UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic WILLIAM B. HALEY
United States Air Force

ACM 35791

21 February 2006

Sentence adjudged 10 September 2003 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Nancy J. Paul.

Approved sentence: Bad-conduct discharge and confinement for 14 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Sandra K. Whittington, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

MOODY, Senior Judge:

A general court-martial consisting of officer members convicted the appellant, contrary to his pleas, of one specification of possession of marijuana and one specification of carnal knowledge, in violation of Articles 112a and 120, UCMJ, 10 U.S.C. §§ 912a, 920. The convening authority approved the findings and sentence as adjudged.

The appellant submitted two assignments of error: (1) Whether the military judge erred by granting a government motion in limine excluding a statement allegedly against

penal interest offered on behalf of the appellant; and (2) Whether the military judge erred by admitting court minutes of the appellant's civilian conviction. Finding error as to the first assignment, we order corrective action.

This court reviews a military judge's decision on admission of evidence for an abuse of discretion. *United States v. Hyder*, 47 M.J. 46, 48 (C.A.A.F. 1997) (citing *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993)). This Court must find Constitutional errors harmless beyond a reasonable doubt before upholding a conviction. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

Evidence adduced at trial established that the Air Force Office of Special Investigations (AFOSI) searched the appellant's dormitory room pursuant to a valid grant of consent. Upon entering the room, AFOSI agents discovered a civilian woman, BK, living there with the appellant. A drug dog alerted on a nearby shelf, and the agents discovered a baggie containing vegetable matter hidden behind a picture of the appellant's daughter. The agents seized the baggie and subsequent testing proved it contained marijuana. The agents also found marijuana residue in an "ear piercing kit" located in a car owned by another member but which had been driven by the appellant. In addition, the agents found what appeared to be marijuana in BK's purse.

On the same day as the search, BK stated to AFOSI that the marijuana found on the appellant's shelf was hers and the appellant did not know it was there. Again on the same day, BK executed a detailed written witness statement, in which she averred that she used marijuana in order to stimulate her appetite. This witness statement also recounted that she and the appellant were acquainted with a known drug dealer and she had seen the appellant smoke marijuana a couple of weeks prior to the search. This witness statement mentions nothing about the seized marijuana being hers. About 12 days later, BK submitted a separate affidavit to AFOSI in which she claimed ownership of the marijuana found in the appellant's room, as well as in the car, and she asserted appellant knew nothing about it.

Despite her statements to AFOSI, BK refused to testify at trial without a grant of immunity; however, the local district attorney denied a government request for immunity. At trial, the government moved the court to exclude any evidence of BK's statements on the grounds that they were hearsay and did not satisfy the requirements of Mil. R. Evid. 804(b)(3). This rule permits admission, inter alia, of a statement against penal interest if the declarant is unavailable and "'corroborating circumstances . . . clearly indicate the trustworthiness' of the out-of-court statement." *United States v. Benton*, 57 M.J. 24 , 31 (C.A.A.F. 2002) (quoting *United States v. Price*, 134 F.3d 340, 347-48 (6th Cir. 1998)); *United States v. Koistinen*, 24 M.J. 676, 677-78 (A.F.C.M.R. 1987), *aff'd*, 27 M.J. 279 (C.M.A. 1988). The military judge granted the government's motion, finding that, although BK was unavailable and the statements she made were against her own penal interest, they were not trustworthy. Specifically, the judge found that BK's relationship

with the appellant gave her a motive to misrepresent in order to protect him from prosecution. The appellant contends that this ruling impaired the exercise of his right to present a defense, a right secured by the Fifth and Sixth Amendments to the Constitution.

We agree with the judge that BK was not available to testify due to the district attorney's denial of immunity. We also agree that her claims that the marijuana in question belonged to her were certainly against her penal interest. The only question is whether we agree with the judge's finding that BK's apparent motive to lie rendered the statements untrustworthy.

We find it peculiar, to say the least, that a civilian like BK could be living in a military dormitory room without being detected. Certainly, given her precarious legal status on base, a reasonable person might suspect that she would lie to protect her boyfriend, who appeared to be her means of support. On the other hand, we note that her statements possess several indicia of trustworthiness. First, they were corroborated by the discovery of marijuana in her purse. Second, the oral statement was at least consistent with her witness statement produced the same day. Third, the oral statement was apparently made prior to any opportunity for collusion with the appellant and fairly close in time to the discovery of the marijuana. Fourth, the witness statement, which was given under oath, contained enough adverse information about the appellant as to belie an unequivocal intent to exculpate him. Fifth, the residue in the car was located in an ear piercing kit, an item more likely to belong to a civilian than to an active duty member held to Air Force dress and appearance standards. Sixth, the location of the marijuana in the dormitory room was as easily accessible to BK as it was to the appellant.

Examining the record of trial we conclude that BK's statements were sufficiently trustworthy that they should have been presented to the members for their evaluation. Given the fact that the appellant's defense to the marijuana possession charge was ignorance of its presence in the locations alleged, we are unable to conclude that the error was harmless beyond a reasonable doubt. We hold that the military judge abused her discretion by granting the government's motion in limine. *See Hyder*, 47 M.J. at 48. Charge I and its Specification are dismissed.

We examined the remaining assignment of error and hold it to be without merit. The court minutes in question were admitted as evidence of a prior conviction under Rule for Courts-Martial 1001(b)(3). These minutes constituted an authenticated document from the "court that entered the guilty finding." *United States v. Yeckinevich*, 26 M.J. 833, 834 (A.F.C.M.R. 1988).

Having found error, we must now consider whether we can reassess the sentence or whether we must return the case to the convening authority for a sentence rehearing. In *United States v. Doss*, 57 M.J. 182 (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.

Doss, 57 M.J. at 185.

In this case we conclude that we can perform sentence reassessment. The drug possession charge was only a small part of the government's case. Far and away the more serious of the charges was the conviction for having knowingly engaged in sexual intercourse with a child under the age of 16. Furthermore, by dismissing the marijuana possession charge we reduce the maximum period of confinement from 22 years to 20 years. We are satisfied beyond a reasonable doubt that the interests of justice will be best served by reassessing the sentence as follows: a bad-conduct discharge and confinement for 13 months.

The approved findings, as modified, and 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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court