UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic BRIAN J. GERDS, JR.
United States Air Force

ACM 37734

29 November 2012

Sentence adjudged 29 July 2010 by GCM convened at McConnell Air Force Base, Kansas. Military Judge: Beth A. Townsend.

Approved sentence: Bad-conduct discharge, confinement for 7 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Captain Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and MARKSTEINER
Appellate Military Judges

PER CURIAM:

The appellant was tried by general court-martial consisting of officer and enlisted members. Contrary to his pleas, he was found guilty of one specification of failing to report to his appointed place of duty[*] and three specifications of wrongfully using hydrocodone (Lortab), oxycodone (Percocet), and ecstasy, under Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a, respectively. The appellant was also found guilty,

[*] This was an additional charge, added after the convening authority referred the original charge (hereinafter "the Charge") to court-martial.

consistent with his plea, of wrongfully distributing Lortab and acquitted of one specification of wrongfully using cocaine. The appellant was sentenced to a bad-conduct discharge, confinement for 7 months, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts this Court should set aside the findings of guilty as to the three specifications of wrongful use under Article 112a, UCMJ (specifications 2-4 of the Charge), because of a disparity between the annotated findings worksheet and the findings as announced by the president in court. Additionally, the appellant asserts the finding of wrongful use of Lortab is legally and factually insufficient to sustain a conviction because the appellant had a valid prescription for Lortab at the time of the alleged wrongful use. Lastly, the appellant asserts the finding of wrongful use of ecstasy is legally and factually insufficient to sustain a conviction.

Disparity Between Findings Worksheet and Announced Sentence

The president announced the court-martial's findings with regard to the four contested specifications of the Article 112a, UCMJ, charge as follows:

PRES: Airman Basic [(AB)] Brian Gerds, this court-martial finds you:

Of Specification 1 of the Charge: Not Guilty;

Of Specification 2 of the Charge: Guilty;

Of Specification 3 of the Charge: Guilty;

Of Specification 4 of the Charge: Guilty;

Of the Charge: Guilty.

The relevant portion of the findings worksheet completed by the court members is reproduced below:

III. GUILTY OF SOME SPECIFICATIONS AS CHARGED

NOTE: *If the accused is found guilty of some of the specifications and charges, unmodified, announce:*

PRESIDENT: AB Brian Gerds, this court-martial finds you:
Of (all) Specification(s) (1) of the Charge: ~~(GUILTY)~~ (NOT GUILTY);

Of Specification (2) of the Charge: (GUILTY) ~~(NOT GUILTY)~~;

Of Specification (3) of the Charge: (GUILTY) ~~(NOT GUILTY)~~;

Of Specification (4) of the Charge: (GUILTY) ~~(NOT GUILTY)~~;

Of the Charge (GUILTY) ~~(NOT GUILTY)~~.

Of the Specification of the Additional Charge: (GUILTY) ~~(NOT GUILTY)~~;

Of the Additional Charge (GUILTY) ~~(NOT GUILTY)~~.

The crux of the appellant's argument is that the members' failure to strike through the parenthetical word "all" in the line on the worksheet reading "Of (all) Specification(s) (1) of the Charge: (GUILTY) (NOT GUILTY)," and the resulting disparity between the findings, as announced, and those reflected on the worksheet render the verdict, as to Specifications 2-4 of the Charge, fatally ambiguous.

If an announced finding is ambiguous, "the military judge should seek clarification." Rule for Courts-Martial 922(b), Discussion. An announced finding is sufficiently certain, definite, and free of ambiguity if it enables the court to "base judgment thereon and to protect against subsequent prosecution for the same offense." *United States v. Darden*, 1 M.J. 574, 575 (A.C.M.R. 1975) (citing *United States v. Gilday*, 47 C.M.R. 172 (A.C.M.R 1973)). In addition, appellate courts may affirm ambiguous findings when, "[t]aken as a whole, the record makes clear that the intent of the court members was to find the appellant guilty because he had performed the very acts alleged in the specification[s]." *United States v. Williams*, 21 M.J. 330 (C.M.A. 1986); *see also United States v. Williams*, ACM S28342, unpub. op. at 4 (A.F.C.M.R. 18 January 1991).

"In military practice, a findings worksheet is provided to the court members during the military judge's instructions. This worksheet is intended to be used by the members as *a guide* to putting their findings in proper form . . . ." *United States v. Barclay*, 6 M.J. 785, 789 (A.C.M.R. 1978) (emphasis added).

In the case before us, the announced findings were not at all ambiguous. The president clearly and unambiguously announced that the members found the appellant not guilty of Specification 1 of the Charge, but guilty of Specifications 2 through 4 of the Charge, and guilty of the Charge. Each specification of the Charge particularize the actions, dates, and locations of the offenses with which the appellant was charged and do so in a way that would ensure the appellant is afforded full protection against subsequent prosecution for the same offenses. *United States v. Timmerman*, 28 M.J. 531, 537 (A.F.C.M.R. 1989); *Darden*, 1 M.J. at 575. Nine witnesses provided testimony relevant to one or more of the specifications of the Charge in a two-day litigated trial before members. The military judge appropriately instructed the members on the elements of each specification of the Charge, referencing time periods and locations, as well as naming the alleged wrongfully used drugs. The judge also included particularized instructions pertaining to the fact that the appellant had valid prescriptions for Lortab (relevant to Specification 2) and Percocet (relevant to Specification 3). She also included an "attempt" instruction pertaining to the appellant's alleged use of ecstasy (relevant to Specification 4). The military judge described the findings worksheet, noting particularly, "[t]he worksheet is provided only as an aid in finalizing your decision." Six of the nine members asked a total of 15 questions during the proceeding, including questions posed to six of the witnesses who testified. The members were clearly willing and able to "speak up" if and when they believed it appropriate to do so. Following the

president's announcement of the findings, no member questioned the findings or gave any other indication that the verdict, as announced, failed to accurately reflect the results of their deliberations.

Based upon the entire record, we are satisfied that the members' failure to strike through the parenthetical word "all," as described above, was an administrative error; that the appellant has suffered no prejudice as a result of that administrative error; and that the findings on Specifications 2, 3, and 4 of the Charge are sufficiently certain, definite, and free from ambiguity.

Legal and Factual Sufficiency of Wrongful Use of Lortab

Between late February 2009 and late March 2010, the appellant was lawfully prescribed Lortab on numerous occasions in relation to four shoulder surgeries he'd undergone – some number of which occurred during that time frame. On roughly ten occasions during the charged time period (one witness testified, "probably around 10, maybe a few times more and maybe a few times less . . . ."), the appellant and two other Airmen, AB E and AB A, got together in one of their dormitory rooms and consumed Lortab by crushing the pills and then snorting the powder into their noses through a rolled up dollar bill. AB E and the appellant both had lawful prescriptions for Lortab; AB A did not. Sometimes the appellant and AB E crushed up their pills together then divided the powder between themselves and AB A, and other times they crushed and consumed their own pills. When using the pills, they would crush them and split the powder from two to five pills among the two of them, or the two of them and AB A. The appellant pled guilty to unlawfully distributing Lortab to AB A based on these facts. The appellant and the other participants also regularly drank alcohol during these gatherings. Witness testimony characterized the gatherings as primarily social in nature.

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, 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 factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[I]n resolving questions of legal sufficiency, we are bound to 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) (citation omitted). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

"The test for factual sufficiency is whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses, [we ourselves are] convinced of the [appellant's] guilt beyond a reasonable doubt." *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325) (internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

In his second assignment of error, the appellant argues that the evidence adduced at trial was legally and factually insufficient to sustain a conviction as to Specification 2 of the Charge, because he had a valid prescription for Lortab, as a result of multiple shoulder surgeries. The issue, therefore, is whether the appellant's use was wrongful. The military judge appropriately instructed the members on this issue, noting:

> Evidence has been introduced raising an issue of whether the accused's use of hydrocodone, Lortab, was wrongful in light of the fact that the substance had been duly prescribed by a physician and the prescription had not been obtained by fraud. This raises the issue of innocent use. Innocent use is not a defense where an accused uses a controlled substance without a legitimate medical purpose. In determining this issue, you must consider all relevant facts and circumstances. However, you may not find the accused guilty of wrongful use of hydrocodone based solely on the fact that he ingested the substance through his nose. The burden is on the prosecution to establish the guilt of the accused beyond a reasonable doubt. Unless you are satisfied beyond a reasonable doubt that the accused's use of the substance was not for a legitimate medical purpose, you may not find the accused guilty.

Considering the evidence adduced at trial in the light most favorable to the Government, we hold that a rational trier of fact could have found the appellant's use of Lortab, under the circumstances as they were described at trial, wrongful. The evidence of record supporting this finding includes, but is not limited to, the fact that the appellant distributed Lortab to AB A, a person he knew had no lawful prescription, under circumstances AB A described as primarily social settings. AB A specifically testified that the first time the appellant provided the Lortab was "sometime after his surgery obviously – after he had acquired the medication – and I'm sure it was at some point when we were drinking." AB A also noted "drinking was pretty much the underlying theme of most of our times that we hung out together." AB A also said he snorted the Lortab "to get high"; AB E testified "I guess [snorting the medication with the appellant] was – for me, it was just more fun, I guess, to do it together instead of taking them by ourselves. It was just a social thing." We note that AB A and AB E also stated at various

points in their testimony their belief that the appellant used drugs during the charged timeframe in relation to pain he suffered as a result of multiple surgeries. However, based on the entire record, a rational trier of fact could have rejected trial defense counsel's argument that pain management or pain mitigation was any part of the appellant's purpose in ingesting Lortab under the circumstances as described, and therefore found beyond a reasonable doubt that his use was without a legitimate medical purpose. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Article 66(c), UCMJ.

After weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Article 66(c), UCMJ. There is no disagreement between the parties that the appellant used a controlled substance. The sole point of contention is whether the appellant's use was wrongful. Referencing primarily the same set of operative facts discussed above, our fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt, convinces us beyond a reasonable doubt that the appellant's use of Lortab was not for a legitimate medical purpose, but rather was a social component of the periodic get-togethers among friends and co-workers in the dorms described in the record. Accordingly, we are convinced beyond a reasonable doubt that the appellant's use of Lortab was wrongful.

Legal and Factual Sufficiency of Wrongful Use of Ecstasy

The standard for evaluating legal and factual sufficiency, recited above, applies to the following discussion as well.

The appellant draws a comparison between his case and this Court's unpublished opinion in *United States v. Stevens*, ACM S30170 (A.F. Ct. Crim. App. 20 July 2004) (unpub. op.). In *Stevens*, the accused was convicted of distributing ecstasy to her husband. While the two were at a dance club, the accused bought a pill from an unknown individual who told her the pill was ecstasy. She later gave the pill to her husband. He did not testify as to the pill's effect, and there was no other evidence regarding the identity of the substance. The Court therefore found insufficient evidence in the record to support the conviction for distributing ecstasy. Comparing the present case to *Stevens*, the appellant notes that the only evidence in the record is testimony of two witnesses who say whatever it was they took that night had no effect on them, so – as was the case in *Stevens* – proof beyond a reasonable doubt as to the drug's actual nature is lacking.

"[M]ere speculation as to the identity of a substance by one non-expert witness – and nothing more – does not rise to the level of legally sufficient evidence for conviction." *United States v. Nicholson*, 49 M.J. 478, 480 (C.A.A.F. 1998). We are, however, not limited to direct evidence in our review of this issue. Rather, we may also consider circumstantial evidence regarding the identity of the illicit drug. *United*

States v. Griggs, 61 M.J. 402 (C.A.A.F. 2005). The type of circumstantial evidence we may consider includes "the physical appearance of the substance; evidence that the substance had the expected drug effect, evidence that the substance was used in the same manner as the illicit drug in question, evidence that transactions involving the substance were for high prices, paid in cash, and covert, and evidence that the substance was called by the name of the illegal narcotic by those in its presence." *Id*. at 405 (quoting *Nicholson*, 49 M.J. at 480) (internal citations and quotations marks omitted).

In the case before us, referencing the types of circumstantial indicators considered by the Court in *Griggs*, the record lacks evidence that the substance described by the witnesses physically resembled ecstasy, that it produced any effects customarily produced by ecstasy, or that it was used in the same way ecstasy is commonly used. The *Griggs* factors related to price, method of payment, or covert versus public use are not implicated in the facts before us. There is evidence that the appellant told the others the substance they consumed was ecstasy and that he used it in the same sort of social or party atmosphere in which he wrongfully used and distributed other drugs. The Government adds "the substance appellant took with his friends was in pill form with a stamped red rose on it, consistent with the common characteristics of ecstasy. The facts also show that appellant used the ecstasy in a manner [orally] consistent with the illicit drug in question." However, the Government does not cite to the record for either of the latter assertions. No one testified or offered evidence about the common characteristics of ecstasy. Similarly, no one testified or offered evidence about how ecstasy is customarily used or ingested. And, self-serving though their testimony may be, the two witnesses who testified about the effects of the pill they consumed said they felt nothing.

Apparently, trial counsel saw this shortcoming in the Government's evidence because he addressed the lesser included offense (LIO) of attempted wrongful use of ecstasy in his closing. The military judge also instructed on the attempt LIO.

On balance, and considering the evidence produced at trial in the light most favorable to the prosecution, we are not convinced a reasonable factfinder could have found beyond a reasonable doubt that the substance actually ingested by the accused was, in fact, ecstasy. Similarly, having made allowances for not having personally observed the witnesses, we are likewise not convinced beyond a reasonable doubt that the substance the appellant consumed was, in fact, ecstasy.

We are, however, convinced beyond a reasonable doubt that the appellant attempted to use ecstasy. AB A and AB E both testified that they used what they believed to be ecstasy, along with the appellant. The appellant told them the pills in question were ecstasy, and they all consumed them. Though evidence pertaining to the actual substance of those pills is lacking, these overt acts of the appellant, based on the evidence produced at trial and considered in the light most favorable to the prosecution, could have convinced a reasonable factfinder beyond a reasonable doubt that the

appellant attempted to use ecstasy. Likewise, we are convinced beyond a reasonable doubt that the appellant attempted to use ecstasy.

Therefore, pursuant to our authority under Article 59(b), UCMJ, 10 U.S.C. § 859(b), we affirm a finding of guilty to the lesser included offense of attempted wrongful use of ecstasy under Article 80, UCMJ, 10 U.S.C. § 880. *See* Article 59(b), UCMJ; *United States v. King*, 71 M.J. 50 (C.A.A.F. 2012).

Sentence Reassessment

Having modified the findings of guilty with respect to the specification alleging use of ecstasy, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been of at least a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307).

Under the circumstances of this case, and the fact that the maximum punishment for attempted use is the same as the maximum punishment for actual use, we are confident that the panel members would have imposed the same sentence. *See Doss*, 57 M.J. at 185; *Manual for Courts-Martial, United States*, Part IV, ¶ 4.e. (2008 ed.).

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals 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." *United States v. Moreno*, 63 MJ. 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 MJ. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

We set aside the guilty finding to Specification 4 of the Charge and affirm a guilty finding to the lesser included offense of attempted use of Ecstasy, in violation of Article 80, UCMJ. The remaining 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; *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court