UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman HEATHER M. BREWSTER
United States Air Force

ACM 37247

07 May 2009

Sentence adjudged 28 March 2008 by GCM convened at RAF Alconbury, United Kingdom. Military Judge: Gordon R. Hammock (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-3.

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

Appellate Counsel for the United States: Major Jeremy S. Weber.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted her of two specifications of negligent dereliction of duty, two specifications of making a false official statement, one specification of wrongful use of morphine, and one specification of wrongful use of oxycodone, in violation of Articles 92, 107, and 112a, UCMJ, 10 U.S.C. §§ 892, 907, 912a.[1] The adjudged and approved sentence consists of a bad-conduct discharge, five months confinement, and a reduction to the grade of E-3.

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[1] The appellant was charged with two specifications of willful dereliction of duty but the military judge found her guilty of the lesser-included offense of negligent dereliction of duty.

On appeal the appellant asserts: (1) the Record of Trial (ROT) does not qualify as a complete record of trial in accordance with Article 54, UCMJ, 10 U.S.C. § 854, and Rule for Courts-Martial (R.C.M.) 1103; (2) the convening authority's Action should be set aside because of a discrepancy with the promulgating order; (3) the military judge abandoned his impartial and neutral role; and (4) the evidence is legally and factually insufficient to sustain her wrongful use of controlled substance convictions.[2] We disagree and, finding no prejudicial error, affirm.

Background

On 16 June 2007, the appellant, while partying at a local night club, ingested two pills she had received from an unnamed British citizen. At the time the appellant ingested the pills she was a medical laboratory apprentice and Air Force Demand Reduction Urinalysis Testing Monitor assigned to Royal Air Force (RAF) Upwood, United Kingdom. On 20 June 2007, the appellant was randomly selected for a urinalysis. She provided a urinalysis sample but later became concerned because of the pills she had ingested. In an effort to void her sample, the appellant transferred her sample to a new bottle, signed her name on the bottle, and replaced the chain of custody document with a new document upon which she had forged her supervisor's signature. The appellant's urine sample was sent to the Air Force Drug Testing Laboratory for analysis, and despite her efforts, tested positive for morphine and oxycodone.

On 11 October 2007, agents with the Air Force Office of Special Investigations (AFOSI) summoned the appellant to their office for an interview. After proper rights advisements, the appellant waived her rights and confessed to: (1) ingesting what she thought was ecstasy; (2) tampering with her urine specimen; and (3) forging her supervisor's signature on a new chain of custody document. A portion of the evidence used to convict the appellant at trial consisted of a stipulation of expected testimony from Mr. FB, the RAF Lakenheath Demand Reduction Program Manager. Trial counsel read Mr. FB's stipulation of expected testimony to the military judge. However, rather than transcribing the reading of the stipulation verbatim, the court reporter only noted that the stipulation had been read verbatim into the evidence. The court reporter's use of this method forms the basis of the appellant's first assignment of error.

Incomplete ROT

This Court reviews de novo whether a record of trial is complete, or if there are omissions, whether the omissions are substantial. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000); *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). Both parties acknowledge the appellant's right to a complete record of trial under the circumstances of this case. Articles 19 and 54, UCMJ, 10 U.S.C. §§ 819, 854; R.C.M.

[2] The fourth issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

1103(b)(2)(A); *Henry*, 53 M.J. 108. The issue at hand is whether the omission of the verbatim reading of the stipulation from the record is substantial.

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [g]overnment must rebut." *Henry*, 53 M.J. at 111 (citing *United States v. McCullah,* 11 M.J. 234, 237 (C.M.A. 1981); *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973)). However, "[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript." *McCullah,* 11 M.J. at 236-37 (quoting *Boxdale*, 47 C.M.R. at 351) (alteration in original). Whether a given omission is substantial is a question that we approach on "a case-by-case" basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

We find the omission from the record of the verbatim reading of the stipulation insubstantial. Requiring the court reporter to transcribe verbatim the reading of the stipulation would have been redundant – the stipulation had been read and admitted as an appellate exhibit. We decline today, as we have in the past, to require redundancy that elevates form over substance. *See United States v. Wilhelm*, 36 M.J. 891, 895 (A.F.C.M.R.) (finding that the court reporter's note in the record that she read the transcripts was sufficient and that requiring the court reporter to set forth in the record the verbatim reading of the transcripts would have been redundant), *rev. denied*, 38 M.J. 454 (C.M.A. 1993). In short, we find the record both complete and verbatim.

