UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MATTHEW C. BRANNON
United States Air Force

ACM 36865

21 March 2008

Sentence adjudged 23 August 2006 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Ronald A. Gregory (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Matthew C. Hoyer, Captain John S. Fredland, and Captain Tiaundra D. Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

In accordance with his pleas, all of which were conditional pending appeal except for Specification 3 of the Charge, the appellant was found guilty of wrongful use of methamphetamine, wrongful possession of methamphetamine, with the intent to distribute, wrongful use and possession of marijuana, and wrongful possession of hydrocodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Appellant raises the following issue:

Whether the military judge abused his discretion when he denied the accused's motion to suppress evidence seized in violation of the Fourth Amendment.

We find the appellant's contention to be without merit for the reasons stated below.

Background

Prior to pleas, the appellant made a motion to suppress evidence consisting of marijuana, hydrocodone tablets, and drug paraphernalia discovered during a warrantless search of his vehicle. At approximately midnight on 7 July 2005, MS, a police officer of the Las Vegas Police Department, received a "suspicious vehicle" report from the police dispatcher. MS proceeded to the location in a mobile home park, a high crime area known for shootings, narcotics, and recovered stolen vehicles. He located a black Toyota 4-Runner which generally fit the report's vehicle description of a "dark-colored pick-up truck." MS pulled in behind the Toyota and turned on his two floodlights and the emergency red and blue lights, all mounted on the top of his police cruiser.

MS approached the driver's side of the vehicle which had its engine running. He then observed the appellant in the driver's seat. The appellant's head was tilted back with his mouth open. In similar situations MS had encountered in the past, the driver was found to be intoxicated. MS then shined his flashlight in the appellant's face and knocked on the truck's window. The appellant came to; MS identified himself as a police officer and asked the appellant to step out of the vehicle.

As the appellant began to exit the vehicle, MS shined his flashlight on the floor of the vehicle in front of the driver's seat to check for the presence of weapons. He observed two bright orange caps similar to those he had previously seen on hypodermic needles. They were inside of a plastic sandwich bag. He then observed the tip of a hypodermic needle.

MS escorted the appellant to his cruiser where they met up with another officer, OL, who had just arrived as back-up. OL conducted a pat down and searched the appellant's pockets. OL found a blue metal smoking pipe in one of the appellant's pockets. MS observed that the pipe smelled of burnt marijuana.

The appellant was handcuffed and placed under arrest for the possession of narcotics paraphernalia. MS advised the appellant of his Miranda rights. MS then conducted a search of the vehicle. MS discovered a velvet Crown Royal bag in an unlocked compartment in the right-rear of the hatchback section of the trunk. The bag contained a digital scale and multiple baggies containing a white crystal substance. Each bag was marked with what appeared to be a weight designation, such as "6 g." There were other bags which contained what appeared to be marijuana. In addition, the velvet

bag contained syringes and a spoon, the head of which was wrapped in a small plastic bag containing a hard white crystallized substance.

Continuing the search, MS also discovered a black notebook between the driver's and front passenger's seat. Written inside were numbers with grams, what appeared to be codenames, dollar amounts, some of which had the notation "total profit," and some with the notation "8-ball." Based on his training and experience, MS determined that these makings constituted a log of narcotics transactions.

MS decided not to impound the appellant's truck due to the appellant's having been cooperative. The appellant contacted his wife to have her pick up the truck. MS testified that, had the truck been impounded, an inventory would have been conducted of the truck's contents.

In announcing his findings, the military judge found that MS's discovering the appellant asleep with the motor running gave him reasonable suspicion of criminal activity – operating a vehicle while under the influence of alcohol or drugs. MS's spotting of the two caps for hypodermic needles provided probable cause to search the rest of the appellant's vehicle. The resulting discovery of drug paraphernalia led to the appellant's arrest, following which the appellant's truck could have been impounded – which would have resulted in an inventory during which the drugs would have been discovered. The motion to suppress was denied.

Discussion

A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *United States v. Barnett,* 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

Under the "automobile exception" to the Fourth Amendment's warrant requirement for a search of personal property, police officers may search an entire operable vehicle, including the trunk, without the need to obtain a search warrant, if they have probable cause to believe the vehicle contains contraband. *United States v. Ross*, 456 U.S. 798, 799-800 (1982). Appellate military courts have applied *Ross*, see *United States v. Switzer*, 17 M.J. 540 (A.C.M.R. 1983), *pet. denied*, 17 M.J. 438 (C.M.A. 1984) and it has been codified in Mil. R. Evid. 315(g)(3).

In *United States v. Owens*, 51 M.J. 204 (C.A.A.F. 1999), the accused's car broke down, and a tow truck driver took his car to a service station. While working on the car, the tow truck driver noted a large amount of stereo equipment with cut wires in the back of appellant's car and notified police. The court held that police officer's initial search of

the vehicle was proper under the automobile exception when he had probable cause to suspect equipment was stolen. *Id.* at 211.

This Court has also applied the automobile exception. In *United States v. Torres*, 60 M.J. 559, 563 (A.F. Ct. Crim. App. 2004) we held that the search of a servicemember's automobile at the time of his arrest by civilian police was proper on two independent grounds. First, an officer saw in plain view a sheriff's badge in the servicemember's vehicle. Because the servicemember was not a law enforcement officer, it was illegal under Texas law for him to have possessed the badge. This established probable cause for an arrest. Second, this same probable cause also justified the warrantless search of the vehicle under the "automobile exception" of Mil. R. Evid. 315(g)(3).

Conclusion

We concur with the military judge's conclusion that the appellant's posture when first observed in the vehicle, along with the vehicle's engine running, established a reasonable suspicion that the appellant had been operating the vehicle while under the influence of alcohol or drugs. After having detected no odor of alcohol emanating from the appellant and upon observing the orange caps and hypodermic needles on the floor of the truck, MS had probable cause to suspect that the appellant's vehicle contained drug-related contraband. Accordingly, the warrantless search of the entire vehicle was proper and the military judge did not abuse his discretion by denying the appellant's motion to suppress.

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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, GS-11, DAF
Clerk of the Court