UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TIMOTHY J. GAZZOLA
United States Air Force

ACM S31764

18 August 2011

Sentence adjudged 25 November 2009 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Terry O'Brien.

Approved sentence: Bad-conduct discharge, confinement for 7 months, forfeiture of $933.00 pay per month for 7 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Deanna Daly; Major Coretta E. Gray; and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was found guilty by a panel of officers of one specification each of wrongful distribution of cocaine, wrongful use of cocaine, divers wrongful possessions of marijuana, and wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 7 months, forfeitures of $933.00 pay per month for 7 months, reduction to E-1, and a reprimand.

The issues on appeal are whether the military judge abused her discretion by: (1) failing to permit the admission of the appellant's negative urinalysis and hair sample; and (2) allowing the trial counsel to cross-examine the defense's witness, Special Agent (SA)

JT, about Mr. CJ as the possible source of cocaine and that CJ had been arrested on numerous occasions for possession of illegal narcotics. Finding no error, we affirm.

Background

The appellant and several Airmen traveled to Tampa, Florida, for the weekend around 23 January 2009. They rented a hotel room in Ybor City. Sometime on that Saturday, the appellant, Airman Basic (AB) CD, and AB DT traveled to the appellant's friend's house. The friend's name was "Ced" (CJ). CJ went to his car and grabbed a bag of cocaine and a bag of marijuana and gave them to the appellant.

On 9 February 2009, the appellant was called into the Office of Special Investigations. He was suspected of cocaine use. At the conclusion of the interview, the appellant consented to a search of his residence, vehicle, urine and hair.[1] Nothing was found.

At trial, the defense counsel wanted to present information to the members that the appellant had consented to a urinalysis (UA) and the taking of his hair. Both were tested and resulted in negative findings. On the record, the defense counsel conceded that the results were not relevant, but they wanted to show that the appellant consented to the testing and was cooperative. The defense counsel argued that the level of cooperation by the appellant was crucial to the case. The trial counsel pointed out that the relevant information, appellant being cooperative, was when he consented to a search of his vehicle and residence only. The military judge granted the government motion in limine, preventing this information from being presented to the members.

In findings, the defense called SA JT to talk about how cooperative the appellant was. On cross-examination, the trial counsel elicited that the extent of the cooperation was his consent to search the residence and the car. In an Article 39a, UCMJ, 10 U.S.C. § 839a, session, the defense counsel re-engaged, stating that the door had been opened by the trial counsel as to the admission of the appellant's consent to testing of his urine and hair. Again, the military judge determined the information was not admissible – specifically stating that the defense counsel started the conversation with the agent, and the trial counsel had only confirmed that information and did not open the door.

At trial, AB DT and AB CD testified about the appellant meeting up with CJ while they were in Tampa.[2] While cross-examining SA JT, the trial counsel questioned him about any information he had regarding a man by the name of CJ in Tampa. SA JT testified that they had tracked down a CJ in Tampa. The trial counsel then asked if they

[1] The appellant consented to the hair analysis on 9 February 2009, however it was untestable. A second hair sample was taken pursuant to a probable cause order on 5 March 2009.

[2] Although Airman Basic (AB) CD testified directly to witnessing the transaction, AB DT changed his testimony and denied knowing anything about the origins of the cocaine. AB DT did admit to prior inconsistent statements that named "Ced in Tampa."

had conducted any further investigation into CJ. The defense counsel objected on relevancy grounds. The military judge overruled the objection. SA JT testified he had researched him in different databases and found he had been arrested on numerous occasions for possession of an illegal narcotic.

Admission of Evidence

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly erroneous standard and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *Ayala*, 43 M.J. at 298). "For the ruling to be an abuse of discretion, it must be 'more than a mere difference of opinion'; rather, it must be 'arbitrary, fanciful, clearly unreasonable' or 'clearly erroneous.'" *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009) (internal citations omitted).

Turning to the first specified issue, the military judge determined that the results of the hair and urine testing clearly were not relevant, and that the introduction of that information would mislead the members and be confusing. Basically, if the information about the testing was presented, logically the members would want to know the results. She did not abuse her discretion in her ruling. Further, she allowed the defense counsel to pursue testimony regarding the cooperative nature of the appellant without specific mention of those tests.

As for the testimony provided by SA JT about CJ, although no specific findings or conclusions were made by the military judge, it is readily apparent that the evidence was corroborative of the testimony of the other witnesses, and it was for the parties to argue its weight. Again, the military judge did not abuse her discretion in allowing this evidence to be admitted.

Post-Trial Processing Delay

In this case, the overall delay between the date this case was docketed with the Court and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See also United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v.*

Allison, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review of his appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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
Clerk of the Court