UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman VANESSA GARCIA
United States Air Force

ACM 37302

09 June 2009

Sentence adjudged 26 June 2008 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance J. Wood, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Major Jeremy S. Weber, Captain Megan E. Middleton, and Gerald R. Bruce, Esquire.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Contrary to the appellant's pleas, a panel of officer and enlisted members sitting as a general court-martial convicted her of one specification of cocaine use, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The adjudged and approved sentence includes a bad-conduct discharge, confinement for 90 days, and reduction to the grade of E-1. On

[1] The appellant was found not guilty of specifications alleging conspiracy to distribute cocaine and possession of cocaine with intent to distribute.

appeal, the appellant asserts that the military judge abused his discretion by allowing in evidence of prior uncharged misconduct. Finding no error, we affirm.

Background

The asserted error arises from the testimony of Airman Basic (AB) XH, a friend of the appellant. The appellant was charged with wrongful use of cocaine between 1 July 2007 and 6 July 2007, a time period determined by the result of a positive urinalysis. At trial, the government called AB XH to testify about a conversation he had with the appellant in late July 2007, subsequent to the referenced urinalysis, during which she purportedly admitted past use of cocaine. According to AB XH, after telling the appellant about his own pre-service use of marijuana, he asked her about cocaine, and she told him she had previously used it, describing for him its effects. AB XH assumed that the appellant was referring to pre-service use because he had been talking about his pre-service use. However, he acknowledged that the appellant never specifically told him when she had used cocaine or whether or not that use occurred while she was in the military.

The defense objected to admission of AB XH's testimony, arguing that the appellant's statement, if it occurred, referred to pre-service use, and thus constituted evidence of uncharged misconduct that was not otherwise admissible under Mil. R. Evid. 404(b). The government countered that the appellant never specified when the use occurred and, because the admission came just a short time after the positive urinalysis, logically must have been referring to the use captured by that test, and thus within the time frame charged.

After an extensive hearing on the matter, and after conducting the balancing test mandated by Mil. R. Evid. 403, the military judge overruled the defense objection and admitted AB XH's testimony, subject to a special instruction to the members. The instruction advised the members that they could consider AB XH's testimony concerning the appellant's admission of prior cocaine use only if they first determined both that the appellant made the statement and that the admission was to the use of cocaine during the charged time period. The instruction specifically precluded the members from considering the admission "***for any purpose***" if they believed that it did not refer to cocaine use during the charged time frame. (Emphasis in original).

Discussion

We review a military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. Goodin*, 67 M.J. 158, 160 (C.A.A.F. 2009). We find no abuse of discretion here. The appellant correctly notes that admission of evidence of uncharged misconduct is constrained by Mil. R. Evid. 404(b). *United States v. Thompson*, 63 M.J. 228, 230 (C.A.A.F. 2006). However, it is clear that no evidence of

uncharged misconduct was considered by the members in this case. Although AB XH "was under the impression" that the appellant was talking about pre-service use when she admitted prior use of cocaine, the appellant never told AB XH when her prior use occurred, and her admission could have referred to either pre-service use or use during the charged time frame. The special instruction crafted by the military judge reasonably addressed that dichotomy, permitting the members to consider the appellant's admission *only* if they determined that it was an admission to the use of cocaine during the charged time frame and specifically precluding them from considering it if they determined that it related to cocaine use during any other period.[2] Both the prosecution and the defense were then given the opportunity to emphasize, during their questioning of AB XH and in subsequent argument to the panel members, those portions of AB XH's testimony that they believed supported their respective positions as to whether the appellant's admission was to the charged offenses. If the members followed the judge's instruction, the only way they could have considered the admission at issue was if they determined it related to the charged offense, i.e., was *not* uncharged misconduct. "In the absence of evidence to the contrary, the members are presumed to follow the military judge's instructions." *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991) (citing *United States v. Ricketts*, 1 M.J. 78, 82 (C.M.A. 1975)). We find no indication in the record that they did not do so here.

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, 10 U.S.C. § 866(c); *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

[2] We note that the trial defense counsel was afforded the opportunity to aide in the crafting of that special instruction and ultimately offered no objections or alterations to the language proposed by the military judge.