett*, 31 M.J. at 217. Unless Ms. King committed a crime, there can be no liability as an aider and abetter.

Under Article 77, UCMJ, there are three primary theories of culpability for a criminal act: (1) to be the actual perpetrator of an offense, Article 77(a)(1); (2) to aid, abet, counsel, command, or procure the commission of an offense, Article 77(a)(1);[5] and (3) to cause an act to be done which if directly performed by the accused would be punishable by the UCMJ, Article 77(a)(2). The allegation is that Ms. King's use of Oxymorphone caused her death, thus the first theory clearly does not apply.

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[4] *United States v. Staten*, 581 F.2d 878, 887 (D.C. Cir. 1978); *United States v. Indelicato*, 611 F.2d 376, 385 (1st Cir. 1979); *United States v. Ordner*, 554 F.2d 24, 29 (2nd Cir. 1977); *United States v. Cades*, 495 F.2d 1166, 1167 (3rd Cir. 1974); *United States v. Pino*, 608 F.2d 1001, 1003 (4th Cir. 1979); United States v. Alvarez, 610 F.2d 1250, 1254 n.3 (5th Cir. 1980); *Manning v. Biddle*, 14 F.2d 518, 519 (8th Cir. 1926); *United States v. Oscar*, 496 F.2d 492, 493 (9th Cir. 1974); *Morgan v. United States*, 159 F.2d 85, 87 (10th Cir. 1947); *United States v. Hornaday*, 392 F.3d 1306, 1312-13 (11th Cir. 2004); *accord South Dakota v. Jucht*, 821 N.W.2d 629, 634 (S.D. 2012).

[5] The standard instructions used by military judges further break this theory down into two separate parts: (1) to aid and abet, and (2) to counsel, command, or procure. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judge's Benchbook, paras. 7-1-1 and 7-1-2 (Jan. 1, 2010). The first part—to aid and abet—is the only applicable provision in this case because "aiding and abetting" were the words used in the specification. (JA 34).

Private Bennitt is also not liable under the third theory—to cause the offense to be committed—for two primary reasons. First, the government never alleged that PV2 Bennitt "caused" Ms. King to commit an offense via Article 77(a)(2). Rather, the government alleged that PV2 Bennitt "aid[ed] and abet[ed]" Ms. King's commission of an offense—wrongful use of Oxymporphone—via Article 77(a)(1). (JA 34). Second, PV2 Bennitt did not cause Ms. King to do anything. At Ms. King's request, PV2 Bennitt merely provided Ms. King with the Oxymorphone to use. (JA 121). Ms. King alone moved to the nightstand where the drug was placed, she alone took possession of an instrument to ingest the drug, and then she alone consciously chose to bend down to the nightstand and snort the drug through her nose. (JA 119-24).

Private Bennitt is also not liable under the second theory—that he aided and abetted the commission of an offense. As established above, an actual offense must be committed in order for liability under Article 77(a)(1) to attach. Military courts have dealt with analogous issues on several occasions. In *United States v. Hill*, the CMA stated that a person could not aid and abet a drug distribution between two government agents because the transfer was not unlawful—a crime never occurred. 25 M.J. 411, 412-13 (C.M.A. 1988). The Air Force and Army courts reached similar holdings. *United States v. Mercer*, 18 M.J. 644, 645 (A.F.C.M.R. 1984)(citing *United States v. Zerbst*,

111 F. Supp. 807 (E.D.S.C. 1953)("[O]ne cannot render himself criminally liable as an aider and abettor for aiding in the commission of an act which is not in fact criminal.")), *aff'd*, 21 M.J. 28 (C.M.A. 1985); *United States v. Elliot*, 30 M.J. 1064, 1065-66 (A.C.M.R. 1990); *see also United States v. Seberg*, 5 M.J. 895, 900 (A.F.C.M.R. 1978)(dismissing a charge because "when the act is not an offense by the individual who does it, the aider or abettor cannot be guilty of a crime"). Likewise, in *United States v. Sneed*, the CMA held that a person could not aid and abet a larceny of government property when the property never left the control of government agents because there was no taking—a crime never occurred. 17 U.S.C.M.A. 451, 453, 38 C.M.R. 249, 251 (1968).

