UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic WAYNE G. AUGSPURGER
United States Air Force

ACM S30222

18 May 2004

Sentence adjudged 13 September 2002 by SPCM convened at Eglin Air Force Base, Florida. Military Judge: Ann D. Shane.

Approved sentence: Bad-conduct discharge and confinement for 3 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major Linette I. Romer, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of drunk and disorderly conduct, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was convicted, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The special court-martial, consisting of officer members, sentenced the appellant to a bad-conduct discharge and confinement for 3 months. The convening authority approved the sentence as adjudged. The appellant has submitted three assignments of error: (1) that the finding of guilty as to use of marijuana was ambiguous in that it failed to specify which of the three alleged divers uses formed the basis of the conviction; (2) that the military judge erred in not instructing the members that they had to vote separately on each instance of divers use of marijuana;

and (3) that the military judge committed plain error in not instructing the members on the possibility of an administrative discharge. Finding no error, we affirm.

I. Facts

On or about 1 December 2001, the appellant submitted a urine specimen to the hospital at Eglin Air Force Base (AFB), Florida. This was for purposes of a medical diagnosis and not pursuant to a criminal investigation. The laboratory screening test yielded a positive result for marijuana, which was confirmed by the laboratory at Brooks AFB, Texas. In a subsequent interview with an investigator from the Security Forces Squadron at Eglin AFB, the appellant admitted that at about the time of the urinalysis, which was on 1 December 2001, he smoked marijuana in an off-base apartment with a group of people he met at a bowling alley. In addition to this, Airman Basic (AB) Coleman, who had previously been convicted of drug use, provided information that on two separate occasions in January and February 2002 he observed the appellant smoke marijuana. Finally, in June 2002, the appellant was admitted to the emergency room at Eglin AFB, acting belligerent due to overindulgence in alcohol. These matters form the basis for the charges and specifications of which the appellant was convicted.

II. Ambiguous Finding of Guilt

We review this issue de novo. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). In that case, our superior court held that, in a prosecution for wrongful divers use of ecstasy in which the members found the accused guilty, by exceptions, of only one use, the finding was ambiguous when the members did not specify which particular instance formed the basis of the conviction. *Id.* at 396. Such ambiguity precluded a legal and factual sufficiency review in accordance with Article 66(a), UCMJ, 10 U.S.C. § 866(a). *Id.* Our superior court stated:

> The Court of Criminal Appeals is required to weigh the evidence and be themselves convinced beyond a reasonable doubt of Appellant's guilt of engaging in wrongful use on the same "one occasion" that served as the basis for the members' guilty finding. Without knowing which incident that Appellant had been found guilty of and which incidents he was found not guilty of, that task is impossible.

Id.

In the case sub judice, the appellant was charged with divers use of marijuana between on or about 15 October 2001 and on or about 20 February 2002. The evidence presented by the government included the use on 1 December 2001, as evidenced by the urinalysis and confession, and the two subsequent uses for which the only evidence was the testimony of AB Coleman. When the members returned their finding of guilty by

excepting the phrase "on divers occasions," the military judge did not require them to specify which of the three instances of use formed the basis of their finding. This was error.

However, unlike the situation in *Walters*, we can determine in this case which of the three alleged uses the appellant was convicted of, and thus we conclude the error was harmless beyond a reasonable doubt. Although trial defense counsel moved to suppress the appellant's confession, he did not otherwise attempt to discredit it once admitted. Indeed, both in his opening statement and in his argument on findings, trial defense counsel practically invited the members to find the appellant guilty of the instance reflected in the confession. In his opening statement, for example, he stated to the members, "[T]here's evidence of one single use, but there's not evidence of divers uses on different occasions." In his findings argument, he told the members that his client "admits that he wrongfully used marijuana in his 1 December statement. That's not in dispute. In fact, his statement is corroborated by the fact that his drug screen came back positive for marijuana when he checked into the hospital." The trial defense counsel elicited nothing on cross-examination of the government witnesses and presented no evidence in his case-in-chief to contradict or discredit the appellant's confession.

On the other hand, trial defense counsel vigorously attacked the credibility of AB Coleman, whose testimony was to a certain degree self-serving and who had made inconsistent and false statements in the past. The defense strategy appears to have been that the appellant was a forthright person who admitted to those offenses of which he was guilty and who denied only those of which he claimed to be wrongly accused. Nonetheless, by pleading not guilty to this one occasion of drug use, he was able to preserve for appeal the issues raised by the suppression motion.

Given our review of the record as a whole, and considering the strategy of the trial defense counsel, we are satisfied beyond a reasonable doubt that the members convicted the appellant of the 1 December 2001 use. We note that the appellant was acquitted of a companion specification of divers distribution of marijuana, which was predicated solely on testimony by AB Coleman, confirming our conclusion that the members did not find his testimony sufficiently credible to sustain a conviction. We find that we can obviate any apparent ambiguity by modifying the findings to reflect wrongful use of marijuana "on or about 1 December 2001."

Generally, if this Court modifies a finding of guilty, it must reassess the sentence or remand the case for a rehearing on sentence. Based upon the criteria establish by our superior court for sentence reassessment, we are confident that we are able to do so without remanding for a sentence rehearing. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986)). As our modification in this case merely identifies the specific use that forms the basis of the conviction, we conclude that we can "reliably determine what sentence would have been

imposed at the trial level if the error had not occurred." *Sales*, 22 M.J. at 307. Under these circumstances, we conclude the sentence would not have been different, absent the error. Therefore, we find no cause to reduce the sentence.

III. Other Issues

We resolve the remaining issues adversely to the appellant. The appellant's failure to object waived the assigned error in the findings instruction. Even if not waived, we find no error in the military judge having failed to instruct the members to vote separately on each alleged instance of divers wrongful use of marijuana. Of course, the instructions should have advised the members to the effect "that any findings by exceptions and substitutions that remove the 'divers occasions' language must clearly reflect the specific instance of conduct upon which their modified findings are based." *Walters*, 58 M.J. at 396. However, in light of the above, we conclude that this error did not prejudice the substantial rights of the appellant and was, therefore, harmless beyond a reasonable doubt. Finally, the appellant waived any objection to the sufficiency of the sentencing instructions. Even if not waived, we find that the military judge did not abuse her discretion in not advising the members about the possibility of an administrative discharge. *See United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002).

IV. Conclusion

The finding of guilty as to Specification 2 of the Charge is modified by excepting the words "on divers occasions between on or about 15 October 2001 and 20 February 2002," substituting therefore the words "on or about 1 December 2001." The findings, as modified, and the sentence, as reassessed, 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 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator