UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JEREMY M. GEHLHAUSEN
United States Air Force

ACM 35280

14 October 2004

Sentence adjudged 14 June 2002 by GCM convened at Moody Air Force Base, Georgia. Military Judge: Thomas G. Crossan.

Approved sentence: Dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major John D. Douglas, and Captain Matthew J. Mulbarger.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification each of wrongful use and distribution of ecstasy on divers occasions, and one specification of wrongful use of gamma hydroxybutyric acid (GHB), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was also convicted, contrary to his pleas, of one specification each of wrongful use and distribution of lysergic acid diethylamide (LSD), one specification of wrongful use of cocaine, and one specification each of wrongful use and distribution of psilocybin, in violation of Article 112a, UCMJ. The general court-martial, consisting of officer members, sentenced the appellant to a

dishonorable discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant has submitted four assignments of error: (1) The evidence is legally and factually insufficient to sustain the convictions of the contested specifications; (2) The military judge erred in admitting improper aggravation evidence concerning GHB use during the presentencing phase of the trial; (3) The assistant trial counsel (ATC) improperly argued that the appellant should be punished on the basis of uncharged misconduct; and (4) The ATC misstated the legal significance of a punitive discharge and argued facts not in evidence. Finding error, we order corrective action.

Legal and Factual Sufficiency of the Evidence

The test for legal sufficiency is whether any rational trier of fact, when viewing the evidence in the light most favorable to the government, could have found the appellant guilty of all elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Our superior court has determined that 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," this Court is "convinced of the [appellant's] guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

We have considered the evidence presented by the prosecution as to the contested specifications, along with the matters raised by the defense in cross-examination. We find the prosecution's witnesses, on the whole, to have provided testimony that is detailed, consistent, and credible. Mindful of the fact that we ourselves have not heard these witnesses, and applying the criteria described above, we hold that the evidence is both legally and factually sufficient to sustain the convictions for those offenses to which the appellant pled not guilty.

Aggravation Evidence Concerning GHB Use

This court reviews a military judge's rulings on the admission of sentencing evidence for an abuse of discretion. *See United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003); *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001).

The appellant entered a plea of guilty to Specification 6 of the Charge, which alleged a single wrongful use of GHB, in violation of Article 112a, UCMJ, between 1 May 2001 and 30 June 2001. During the providence inquiry, the appellant stated he

used the drug at the instigation of an unnamed civilian, at a gym in downtown Valdosta, Georgia. The military judge then questioned the appellant:

> MJ: How did you know that what you used was GHB?
>
> ACC: The gentleman told me, sir.
>
> MJ: Did you have any prior contact with this gentleman?
>
> ACC: Just at the gym, sir.
>
> MJ: And what led you to believe this gentleman when he told you it was GHB?
>
> ACC: I believed him, and I took it and felt the effects of it.

After further questioning, the military judge accepted the appellant's plea and found him guilty of those offenses to which he pled guilty, including the GHB use.

During the presentencing phase of the trial, the prosecution sought to present evidence in aggravation, in accordance with Rule for Courts-Martial (R.C.M.) 1001(b)(4), which permits the admission of evidence as to matters "directly relating to or resulting from the offenses of which the accused has been found guilty." *See United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). Specifically, the prosecution proffered the testimony of a witness as to a separate, and apparently unrelated, instance of GHB use, which took place at the end of June 2001. According to the witness, the appellant used GHB at a local bar, became impaired, and subsequently drove a car belonging to another person, wrecking it. As a consequence, the witness stated, the appellant "got a DUI [driving under the influence]."

The appellant objected to this testimony on the grounds that this separate instance constituted uncharged misconduct[1]. The military judge overruled the objection, but he instructed the prosecution that they were limited to presenting only one instance of GHB use. That is, the prosecution could present to the panel the statements which the appellant made during the providence inquiry or could present evidence of the other use, but not both. The prosecution chose to present the latter.

We conclude that the evidence presented by the prosecution did not constitute proper matters in aggravation of the offense to which the appellant pled guilty. *See*

[1] At the time the trial defense counsel made this objection, he referenced an Airman (Amn) Travis Williams, whom he understood to be testifying about this separate, unrelated use of GHB. However, during the prosecution's presentencing case, rather than calling Amn Williams, the prosecution called a different witness to discuss a separate, unrelated use of GHB.

R.C.M. 1001(b)(4). By ruling as he did, the military judge effectively permitted the prosecution to substitute a separate instance of GHB use in place of the instance to which the appellant had pled guilty. The prosecution's evidence was not offered as "directly relating to or resulting from" the offense of which the appellant had been found guilty, R.C.M. 1001(b)(4), nor to show the full impact of a continuing course of conduct. *United States v. Nourse*, 55 M.J. 229, 231 (C.A.A.F. 2001); *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992). Instead, *it was presented as evidence of the charged offense itself*. The result was that the court members were invited to punish the appellant, not for the misconduct to which he intended to plead guilty but, rather, for acts which were not fairly embraced by the conviction. *See, e.g.*, *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1993).

We note that the record provides us with no basis to infer that the appellant perjured himself or that his plea of guilty to use of GHB was otherwise improvident. As a result of the military judge's ruling, the appellant was punished for acts which were neither validated by a providence inquiry nor tested by cross-examination during litigation on findings and, therefore, which never formed the basis of a conviction. Indeed, this court has no way of knowing whether these acts would have been sufficient to convince a panel beyond a reasonable doubt that the appellant wrongfully used GHB.

We conclude that the military judge's ruling on this matter is inconsistent with the requirements of due process, and we hold that he erred by admitting the evidence in question. We will address the issue of sentence reassessment below.

Sentencing Argument

We are combining the third and fourth assignments of error in one discussion. The standard of review for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). "Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection." R.C.M. 1001(g). Absent such an objection, this court reviews allegedly improper sentencing arguments for plain error. *See United States v. Jenkins*, 54 M.J. 12, 19 (C.A.A.F. 2000); *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998).

During the sentencing phase of the trial, the prosecution called a witness who testified as to the facts and circumstances surrounding the distribution of ecstasy. The testimony included the following colloquy:

> Q: Did the accused have a conversation with you about using ecstasy, and did you have a conversation with him about it?

A: Yeah. I said, "This is my first time rolling," and he said he's been rolling for about a year.

. . . .

Q: Did he say how often he's been rolling for about a year?

A: Every weekend.

As the charged ecstasy use occurred between 1 March 2001 and 31 July 2001, those uses that occurred prior to that time period were by definition uncharged misconduct. R.C.M. 801(d). During the sentencing argument, the ATC stated that the appellant

> took ecstasy over, and over, and over again. . . . These were not isolated incidents. Every weekend for a year. That's what he told Destiny when she first got into this stuff. After that, every weekend for three months. What is that? Fifty weeks a year. Fifty times? Three months every weekend. Approximately 12 times? That's over 60 uses of ecstasy. . . . Finally, a dishonorable discharge. That is the only way that you can accurately describe the accused's military, his service to his country. Over 60 uses of ecstasy. One is bad conduct. Two is bad conduct. Three, five, still bad conduct, but there is a line. Where is that line? Ten uses? Twenty uses? Thirty uses? That's up for you to decide. Certainly 60 uses crosses the line from bad conduct to dishonorable conduct. . . . The only way to characterize his service is dishonorable.

The ATC also commented on the possible harm the appellant's drug abuse would have on his young child. Specifically, he argued, "Drug use and distribution undermine patience, undermine responsibility. When that child is eight months old, it'll start to crawl. At approximately 14 months old, it'll walk and it'll talk and it'll get into everything and . . ." Although there was no objection by the trial defense counsel, the military judge interrupted the ATC at that point and advised him to "move on" from that line of argument. The trial defense counsel did object to the ATC's extrapolation of 60 uses of ecstasy, which the military judge overruled, but did caution the members to "apply your memory of the testimony." The defense did not object to the reference to a dishonorable discharge as a service characterization.

First of all, we find no error in the ATC's comments about the appellant having used ecstasy 60 times. It is a legitimate matter in aggravation that an offense of which an accused was convicted is part of a continuous course of conduct. *Nourse*, 55 M.J. at 231; *Shupe*, 36 M.J. at 436; *Ross*, 34 M.J. at 187. The number 60 is a reasonable inference from matters properly before the court.

Furthermore, we find that the comments about the appellant's child, even if improper as being facts not in evidence, did not materially prejudice the substantial rights of the appellant. The military judge terminated that line of argument in the hearing of the members and, looking at the case as a whole, we find it unlikely that the comments exerted a real influence on the members' deliberations.

On the other hand, we reach a different conclusion concerning the ATC's argument that the appellant should be punished for, among other things, 60 uses of ecstasy. While the appellant's continuous use of that drug over the course of a year was a proper matter in aggravation, it is a fundamental principal of military justice that an accused is to be punished only for the offenses of which he has been convicted. *See United States v. Saferite*, 59 M.J. 270 (C.A.A.F. 2004); *United States v. Boles*, 11 M.J. 195 (C.M.A. 1981); *United States v. Lucas*, 41 C.M.R. 172 (C.M.A. 1969). While matters in aggravation can assist the panel in understanding the true context of the offenses, it is improper to urge that an accused be punished for acts not fairly embraced by the conviction. We also agree with the appellant that it is improper to describe a punitive discharge as a service characterization. *See* R.C.M. 1003(b)(8); *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989) (sentencing proceeding "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated").

Having so concluded, we must now examine the record to see if the offending comments prejudiced the appellant. While the military judge did instruct the members that "the accused is to be sentenced only for the offenses of which he had been found guilty," he did not otherwise clearly distinguish between the offenses themselves and the other acts admitted in aggravation. Mil. R. Evid. 105. Although the instructions were correct as far as they went, we are not satisfied that the panel clearly understood its responsibilities concerning the imposition of punishment.

We would be less concerned about this had the military judge himself sentenced the appellant. As it stands, we find that the ATC's argument, considered in light of the record as a whole, improperly affected "the court members' 'determination of a just and adequate sentence in this case.'" *Boles*, 11 M.J. at 199 (citing *United States v. Montgomery*, 42 C.M.R. 227, 232 (C.M.A. 1970)). As such, we hold that the argument materially prejudiced the substantial rights of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Sentence Reassessment

Having found error we must now reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. . . . If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id.*

In this case, we are satisfied that we can reassess the sentence. We have considered the offenses of which the appellant was convicted and have taken into account all the matters properly before the panel in the sentencing phase of the court-martial. We are satisfied that, even without the errors discussed above, the panel would have adjudged a sentence no less than a bad-conduct discharge, confinement for 16 months, forfeiture of all pay and allowances, and reduction to E-1.

The findings and the sentence, as reassessed, 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); *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court