UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant TERRENCE A. BETHEA
United States Air Force

ACM 35381

20 July 2004

Sentence adjudged 28 January 2002 by GCM convened at Yokota Air Base, Japan. Military Judge: David F. Brash.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Eric D. Placke.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to his pleas, of one specification of divers uses of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The general court-martial, consisting of officer and enlisted members, sentenced him to a bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant raises two assignments of error: (1) Whether the military judge abused his discretion by not suppressing evidence indicating the presence of cocaine in the appellant's hair; and (2) Whether the evidence is factually and legally insufficient to sustain a conviction. Finding no error, we affirm.

Facts

The appellant was assigned to the 374th Security Forces Squadron at Yokota Air Base, Japan. On 7 February 2001, the appellant submitted a urine specimen as part of a random drug test. His sample tested positive for cocaine in the amount of 238 nanograms per milliliter. This information was passed on to the Air Force Office of Special Investigations (AFOSI). AFOSI agents interviewed the appellant, who denied any use of cocaine. He further stated that he was not aware of anyone who would have surreptitiously drugged him.

After consulting with a regional forensic science consultant and the base legal office, the AFOSI agents sought an authorization from the military magistrate to obtain a sample of the appellant's hair for drug testing. The hair test came back positive for divers uses of cocaine. The forensic testing of the appellant's hair and urine form the factual basis of the charge and specification.

Search and Seizure of the Appellant's Hair

We review this issue for an abuse of discretion. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983) (determination of probable cause by magistrate "should be paid great deference by reviewing courts"). "In reviewing a probable cause determination, courts should consider 'the information made known to the [magistrate] at the time of his decision . . . [which] must be considered in the light most favorable to the prevailing party.'" *United States v. Mason*, 59 M.J. 416, 421 (C.A.A.F. 2004) (quoting *United States v. Carter*, 54 M.J. 414, 418 (C.A.A.F. 2001)).

"Probable cause to search exists when there is a reasonable belief that the . . . evidence sought is located . . . on the person to be searched." Mil. R. Evid. 315(f)(2); *United States v. Hall*, 50 M.J. 247, 249 (C.A.A.F. 1999); *United States v. Figueroa*, 35 M.J. 54, 55-56 (C.M.A 1992). Good faith reliance by law enforcement personnel upon a subsequently invalidated warrant does not require suppression of the fruits of the search. *United States v. Leon*, 468 U.S. 897, 909 (1984). *See also United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993).

In support of its request for a search authorization, the AFOSI presented to the magistrate an affidavit that contained the appellant's urinalysis results. In addition, the affidavit included information about hair analysis. The affidavit averred: (1) That drugs in the bloodstream can become trapped in the hair, remaining as the hair grows; (2) That drugs can be detected in hair using the same technology as in urine testing; and (3) That hair analysis can be used to establish binge use as well as multiple or chronic use of drugs. In support of his suppression motion, the appellant offered evidence to the effect that a single use of a small amount of a drug would not necessarily show up in hair analysis. This information was not presented to the military magistrate. The appellant

contends that, as there was no evidence presented to show the magistrate that the positive urinalysis resulted from binge or chronic use of cocaine, there was no probable cause to search his hair.

Admittedly, the urinalysis standing alone does not conclusively establish binge or chronic use of cocaine. However, in evaluating a magistrate's decision as to whether probable cause exists, we do not apply the "beyond a reasonable doubt" or "preponderance of the evidence" standards used at trial. Rather, we apply common-sense, using the "totality-of-the-circumstances" test. *Gates*, 462 U.S. at 235-38. By that yardstick we find no basis to disturb the military judge's findings and conclusions. The urinalysis, which indicated the appellant's urine was well over the 100 nanograms per milliliter cutoff established by the Department of Defense for reporting positive cocaine use, was sufficient to establish a "fair probability" that the appellant's hair would contain evidence of cocaine use. *See Figueroa*, 35 M.J. at 56. *See also United States v. Bush*, 47 M.J. 305 (C.A.A.F. 1997). The appellant has failed to demonstrate that the omitted information would have "extinguished" probable cause had it been included. *See Mason*, 59 M.J. at 421-22.

Even if the evidence fell short of probable cause, however, the record contains no basis to conclude that AFOSI agents acted with "reckless disregard of the truth" in preparing the affidavit. *Leon*, 468 U.S. at 923. To the contrary, the record is most consistent with their having acted in "objectively reasonable reliance" upon the magistrate's facially valid search authorization. *See United States v. Pond*, 36 M.J. 1050, 1059 (A.F.C.M.R. 1993). Therefore, we hold that the military judge did not abuse his discretion in denying the motion to suppress the hair analysis results.

We resolve the remaining issues adversely to the appellant. Considering the evidence in the light most favorable to the prosecution, we hold that a rational factfinder could have found all essential elements of the offense 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 in the record of trial and making allowances for not having personally observed the witnesses, we are 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 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, 10 U.S.C. § 866(c). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court