UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DONALD A. CALEF JR.
United States Air Force

ACM 34163

25 January 2002

Sentence adjudged 10 May 2000 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Bruce T. Brown (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 135 days.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Captain Kyle R. Jacobson.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Christa S. Cothrel.

Before

BURD, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of the wrongful use of marijuana. He was also found guilty, contrary to his pleas, of the wrongful use of cocaine, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The sentence adjudged and approved was a bad-conduct discharge and confinement for 135 days. The appellant raises several issues before this Court. We will address each below.

Legal and Factual Sufficiency of the Evidence—Use of Cocaine

The appellant maintains the evidence is not legally or factually sufficient to support his conviction for the wrongful use of cocaine. We do not agree.

On 5 November 1999, the appellant was walking along a road on Langley Air Force Base (AFB), when a noncommissioned officer (NCO) stopped and gave him a ride. Earlier that day, the appellant told the NCO his car was in the shop. The NCO inquired about the appellant's car. The appellant became visibly upset and said his car was stolen. When the NCO inquired further, the appellant admitted he had smoked some "weed" with some others the night before, and lent them his car. He related they did not return the vehicle, and he feared it was stolen. The NCO reported the statement. Agents from the Air Force Office of Special Investigations (AFOSI) interviewed the appellant, who confessed to using marijuana. He also consented to a urinalysis test, which was positive for the metabolites of both marijuana and cocaine.

At trial, the appellant pled guilty to a specification alleging wrongful use of marijuana. After a proper inquiry, the military judge accepted his plea.

The appellant pled not guilty to a separate specification alleging the wrongful use of cocaine. The parties stipulated to the appellant's marijuana use, his confession to authorities, and the chain of custody and laboratory results of his urinalysis sample. The prosecution presented the testimony of a forensic toxicologist, who testified about the testing procedures and the test results, and that the metabolite of cocaine is not naturally produced by the body. There was extensive testimony, through both direct and cross-examination, about the rate at which the cocaine metabolite is eliminated from the body, and the circumstances under which a user would have felt the physiological effects of the drug. The appellant did not testify.

The prosecution argued that the presence of the cocaine metabolite in the appellant's body permitted the inference that the appellant's use was knowing and wrongful. The defense counsel argued that the appellant's use was unknowing, probably because the cocaine was mixed with the marijuana he smoked. The military judge found the appellant guilty of the wrongful use of cocaine.

Citing *United States v. Campbell*, 50 M.J. 154 (1999) and *United States v. Campbell*, 52 M.J. 386 (2000), the appellant argues the evidence does not exclude the possibility of unknowing ingestion. The appellant argues that the government did not produce direct or circumstantial evidence, other than the urinalysis report, to prove the appellant's guilt.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we will approve only those findings of guilt we determine to be correct in both law and fact. The test for legal

sufficiency is whether, when the evidence is viewed in the light most favorable to the government, any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). This is the test we apply in this case. *But see United States v. Nazario*, 56 M.J. 572 (A.F. Ct. Crim. App. 2001); *United States v. Washington*, 54 M.J. 936, 941 (A.F. Ct. Crim. App. 2001) (indicating Congress intended this Court to employ a preponderance of the evidence test in determining the factual sufficiency of the evidence).

We find the evidence legally and factually sufficient to sustain the appellant's wrongful use of cocaine beyond a reasonable doubt. The military judge properly performed his role as the "gatekeeper" with regard to the admissibility of the expert testimony. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993); *United States v. Green*, 55 M.J. 76, 80, *cert. denied*, __ U.S. __, 122 S. Ct. 469 (2001); *United States v. Bush*, 47 M.J. 305, 310 (1997). The testimony of the expert provided a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use of cocaine. *Green*, 55 M.J. at 81; *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987). Certainly, the military judge may rely on the permissive inference when deciding the wrongfulness of the appellant's use of the drug. *Green*, 55 M.J. at 81.

Multiple Drug Offenses

The appellant also makes several arguments based upon his presumption that the offenses occurred simultaneously. He argues that he cannot be lawfully convicted of using both marijuana and cocaine where the use is concurrent, that the Due Process Clause prohibits two separate convictions where one drug use was knowing but the other was unknowing, and that separate convictions and punishment for using two drugs simultaneously is an unreasonable multiplication of charges. We find no merit to any of these arguments.

First, it is clear from the record of trial that the military judge did not find that the appellant's use of cocaine was unknowing. Because the appellant's arguments are based upon the assumption that the cocaine use was unknowing, they must fail.

Even if the appellant used marijuana and cocaine at the same time, the appellant's arguments are still unpersuasive. Article 112a(a), UCMJ, provides, "Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct." We find that the language clearly establishes congressional authorization to separately charge and punish each drug involved in an incident of drug misconduct. *See United States v. Inthavong*, 48 M.J. 628, 631 (Army Ct.

Crim. App. 1998) (including an excellent analysis of the development of Article 112a, UCMJ, and federal court opinions in this area).

