UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SAMUEL E. GARCIA
United States Air Force

ACM S31426

20 February 2009

Sentence adjudged 15 December 2007 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Terry A. O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Contrary to his plea, the appellant was convicted of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-1.

The issues on appeal are whether the appellant's conviction is legally and factually sufficient considering: (1) Colonel RR, an expert in the field of forensic toxicology, testified that the likely range of the appellant's blood alcohol content at the time of the incident was between 0.31 and 0.46; (2) the appellant testified to his belief that the

substance he placed in his mouth was candy or gum and not an illegal drug; (3) two witnesses testified to the appellant's good military character; and (4) the appellant's urine sample tested positive for benzoylecgonine at only 104 ng/mL, slightly above the Department of Defense cut-off of 100 ng/mL; and whether the sentence that includes one month confinement and a bad conduct discharge for a conviction for cocaine use is inappropriately severe.*

Background

The appellant was a heavy drinker, and over Easter weekend of 2007, he decided to drink quite a bit. In his first story, the one he wrote on the Air Force Form 1168, the appellant stated that on Easter Sunday he played softball and went to a local club called Cool Arrow. After consuming a lot of alcohol, he went to the restroom. While in there, a man in a cowboy hat told him to chew something so he did. He did not like the way it tasted and spit it out.

According to the Air Force Office of Special Investigations (AFOSI) agent who interviewed him, the appellant said the guy in the cowboy hat handed him a baggie and told him to chew it because "it will make you feel good." Further, the appellant described the substance as powdery. And when asked what color the powder was, the AFOSI agent remembers the appellant saying "if I tell you what color I think it is, you know, you're going to – you're going to hold that against me."

In addition to the agent testifying at trial, the normal parade of urinalysis witnesses testified. The observer, a good friend of the appellant's, did testify that when he told the appellant he was testifying, the appellant stated either "I [F'd] up" or "It's [F'd] up."

At trial, the appellant testified that he was not alone during the day in question. His friend, RA, was with him all day. Further, they went to his aunt's house after playing softball and before going to Cool Arrow. The appellant also stated he never told AFOSI that the substance was powdery or that he was told it would make him feel good. RA testified he was with the appellant all day, and the appellant was really drunk. Another witness testified the appellant was "wasted," and RA was driving the appellant.

A defense expert witness testified to his extrapolation of the appellant's blood alcohol content at the time of the incident based upon the amount of alcohol the appellant ingested, at least according to the appellant and RA. He also testified that blackouts could happen at that level but that the appellant would still know right from wrong. Two supervisors testified as to the appellant's good military character.

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

Legal and Factual Sufficiency

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). In resolving questions of legal sufficiency, we must "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) (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 ourselves are] convinced of the [appellant's] guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. We are convinced of the appellant's guilt, and find this issue to be without merit.

Inappropriately Severe Sentence

The appellant avers his sentence to a bad-conduct discharge and 30 days of confinement is inappropriately severe. Article 66(c), UCMJ, provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Our superior court has concluded that we have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955), *quoted in United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence, as approved by the convening authority, inappropriately severe.

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