UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

First Lieutenant TAMIKA L. BARKER
United States Air Force

ACM 35560

29 August 2005

Sentence adjudged 19 December 2002 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: Kurt D. Schuman and Steven B. Thompson (sitting alone).

Approved sentence: Dismissal and confinement for 15 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Rachel E. VanLandingham, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain C. Taylor Smith.

Before

BROWN, ORR, and MOODY
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's reply thereto. The first assigned error asserts that the appellant's convictions for wrongful use and possession of marijuana are both legally and factually insufficient.

The evidence adduced at trial established that the following items were found in the appellant's on-base quarters: several sandwich bags containing a green plant matter that appeared to be marijuana, a partially burned cigarette, and a metal pipe. These items were found in a trinket box in the appellant's bedroom. The baggies and the cigarette were subsequently confirmed as containing marijuana. The metal pipe was also confirmed as containing marijuana residue. Deoxyribonucleic acid (DNA) testing

confirmed the presence of the appellant's DNA on the cigarette and on the mouthpiece of the pipe.

We conclude that a rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offenses beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Furthermore, after weighing the evidence and making allowances for not having observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

The second assignment of error alleges the addendum to the staff judge advocate's recommendation contained new matter which was not served upon the appellant. In her request for clemency, the appellant stated, "I am sorry for the shame that *my situation* has caused the Air Force, my unit, and my family." In the addendum, the staff judge advocate stated that the appellant "apologizes for the shame *her conduct* caused the Air Force and her unit." On appeal, the appellant contends that her use of the term "situation" was meant to imply only that she regretted the shame caused by her court-martial, whereas the addendum's use of the word "conduct" implies an admission of guilt as to the underlying offenses. The appellant contends that the word "conduct" was new matter, in that she had nowhere in the record or in her clemency submissions actually admitted to the truth of the charges.

We have considered the record of trial and the appellate filings. We conclude that a reasonable person could read the addendum as the appellant has, implying an admission of guilt. The appellant's trial defense counsel states by affidavit that such an interpretation of her clemency submission "unfairly undercut[s] our effort to have the convening authority give full and fair consideration to our request for the set aside" of the wrongful use specification. Therefore, we conclude that the appellant has made a colorable showing of possible prejudice. *See United States v. Chatman*, 46 M.J. 321 (C.A.A.F. 1997). We hold that the addendum contains new matter, requiring new post-trial processing.

The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court