UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WALTER S. FLORES JR.
United States Air Force

ACM S30413

31 October 2005

Sentence adjudged 18 December 2002 by SPCM convened at Fairchild Air Force Base, Washington. Military Judge: R. Scott Howard.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $737.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Andrew S. Williams, Major Rachel E. VanLandingham, Major Andrea M. Gormel, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. McCluer.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant contends the military judge abused his discretion by allowing a prosecution witness to testify about his uncharged misconduct. He alleges further abuse of discretion when the military judge limited the trial defense counsel's cross-examination of the prosecution's urinalysis expert. We find no error and affirm.

The appellant was charged with a variety of drug and dishonesty offenses, but the court members only found him guilty of one specification of cocaine use, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of making a false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907. His cocaine conviction resulted from a positive random urinalysis conducted in September 2002. Coincidentally,

on the same day he submitted his urine sample, he also testified in the Article 32, UCMJ, 10 U.S.C. § 832, investigation of one of his friends. His statement to the Article 32, UCMJ, investigating officer that he had never used cocaine formed the basis for the false official statement conviction.

The prosecution introduced the appellant's positive urinalysis test results to prove these offenses. They also presented testimony from Senior Airman (SrA) Lawrence Lyons, one of the appellant's friends, that in December 2001, the appellant asked him twice where he could get some cocaine. SrA Lyons also testified that during the same timeframe, one of their mutual friends was apprehended. When the appellant heard about the apprehension, he asked SrA Lyons if anyone had "narc'd them out."

During his trial, the appellant raised a motion in limine to exclude SrA Lyons' testimony about these statements. The military judge found the testimony relevant to both the cocaine and the false official statement offenses. He found the appellant's statements to SrA Lyons tended to show his desire to purchase cocaine and his consciousness of guilt. The military judge also applied a balancing test under Mil. R. Evid. 403 and found that the probative value of the statements outweighed any prejudicial effect they might have. The appellant now claims the military judge abused his discretion by allowing the witness to testify about these statements.

The appellant cites *United States v. Cousins*, 35 M.J. 70 (C.M.A. 1992), for the proposition that these statements did not make the appellant's cocaine use any more probable. We disagree. *See United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). *Cousins* involved evidence of prior multiple uses of methamphetamine to prove use of cocaine. The appellant's case is different. The evidence shows the appellant was seeking cocaine several months prior to his positive urinalysis. This is relevant to prove his knowing ingestion of cocaine. It is also relevant with regard to the appellant's assertion that he had "never used cocaine." The consciousness of guilt evidence likewise supports both offenses. The military judge did not abuse his discretion when he admitted this relevant evidence. *See United States v. Springer*, 58 M.J. 164, 167 (C.A.A.F. 2003).

The appellant next complains that the military judge abused his discretion by limiting his cross-examination of a prosecution witness in violation of his Sixth Amendment rights. *See United States v. Bahr*, 33 M.J. 228, 232 (C.M.A. 1991). At trial, the appellant's trial defense counsel sought to cross-examine the prosecution's urinalysis expert on a variety of past abnormalities that had taken place at the Air Force Drug Testing Laboratory. The prosecution filed a motion in limine to exclude this information. The military judge granted the motion. He found the incidents too remote in time to be relevant and too confusing to add any probative value. He did, however, let trial defense counsel cross-examine the witness on abnormalities bearing a close relationship to the appellant's urine sample.

The appellant's reliance on *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004), to support his contention is misplaced. In that case, the government failed to provide discovery to the defense about laboratory irregularities that occurred within four months of the accused's urinalysis test. In the appellant's case, most of the irregularities were much more remote in time. For those abnormalities that were not so remote, the military judge allowed the appellant's defense counsel to cross-examine the prosecution witness. *See United States v. Israel*, 60 M.J. 485 (C.A.A.F. 2005). We find the military judge did not violate the appellant's Sixth Amendment rights, nor did he abuse his discretion by limiting the cross-examination of the urinalysis expert. *See United States v. Shaffer*, 46 M.J. 94, 98 (C.A.A.F. 1997).

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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court