Erroneous Promulgating Order

We note three mistakes in the promulgating order. First, the promulgating order erroneously states the accused was arraigned at RAF Upwood, United Kingdom, wherein actually the accused was arraigned at RAF Alconbury, United Kingdom. Second, the specifications of Charge II, in relevant part, read "and was then known by the said to be so false," when the specifications should read "and was then known by the said *Senior Airman Heather M. Brewster* to be so false," because this is the language of which the appellant was convicted. Finally, both parties also acknowledge a discrepancy between the convening authority's Action and the Action highlighted in the promulgating order. In his Action, the convening authority stated, "[T]he sentence is approved and, except for the bad conduct discharge, will be executed. The Air Force Corrections System is designated for the purpose of *confinement*, and the confinement will be served therein." (Emphasis added). However, the Action highlighted in the promulgating order states, "[T]he sentence is approved and, except for the bad conduct discharge, will be executed. The Air Force Corrections System is designated for the purpose of *rehabilitation in the Air Force Return to Duty Program*, and the confinement will be served therein." (Emphasis added).

The appellant avers the Action listed in the promulgating order evinces intent on the part of the convening authority to grant the appellant entry into the Return to Duty Program (RTDP). The government asserts the convening authority's Action, as signed by him, unambiguously evinces intent on the part of the convening authority not to grant the appellant entry into the RTDP. They aver the promulgating order is erroneous. Axiomatically, the convening authority's Action is the Action he personally signs and places in the record of trial. R.C.M. 1107(f)(1). If there is a discrepancy between the convening authority's Action and the Action highlighted in the unsigned promulgating order, the convening authority's Action controls. In the instant case, the convening authority used facially clear and unambiguous language that denied, by his Action, the appellant's entry into the RTDP. Accordingly, the convening authority's Action need not be set aside because of the erroneous promulgating order.[3] His Action is legal.

Military Judge's Impartiality and Neutrality

We review a military judge's refusal to recuse himself for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001); *United States v. Wright*, 52 M.J. 136, 141 (C.A.A.F. 1999). "An accused has a constitutional right to an impartial judge." *Wright*, 52 M.J. at 140 (citing *Ward v. City of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). There is a strong presumption that a military judge is impartial in the conduct of judicial proceedings. *United States v. Foster*, 64 M.J. 331, 333 (C.A.A.F. 2007); *see also United States v. Jarvis*, 46 C.M.R. 260, 262 (C.M.A. 1973); *United States v. Kratzenberg*, 20 M.J. 670, 672 (A.F.C.M.R. 1985).

Except where the parties have waived disqualification of the military judge after full disclosure of the basis for disqualification, a military judge must recuse himself "in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). This overriding concern with appearances stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence; any question of a judge's impartiality threatens the purity of the judicial process and its institutions. *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). Lastly, when a military judge's impartiality is challenged on appeal, the test is whether the military judge's actions would cause a reasonable person observing the trial to question the court-martial's legality, fairness, and impartiality. *Foster*, 64 M.J. at 333.

In the case *sub judice*, the appellant avers the military judge abandoned his impartial and neutral role by: (1) questioning the parties on the proof required on the willful dereliction and false official statement specifications; (2) posing questions to the trial counsel during the trial counsel's opening statement and closing argument; and (3)

[3] We do, however, order the promulgation of a corrected court-martial order that accurately reflects RAF Alconbury, United Kingdom, as the place of arraignment, that accurately states the language of the specifications of Charge II of which the appellant was convicted, and that accurately reflects the convening authority's Action.

by questioning witnesses. We have reviewed the relevant sections in the record of trial and conclude the military judge did not abandon his impartial and neutral role. With respect to his questioning of the parties on the proof required for the aforementioned specifications, we note his questions came as a result of motions to dismiss (for failure to state an offense) by the trial defense counsel. His questions do not evince a departure from his impartial and neutral role but rather exemplifies a conscientious effort on his part to fulfill his duties as the arbiter on motions. *See* R.C.M. 801(a)(4), (e).

The military judge's questions to the trial counsel and the trial defense counsel, during the trial counsel's opening statement and closing argument and the trial defense counsel's closing argument, while unusual, likewise do not evince a departure from his impartial and neutral role. It is clear from the record that the military judge, as the trier-of-fact, was simply attempting to understand the positions of the respective parties.[4] Finally, the military judge's questions to Staff Sergeant (SSgt) MW, Dr. MB, SSgt JW, and Special Agent SG, as extensive as they were, fell within his bailiwick as the trier-of-fact and do not evince a departure from his an impartial and neutral role. Mil. R. Evid. 614(b). The military judge did not abandon nor did he appear to abandon his impartial and neutral role.

Legal and Factual Sufficiency

In accordance with Article 66(c), UCMJ, 10 USC § 866(c), 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 (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) (citing *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial in a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the wrongful use of controlled substance specifications. On this point we note that the appellant's positive urinalysis test results, her confessions, and testimony from SSgt CM, a witness who observed the appellant provide her urine sample, legally support the appellant's wrongful use of a controlled substance convictions.

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[4] While we did not find a departure in this case, such questions may, under different circumstances, result in the finding of a departure or an appearance of a departure from the impartial and neutral role of a military trial judge.

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." *Turner*, 25 M.J. at 325. 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; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of these specifications.

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

AFFIRMED.

OFFICIAL

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