UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major TERRY L. BOWMAN
United States Air Force

ACM 35597

19 December 2005

Sentence adjudged 11 April 2003 by GCM convened at Randolph Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Dismissal.

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

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

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Senior Judge:

A general court-martial, consisting of members, convicted the appellant, contrary to his pleas, of one specification of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced the appellant to a dismissal and this sentence was approved by the convening authority.

The appellant has submitted three assignments of error: (1) Whether the evidence is legally and factually sufficient to sustain the conviction; (2) Whether the military judge provided the members with an improper instruction as to the meaning of wrongful use;

and (3) Whether the military judge abused his discretion in permitting expert testimony that was contrary to his ruling on a motion in limine. Finding no error, we affirm.

Legal and Factual Sufficiency

The test for legal sufficiency is whether any 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 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). Our superior court has determined that the test for factual sufficiency is whether, 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 elements of wrongful use of a controlled substance are: (a) that the accused used a controlled substance; and (b) that the use by the accused was wrongful. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37b(2) (2005 ed.).[1]

> Knowledge of the presence of the controlled substance is a required component of [wrongful] use. Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the [appellant's] body or from other circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c(10); *United States v. Green*, 55 M.J. 76, 79 (C.A.A.F. 2001).

The appellant was randomly selected to submit a urine sample, pursuant to the Air Force urinalysis program. *See* Air Force Instruction (AFI) 44-120, *Drug Abuse Testing Program* (1 Jul 2000). The government's evidence on findings consisted of stipulations of expected testimony, documentary evidence, and the testimony of an expert in the field of forensic toxicology. This evidence established, among other things, the following:

a. That the government maintained a proper chain of custody for the appellant's urine sample;

b. That the initial screening tests performed on the appellant's urine were confirmed by means of gas chromatography/mass spectrometry (GC/MS);

[1] There were no changes in this provision of the previous version of the *Manual* that was in existence at the time of trial.

c. That the accuracy of GC/MS testing is "well recognized" in the scientific community;

d. That the appellant's urine tested positive at a level of 1084 nanograms per milliliter of the metabolite for methamphetamine;

e. That the DoD cutoff for methamphetamine is set at 500 nanograms per milliliter, to preclude a positive due to passive exposure to the drug;

f. That even a low recreational dose of methamphetamine would cause a "naïve user" to feel the effects of the drug;

g. There are no over the counter medications or products that would produce the kind of metabolite found in the appellant's urine.

h. That the metabolite for methamphetamine discovered in the appellant's urine does not occur naturally;

i. That methamphetamine can be prescribed for treatment of certain illnesses; however, the appellant's medical records revealed "no treatment or combinations of treatments . . . [that] would have caused him to test positive for methamphetamine."

The appellant testified in his own defense. He unequivocally denied ever having "wrongfully used methamphetamine" or any other illegal substance. He stated that he had no idea as to how he could have been exposed to the drug. On cross examination he stated, among other things, that:

a. he "had no reason to believe" that those officials involved in collecting his specimen had adulterated it in any way;

b. he was aware of no reason that anyone in the testing process would bear him a grudge or contaminate his sample;

c. the testimony in his case provided no reason to question the validity of the tests performed on his sample;

d. he had no law enforcement responsibilities which would authorize him to ingest methamphetamine;

e. he had no medical prescription for methamphetamine;

f. no member of his family had been prescribed the drug, so that it was not present in his home medicine cabinet;

g. he is very knowledgeable about what he puts into his body;

h. he would only accept food or medicine from someone he trusted "as far as [one] can trust a waitress or waiter or something like that."

The appellant also called six witnesses, who testified as to his outstanding military character and reputation for truthfulness. In addition he produced a massive amount of documentary evidence, including affidavits, award citations, performance reports, etc, to the same effect.

We have considered all matters properly before the court. We have paid particular attention to the appellant's denial of ever having used any illicit drug and to the quality and quantity of his evidence as to his good military character and his character for truthfulness. Character evidence may itself provide a basis for concluding that reasonable doubt exists as to an alleged offender's guilt. *United States v. Vandelinder,* 20 M.J. 41, 47 (C.M.A. 1985).