The appellant relies, both at trial and on appeal, on an earlier opinion of this Court, *United States v. Domingue*, 24 M.J. 766 (A.F.C.M.R. 1987). That opinion held, without citation to authority, that where an accused pled guilty to using marijuana and cocaine concurrently, but averred he was unaware of the presence of the cocaine, the plea was improvident because the inquiry did not show the accused knowingly used cocaine. *Id.* at 767. We find the reasoning in *Domingue* unpersuasive. Moreover, that case was effectively overruled by our superior court's decision in *United States v. Stringfellow*, 32 M.J. 335 (C.M.A. 1991). In order to violate Article 112a, UCMJ, an accused must know that the substance he possesses or uses is a controlled drug, rather than an innocent substance. The fact that an accused did not know the exact pharmacological identity of the controlled substance he ingested is of no legal consequence. *Stringfellow*, 32 M.J. at 336.

There is no basis to find an unreasonable multiplication of charges in this case. The government has the discretion "to charge the accused for the offense(s) which most accurately describe the misconduct and most appropriately punish the transgression(s)." *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994) (citing *Ball v. United States*, 470 U.S. 856, 859 (1985)). The appellant's argument that charging two offenses "exaggerated his criminality and unfairly increased his exposure to punishment" is unpersuasive, for that analysis would apply to every instance where there was more than one charge arising from a single transaction. The policy does not prohibit every multiplication of charges, only the "unreasonable" multiplication of charges. *See* Rule for Courts-Martial (R.C.M.) 307(c)(4), Discussion. The appellant has failed to demonstrate why the charging is this case was unreasonable. The evidence shows the appellant wrongfully used two different drugs, and the government charged him with wrongfully using two different drugs. The charges in this case were not unreasonably multiplied.

Post-trial Processing Error

The appellant notes error in the post-trial processing of this case. On the face of the record, the appellant's argument is correct. However, the government has cured the error in the record through a post-trial affidavit from the convening authority.

After trial, the civilian defense counsel submitted a request for clemency and allegations of legal error. These were received before the staff judge advocate's recommendation (SJAR) was written. Defense counsel did not reserve the right to submit additional clemency matters. Subsequently, the SJAR was served on the accused and his counsel. The SJAR summarized the defense submissions, and listed them as attachments. On 30 June 2000, the civilian defense counsel sent a letter acknowledging receipt of the

SJAR, and reiterating a portion of his earlier request for clemency. There is no indication in the record that the staff judge advocate (SJA) prepared an addendum, or any other document advising the convening authority that he must consider the matters submitted by the appellant. Apparently the SJA did not forward the 30 June 2000 response letter to the convening authority. The convening authority took formal action approving the findings and sentence 11 days after the SJAR was served on the defense.

The appellant claims error in the post-trial process. He points out that the SJA failed to advise the convening authority that he was required to consider the matters submitted by the appellant, and that the record does not otherwise reveal that the convening authority considered the clemency submissions.

In *United States v. Gaddy*, 54 M.J. 769, 773 (A.F. Ct. Crim. App. 2001), this Court summarized the military law in this area.

> Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2), requires the convening authority to consider matters submitted by an accused before taking action on a sentence. Appellate courts will not speculate as to whether a convening authority considered these materials. *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989). This Court presumes a convening authority has done so if the SJA prepared an addendum to the SJAR that (1) tells the convening authority of the matters submitted, (2) advises the convening authority that he or she must consider the matters, and (3) the addendum listed the attachments, indicating they were actually provided. *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). If no addendum to the SJAR is prepared, then the record must reflect that the convening authority was properly advised of the obligation to consider the matters submitted, and there must be some evidence (such as the convening authority's initials) showing the matters were actually reviewed. *United States v. Godreau*, 31 M.J. 809, 811-12 (A.F.C.M.R. 1990).

In this case, the matters submitted by the accused are listed in the SJAR and included in the record. However, there is no indication that the SJA advised the convening authority that he must consider the matters, and there is no independent evidence in the record that the convening authority actually considered the clemency matters. Therefore, this Court finds the record ambiguous. In such circumstances, we have considered affidavits from the convening authority to try to resolve this factual issue. *United States v. Crawford*, 34 M.J. 758, 759 (A.F.C.M.R. 1992); *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989).

The government submitted an affidavit from the convening authority regarding the post-trial processing at issue. The convening authority described his regular practices, and concluded that he was "confident" that he reviewed the clemency matters in this

case. The convening authority's affidavit was more than mere speculation that he considered the matters submitted. We also note that the submissions were summarized in the SJAR and listed as attachments thereto; the SJAR was, in turn, listed as an attachment to a staff summary sheet signed by the convening authority. We find as a matter of fact that there is sufficient evidence in this case that the convening authority properly considered the defense submissions. *Crawford*, 34 M.J. at 761.

However, that does not end our inquiry. The civilian defense counsel submitted an additional clemency request—the letter of 30 June 2000, which reiterated his earlier request for the appellant's early release to attend college. The SJA did not provide this to the convening authority. We find this was error. Article 60(c)(2), UCMJ. The SJA must provide to the convening authority clemency requests received before the convening authority takes action. We also find that this error was harmless, because the clemency request merely repeated the earlier request, which the convening authority considered. Article 59a, UCMJ, 10 U.S.C. § 859a.

The findings 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, SSgt, USAF
Chief Court Administrator