UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRIAN C. CROCKETT
United States Air Force

ACM 35268

29 March 2004

Sentence adjudged 19 June 2002 by GCM convened at Offutt Air Force Base, Nebraska. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 19 months.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Major Linette I. Romer, and Captain Steven R. Kaufman.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

JOHNSON-WRIGHT, Judge:

In accordance with his pleas, the appellant was convicted of one specification of being absent without leave and three specifications of wrongful appropriation of military and private property, in violation of Articles 86 and 121, UCMJ, 10 U.S.C. §§ 886, 921. Contrary to his pleas, the appellant was also convicted of wrongfully disposing of military property, wrongfully using cocaine, and violating a lawful order, in violation of Articles 108, 112a, and 92, UCMJ, 10 U.S.C. §§ 908, 912a, 892. A general court-martial composed of a military judge, sitting alone, sentenced the appellant to a bad-conduct discharge and confinement for 19 months. The convening authority approved the

sentence and waived automatic forfeitures of pay and allowances for the benefit of the appellant's family. The appellant raises two errors for our consideration: (1) whether the evidence that supports cocaine use is legally and factually sufficient; and (2) whether the addendum to the staff judge advocate's recommendation (SJAR) contained new matter. We find no error and affirm.

I. Legal and Factual Sufficiency

The appellant avers that the evidence concerning cocaine use is legally and factually insufficient. The appellant notes this case is "essentially a naked urinalysis case" in which the government relied on a 50-page Air Force Drug Testing Laboratory "litigation package" and expert testimony to prove that the appellant wrongfully used cocaine. Consequently, the appellant argues, irregularities in the testing process[1] of the appellant's urine sample, as well as work performance infractions[2] of two technicians who were involved in the testing of the appellant's urine sample, undermined the reliability of the tests and the government's ability to carry its burden.

However, we note that in addition to the laboratory report and expert testimony, the prosecution also offered testimony from a supervisor who observed the appellant on the day that he provided a urine sample for urinalysis. The supervisor testified that the appellant's eyes were glassy, he was frantic, and he was perspiring. He also stated that the appellant "would make trips back and forth to the sink in the break room." Moreover, the government's expert credibly explained the minor irregularities in the testing procedures that required retesting of the appellant's urine sample. Likewise, the expert credibly addressed the work performance infractions of the two employees at the laboratory.

We may affirm only those findings of guilty we find are correct in law and fact and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. §866(c). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, any rational fact finder could have found all of the essential elements 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). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having observed the witnesses, we are convinced of the appellant's

[1] Retesting (three times) of the appellant's sample was required because of error codes and the necessity to dilute the urine to properly read the concentration levels. Dr. Vincent Papa, the government expert, sufficiently explained why retesting was required and that the appellant's sample was not compromised.

[2] The certifications for two employees who had verified the appellant's extraction process had been suspended. This particular extraction process involved the verification of the appellant's identity barcode on his vial and the chain of custody log. One employee's certification was suspended 5 days later for reasons unrelated to the testing of the appellant's sample. The other employee, whose certification was currently suspended, was permitted to perform this duty involving the appellant's sample because it was not a certifiable task.

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)).

Having carefully reviewed the record of trial, we find the evidence offered by the prosecution to prove wrongful use of cocaine was credible and convincing. We find that there is sufficient evidence to convince a rational trier of fact that the accused is guilty beyond a reasonable doubt of wrongfully using cocaine at the time and place in question. Furthermore, weighing all of the evidence admitted at trial and being mindful of the fact that we have not seen or heard the witnesses, we are ourselves convinced beyond a reasonable doubt that the appellant wrongfully used cocaine in violation of Article 112a, UCMJ. Thus, we hold that the evidence is legally and factually sufficient.

II. New Matter in the SJAR

The second issue before this Court is whether the staff judge advocate (SJA) erred by failing to serve on the defense the addendum to the SJAR. Specifically, the appellant claims it was new matter for the SJA to state that the appellant "has not realized the full import of his crimes and his personal responsibility for them" and that continued confinement will "keep him sober longer and help him maintain sobriety after confinement."

The SJA is authorized to supplement the post-trial recommendation after receiving the comments of defense counsel, however, "[w]hen new matter is introduced . . . counsel for the accused must be served with the new matter and given a further opportunity to comment." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997); Rule for Courts-Martial (R.C.M.) 1106(f)(7). The term "new matter" includes "matter from outside the record of trial and issues not previously discussed." *Chatman*, 46 M.J. at 323. New matter does not ordinarily include matters included in the record of trial or "any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." R.C.M. 1106(f)(7), Discussion.

The appellant contends that the SJA improperly introduced "new matter" into post-trial processing and should have served the addendum on the defense. We disagree. The SJA's comments merely addressed the many comments asserted by the appellant in his clemency matters. *United States v. Komorous*, 33 M.J. 907, 910 (A.F. Ct. Crim. App. 1991) (the defense "must anticipate that a staff judge advocate will comment on the defense submissions, and fair, accurate comment on legal and factual positions is permitted"). Moreover, even if the SJA's comments were "new matter" that was neither neutral nor trivial, the appellant has failed to establish a "colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324.

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

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator