UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Second Lieutenant ANDREW F. FOX
United States Air Force

ACM 37119

22 January 2009

Sentence adjudged 19 September 2007 by GCM convened at Vandenberg Air Force Base, California. Military Judge: Steven J. Ehlenbeck.

Approved sentence: Dismissal and confinement for 45 days.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Steven R. Kaufman.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his plea, of knowingly and wrongfully using marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sentenced the appellant to a dismissal and confinement for 45 days. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts the evidence is legally and factually insufficient to sustain his conviction.* For the reasons set out below, we find no error and therefore affirm the findings and sentence.

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* This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Legal and Factual Sufficiency of the Evidence

The appellant asks that we find the evidence to be legally and factually insufficient to support his conviction because the prosecution failed to establish a complete chain of custody for his urinalysis sample, the government expert testified that "innocent ingestion" was a possible explanation for the test results, and the appellant's illness when his sample was collected, to include vomiting, is inconsistent with the use of marijuana. These assertions are without merit.

In accordance with Article 66(c), UCMJ, 10 U.S.C. § 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) (citations omitted). 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). 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) (citations omitted).

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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 considered the evidence produced at trial in a light most favorable to the government, and find a reasonable factfinder could have found all of the essential elements of wrongful use of marijuana beyond a reasonable doubt. Thus, we find the appellant's conviction to be legally sufficient. As for factual sufficiency, we have carefully considered the evidence under this standard, to include the appellate briefs, and find ourselves convinced beyond a reasonable doubt that the accused is guilty of the charge and its specification.

As for the claim that the chain of custody was broken, it is well settled that "to establish chain of custody, 'the [g]overnment is not required to exclude every possibility of tampering.'" *United States v. Harris*, 55 M.J. 433, 440 (C.A.A.F. 2001) (quoting *United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993)). In the appellant's case, all of the other facts and circumstances surrounding the collection of the appellant's urine lead to the clear conclusion that a legally valid chain of custody existed. On the testimony from the expert that the results were inconsistent with either his illness or proof

of illegal usage, we find neither claim persuasive. The expert testified that while marijuana does have antiemetic qualities, it would "maybe tend to suppress it, but it doesn't necessarily prevent it." As for the possibility of innocent ingestion, the expert's testimony was that it was merely possible that someone could have unknowingly eaten brownies and not realized that they were laced with marijuana. While a possibility, we do not consider it a reasonable possibility.

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