Nevertheless, considering the record as a whole, we conclude that the evidence "provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use . . . ." *Greene,* 55 M.J. at 81. Indeed, we conclude that wrongful use is the only reasonable explanation for the presence of methamphetamine in the appellant's urine under the circumstances of this case. Having virtually conceded the validity of the testing performed on his urine, the appellant was left to rely upon the possibility of some form of unknowing ingestion, at the hands of a waiter in a restaurant or some other such person. However, his testimony is devoid of any specific facts from which such an occurrence may reasonably be inferred. Drawing upon our own common sense and knowledge of the ways of the world we find unknowing ingestion to be so improbable that it does not raise "an honest misgiving" as to the quality of the government's proof. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 2-5-12 (15 Sept 2002). We hold that the conviction is both legally and factually sufficient.

Findings Instructions

This court reviews the content of a military judge's instructions de novo. *United States v. Maxwell,* 45 M.J. 406, 424 (C.A.A.F. 1996). There are two types of knowledge associated with wrongful use of a controlled substance: knowledge of the presence of the controlled substance and knowledge of its character. *United States v. Mance,* 26 M.J. 244, 253-4 (C.M.A. 1988).

In the case sub judice, the military judge instructed the members on the knowledge requirements of wrongful use of methamphetamine as follows:

> Use . . . means that the individual knew he was ingesting [the drug]. So for example, if someone snuck a white powder into an airman's nose while he was sleeping, he might be ingesting it, but it wouldn't qualify as use under the law, because he didn't know that it was there . . . To be punishable under Article 112a, [UCMJ,] use of a controlled substance must be wrongful . . . [A person] must have known of the nature of the substance he was using. So for example, if he put a white powder into his nose, he would be using it because he knew it was there. On the other hand, if he thought it was sugar, even though, in fact, it was cocaine, his use would not be wrongful, because he didn't know of the illegal nature of the substance.

The appellant claims that this instruction was error. Specifically, he complains about the judge's example of the airman who finds out that someone had inserted a drug into his nose while he was sleeping. The appellant asserts that this constitutes a:

> substantial deviation from the more reasonable and feasible unknowing use example from the standard *Benchbook* instruction: . . . *if a person places a controlled substance into the accused's (drink) (food) (cigarette) (_____) without the accused's becoming aware of the substance's presence*, then the accused's use was not knowing or conscious. D.A. Pam. 27-9, ¶ 3-37-2 (Note 2).

As a consequence, the appellant contends that "the misleading instruction served to improperly narrow the range of unknowing use scenarios that the prosecution had to effectively discount in order to meet their ultimate burden."

We have compared the judge's example with the instruction provided in the *Benchbook* and are unable to discover any meaningful difference between the two. Both examples describe a circumstance in which an accused is unaware of the introduction of a controlled substance into his body. The military judge neither stated nor implied that unknowing ingestion could only occur while an accused is unconscious, and there is no reason to conclude that the panel interpreted it that way. Accordingly, we hold that the military judge's instructions contained no error.

However, even assuming that the judge's example was erroneously narrow in its focus, we conclude that any such error did not operate to the material prejudice of the "substantial rights of the appellant." Article 59(a), UCMJ, 10 U.S.C. § 859(a). The instructions taken as a whole adequately advised the panel of the substantive and procedural rules governing their deliberations on findings. There is nothing in the record to suggest that the panel was confused as to the meaning of knowledge as it

applies to wrongful use of methamphetamine. Furthermore, the trial defense counsel did not object to the instructions, buttressing our conclusion that the instructions were, on the whole, at least adequate. We hold that, even if there was error in the judge's instructions as to the meaning of knowledge, the error was harmless beyond a reasonable doubt. *See Mance*, 26 M.J. at 256.

Expert Testimony

We resolve the remaining error adversely to the appellant. The military judge granted a defense motion in limine precluding the government from eliciting information from its expert about the number of positive results obtained at the forensic laboratory. Even if the expert's testimony contravened the military judge's ruling, we hold that the error was harmless. The defense at trial did not seriously challenge the validity of the testing performed on the appellant's sample, relying instead upon the possibility of unknowing ingestion; therefore, we conclude that the testimony in question did not exert "a substantial influence on the findings." *See United States v. Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002). Additionally, we conclude that there is no basis to award relief pursuant to the cumulative error doctrine. *See United States v. Dollente*, 45 M.J. 234 (C.A.A.F. 1996).

Conclusion

The approved 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); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court