UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MOISES GARCIA-VARELA
United States Air Force

ACM S31466

07 April 2009

Sentence adjudged 21 December 2007 by SPCM convened at Travis Air Force Base, California. Military Judge: Charles Wiedie.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $400.00 pay per month for 3 months, 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 Major Steven R. Kaufman.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

HELGET, Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, 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 one month, forfeiture of $400.00 pay per month for three months, and reduction to E-1.

The appellant asserts two assignments of error before this Court. The first issue is whether the appellant's conviction for wrongful use of cocaine is factually and legally

insufficient where: (a) the only evidence against the appellant consisted of a positive urinalysis result only 37 nanograms per milliliter (ng/mL) over the Department of Defense (DoD) cutoff level; (b) the potential for error was enhanced where six visitors toured the laboratory the day the appellant's sample had to be transferred to different equipment for testing; and (c) general evidence indicated that unknowing ingestion could occur and result in a positive urinalysis. The second issue, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the appellant's sentence for one use of cocaine that consisted of a bad-conduct discharge, confinement for one month, forfeiture of $400.00 pay per month for three months, and reduction to E-1 is overly severe. Finding no error, we affirm.

Background

On 21 July 2007, the appellant voluntarily provided a urine specimen at the Demand Reduction Program office at Travis Air Force Base (AFB), California. He was observed by Mr. DL, an experienced observer. The urine specimen was properly collected, stored, packaged, and shipped to the Air Force Drug Testing Laboratory (AFDTL) at Brooks AFB, Texas. The urine specimen tested positive for the cocaine metabolite benzoylecgonine (BZE) with a concentration level of 137 ng/mL, which is above the DoD cutoff level of 100 ng/mL.

At trial, the primary evidence consisted of a laboratory report and the testimony of Dr. MH, an expert in the fields of toxicology, urinalysis drug testing, and pharmacology, who at the time of trial was the Chief of the Confirmation Branch at AFDTL. Dr. MH described the laboratory's procedures and explained the results of the urinalysis. He testified regarding training and certification of AFDTL employees, the decertification process, calibration of the lab's machines, the Air Force Institute of Pathology's oversight of the lab, quality control measures, and chain of custody. Concerning the appellant's urine specimen, Dr. MH testified that the appellant's sample went through three separate tests. The appellant's sample tested positive for BZE in each, and the final test resulted in the reported concentration level of 137 ng/mL of BZE.

Dr. MH testified that cocaine is a strong central nervous system stimulant that produces a variety of nervous system effects, including feelings of euphoria, increased alertness, and reduced fatigue. Cocaine also affects the cardiovascular system by causing increases in blood pressure and heart rate. Dr. MH explained that the effects of cocaine are short in duration, typically only lasting 20 to 40 minutes. Dr. MH further testified that the concentration level in the appellant's urine of 137 ng/mL was consistent with a knowing use of cocaine. Finally, Dr. MH opined that based upon his review of the laboratory report, the appellant's urine was subjected to valid and reliable tests that accurately identified and quantified the concentration of the cocaine metabolite BZE in the urine specimen provided.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain the conviction for wrongful use of cocaine. 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 fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

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." *Turner*, 25 M.J. at 325. 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).

To obtain a conviction under Article 112a, UCMJ, for wrongful use of a controlled substance, the prosecution must prove: (1) that the accused used a controlled substance, and (2) that the use by the accused was wrongful. *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 37.b.(2) (2005 ed.) In defining wrongfulness, the *Manual* provides: "Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary." *MCM*, Part IV, ¶ 37.c.(5). A positive urinalysis, accompanied by the testimony of an expert, is sufficient to support the permissive inference of knowing, wrongful use of a drug. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001).

In challenging the legal and factual sufficiency of his conviction, the appellant asserts that the evidence is insufficient because the sole evidence in this case is a positive urinalysis result, which was only 37 ng/mL above the DoD cutoff level. The appellant also asserts that there were six visitors who toured the AFDTL on the date his urine specimen was tested, which increased the potential for error because a couple of months prior, it was reported that a visitor was caught removing a vial out of a rack to be tested. The appellant further asserts that the evidence suggests a possibility of technical error in the testing process because one of the sample blanks tested in the same batch as the appellant's sample tested positive for drugs due to drug carryover from a positive sample. Also, the appellant highlights that the first instrument used to test the appellant's sample failed, requiring that his sample be transferred to another instrument. Finally, the appellant asserts that "general evidence" presented at trial indicated unknowing ingestion could occur and result in a positive urinalysis.

We have carefully reviewed the record of trial in this case and find no merit to the appellant's contentions. Although the appellant's urine specimen tested positive at a concentration of only 37 ng/mL above the DoD cutoff level, Dr. MH testified that all of the cutoff levels are set sufficiently high to avoid the possibility of a false positive. The appellant's contention that the six visitors who toured the lab on the day the appellant's urine specimen was tested increased the potential for error is mere speculation as no evidence was presented at trial indicating that the appellant's sample was tampered with. Concerning the technical discrepancies, although one of the sample blanks tested positive due to drug carryover, the laboratory report showed that the sample tested immediately before and after the appellant's sample were negative and showed no BZE carryover. Also, despite that the appellant's sample had to be transferred to a new instrument, Dr. MH testified that the new instrument worked properly. Finally, in claiming that the ingestion of cocaine may not have been a knowing use, the appellant cites to a case where a pear was injected with cocaine and to research studies showing that small doses of cocaine in a soda could potentially cause a positive urinalysis result. However, no evidence was presented at trial showing that these isolated incidents applied to the appellant's case.

Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant wrongfully used cocaine. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced the appellant is guilty beyond a reasonable doubt.

Sentence is Inappropriately Severe

The second issue is whether the appellant's sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988).

The maximum possible punishment in this case was a bad-conduct discharge, confinement for 12 months, two-thirds forfeiture of pay per month for 12 months, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge,

confinement for one month, forfeiture of $400.00 pay per month for three months, and reduction to E-1.

Having given individualized consideration to this particular appellant, the nature of the offense, his record of service, and all other matters in the record of trial, we hold that the approved sentence is not 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.

Senior Judge BRAND did not participate.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court