UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BENJAMIN AYALA
United States Air Force

ACM S31550

15 July 2009

Sentence adjudged 26 September 2008 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Gregory O. Friedland (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $800.00 pay per month for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael J. Burnat, and Captain Marla J. Gillman.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain G. Matt Osborn, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the military judge convicted the appellant of two additional specifications of wrongful use of marijuana and one specification of wrongful use of cocaine, also in violation of Article 112a, UCMJ. The adjudged and approved sentence consists of a bad-conduct discharge, five months

confinement, forfeiture of $800 pay per month for five months, and a reduction to the grade of E-1.

On appeal the appellant asks the Court to set aside his findings of guilt on Specifications 2, 3, and 4 of the Charge and reassess his sentence. The basis for his request is that he opines: (1) the military judge erred in finding that the appellant's additional urinalyses conducted pursuant to *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) were for a permissible purpose; and (2) the evidence is legally and factually insufficient to support his findings of guilt on Specifications 3 and 4 of the Charge where there is no evidence that the testing policy was still in effect following the change of command. We disagree. Finding no prejudicial error, we affirm.

Background

Between on or about 20 May 2008 and on or about 18 June 2008, the appellant was at a social gathering at a friend's house, where he smoked marijuana by himself. On 18 June 2008, the appellant was randomly selected to provide a urine sample for drug testing. As required, the appellant provided a urine sample, his sample was sent to the Air Force Drug Testing Laboratory (AFDTL), and the sample subsequently tested positive for tetrahydrocannabinol (THC), a marijuana metabolite, at 186 ng/ml.

On 2 July 2008, the appellant, pursuant to the wing's 1 February 2007 drug testing re-inspection policy, was selected to provide a urine sample for drug testing. As before, the appellant provided a urine sample, the sample was sent to the AFDTL, and the sample subsequently tested positive for THC at 925 ng/ml. On 28 July 2008, the appellant, again pursuant to the wing's drug testing re-inspection policy, was selected to provide a urine sample for drug testing. The appellant provided a urine sample, the sample was sent to the AFDTL, and the sample subsequently tested positive for THC at 67 ng/ml and for benzoylecgonine (BZE), a metabolite of cocaine, at 715 ng/ml.

At trial, the appellant moved to suppress the results of his 2 July 2008 and 28 July 2008 urinalysis test results on the basis that the samples were the product of an unlawful search rather than an inspection. In making his claim, the appellant asserted that the appellant's wing commander implemented the wing's drug testing re-inspection policy, as his staff judge advocate had advised him, for disciplinary purposes and that the "re-inspections" were therefore searches violative of his constitutional right against unreasonable searches and seizures. The military judge denied the appellant's motion, finding that: (1) the appellant's 18 June 2008 urinalysis test was a random urinalysis test and thereby an inspection under Military Rule of Evidence (Mil. R. Evid.) 313(b); (2) the appellant's 2 July 2008 and 28 July 2008 urinalysis tests were ordered pursuant to the wing's 1 February 2007 drug testing re-inspection policy which complied with Mil. R. Evid. 313; (3) the purpose for the appellant's 2 July 2008 and 28 July 2008 urinalysis tests was to ensure security, military fitness, and good order and discipline; and (4) the

appellant's 2 July 2008 and 28 July 2008 urinalysis tests were a continuation of his 18 June 2008 random urinalysis test and the results thereof were admissible.

Motion to Suppress

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). A subsequent order to provide a urine sample for drug testing following a random, positive drug urinalysis test qualifies as an inspection under Mil. R. Evid. 313(b), the results of which are admissible at trial, provided the orders are made pursuant to an established, pre-existing policy or guideline and the subsequent order is not made for the purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings. *Bickel*, 30 M.J. at 286-88.

In the case *sub judice*, the military judge made detailed findings of fact and conclusions of law. His findings of fact are not clearly erroneous and we adopt them as our own. Additionally, his decision was not based on an erroneous view of the law. While the wing staff judge advocate's advice on the drug testing re-inspection policy focused exclusively on the use of such results for disciplinary purposes, the questioned policy makes clear that re-inspection was being done, not as a disciplinary tool, but to ensure "security, military fitness, and good order and discipline." Moreover, the staff judge advocate's advice on the basis for implementing the questioned policy cannot automatically be attributed the wing commander. *United States v. Hamilton*, 41 M.J. 32, 37 (C.M.A. 1994). Additionally, the questioned policy was in existence approximately 16 months prior to the appellant's 18 June 2008 random urinalysis and the appellant can hardly claim his chain-of-command targeted him for urinalysis drug testing.

Furthermore, the questioned policy continued notwithstanding the change of wing commanders. On this point we note that subsequent commanders are not required to specifically ratify or adopt standing orders or policies of their predecessors and those orders and polices continue to exist unless specifically rescinded or changed. *United States v. Brown*, 35 M.J. 877, 880 (A.F.C.M.R. 1992). Here there is no evidence that the appellant's subsequent wing commander rescinded or changed the questioned policy.

Lastly, considering the pre-existing policy was in effect and the subsequent tests were conducted on the heels of the 18 June 2008 random urinalysis test for non-disciplinary purposes, we agree with the military judge that the subsequent urinalysis tests were a continuation of the 18 June 2008 random urinalysis test and the results thereof were properly admissible. In short, the military judge did not abuse his discretion in admitting the results of the appellant's 2 July 2008 and 28 July 2008 urinalysis tests.

Legal and Factual Sufficiency of Findings on Specifications 3 and 4

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

In resolving questions of legal sufficiency, "we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence presented at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the questioned specifications.

First, as noted above, the questioned policy was in effect and continued to be in effect at the time the appellant submitted his urine samples for drug testing. Such was the case even though there was a change in wing commanders. Second, the testimony of Dr. DT, a forensic toxicology and drug testing expert, that the appellant's urine was tested at the AFDTL and contained 67 ng/ml of THC and 715 ng/ml of BZE is legally sufficient to support the appellant's convictions on these specifications. Lastly, the test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of these specifications.

Conclusion

The approved findings and the 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. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court