Like in *Hill* and in *Sneed*, PV2 Bennitt did not aid Ms. King in committing a crime. Although a strange state of the law, it was unlawful for Ms. King to possess the Oxymorphone, but it was not separately unlawful for her to use the Oxymorphone. If the federal government or the state of Washington could prosecute her for any crime, it would solely be that of an unlawful possessor. As aiding and abetting unlawful possession is not a crime against the person, PV2 Bennitt's conviction for involuntary manslaughter is legally insufficient.

Because of the merits of the preceding argument, this Court need not go further. However, if this Court determines that

under Article 77(a)(1), UCMJ, soldiers are liable for violations of the UCMJ by perpetrators not subject to the UCMJ, this Court should address whether the bounds of Article 77, UCMJ, are greater than that of 18 U.S.C. § 2. In cases like *Jones* and *Hill*, the CMA, without discussing the issue, allowed the soldier-accused to be convicted via Article 77, UCMJ, for the acts of civilians who were not subject to the UCMJ. 37 M.J. 459; 25 M.J. 411. If Hill and Jones were prosecuted by the federal government for these offenses under 18 U.S.C. § 2 and the applicable federal statute and the civilians were not subject to federal jurisdiction making them liable for a federal crime, these convictions would not stand.

Article 77, UCMJ, is nearly a mirror image of its counterpart, 18 U.S.C. § 2. *See* Article 77, UCMJ, analysis at A23-1. Article 77, UCMJ, provides for liability to those who aid and abet the commission of an "offense punishable by this chapter" (the UCMJ), where 18 U.S.C. § 2 provides for liability to those who aid and abet the commission of an "offense against the United States." It is clear under federal law that the actual perpetrator has to commit a federal offense for an aider and abettor to be liable under 18 U.S.C. § 2. *See, e.g.*, *Standefer*, 447 U.S. at 20; *Manning*, 14 F.2d at 518. To commit a federal offense, the offense must be committed in a manner to give the United States jurisdiction. *See, e.g., Yenkichi Ito v.*

United States, 64 F.2d 73, 74-75 (9th Cir. 1933)("[T]he act committed by this other person must constitute a crime against the Government which prosecutes the charge."), *cert. denied*, 289 U.S. 762 (1933). Without jurisdiction and a completed federal offense, there is no crime to aid and abet.

Military courts have not justified extending the application of Article 77, UCMJ, beyond those limits as established for 18 U.S.C. § 2. However, in cases such as *Jones* and *Hill*, the civilian actor committed acts that are undoubtedly criminal in any jurisdiction—distribution of controlled substances. 37 M.J. at 460; 25 M.J. at 413. In order to stay within the bounds of the plain meaning of Article 77, UCMJ, and the bounds of its' originating statute 18 U.S.C. § 2, as a civilian cannot commit an offense punishable by the UCMJ due to lack of jurisdiction, the government must prosecute these cases through an enumerated offense only if the elements of the state or federal offense the civilian violated are the same as an enumerated offense. If not, the government must use Article 134, UCMJ, by assimilating relevant state or federal statutes.

In this case, since Ms. King is not subject to jurisdiction of the UCMJ and as there is no applicable federal or state statute prohibiting specifically wrongful use of Oxymorphone, PV2 Bennitt cannot be liable for an assimilated offense. Thus, PV2 Bennitt could not criminally aid and abet a non-offense, Ms.

King's use of Oxymorphone. Thus, Specification 2 of Charge I is legally insufficient and should be set aside and dismissed.

Conclusion

Accordingly, PV2 Bennitt requests that this Honorable Court dismiss Specification 2 of Charge I and return his case for a sentence rehearing.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Bennitt*, Crim.App.Dkt.No. 20100172, USCA Dkt. No. 12-0616/AR, was electronically filed with both the Court and Government Appellate Division on February 22, 2013.

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