UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic LAWRENCE L. HARRIS II
United States Air Force

ACM S31850

28 November 2011

Sentence adjudged 4 June 2010 by SPCM convened at Hurlburt Field, Florida. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge and confinement for 4 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

PER CURIAM:

The appellant was tried by a special court-martial comprised of officer and enlisted members at Hurlburt Field, Florida, on 3-4 June 2010. Contrary to the appellant's pleas, the panel convicted him of two specifications of possessing a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The panel sentenced the appellant to a bad-conduct discharge, confinement for 4 months, and forfeiture of $964.00 pay per month for 4 months. The convening authority approved only so much of the sentence as provided for a bad-conduct discharge and confinement for 4 months. On appeal, the appellant asks the Court to set aside the findings of guilty and the sentence,

[1] The appellant also pleaded not guilty to and was found not guilty of one specification of adultery and one specification of wrongfully providing alcohol to a minor, in violation of Article 134, UCMJ, 10 U.S.C. § 934.

and to dismiss the original charge and its two specifications with prejudice.[2] The appellant raises two assignments of error to support his request: (1) the military judge erred by denying the appellant's motion to suppress the purported results of a search of the appellant's pocket due to the destruction of a video recording of the search;[3] and (2) the evidence is factually insufficient to prove beyond a reasonable doubt that the appellant wrongfully possessed controlled substances.[4] We disagree. Finding no prejudicial error, we affirm the findings and the sentence.

Background

On the morning of 6 November 2009, the appellant was pulled over for erratic driving by Fort Walton Beach Police Officer JP. Suspecting that the appellant was driving under the influence, Officer JP performed a series of field sobriety tests on the appellant, which he failed. Officer JP arrested the appellant for driving under the influence of drugs and/or alcohol. Before transporting the appellant to the station for booking, Officer JP performed a pre-transport search of the appellant in accordance with Fort Walton Beach Police Department (FWBPD) policy to see if the appellant was carrying anything that might pose a threat during transport.[5] During the search, Officer JP found a small Altoids container in the appellant's pocket. When questioned about it, the appellant told Officer JP that the Altoids container contained cold medicine. Believing the container did not pose a threat, Officer JP put the container back into the appellant's pocket and transported the appellant to the station for booking. This account was further corroborated by two in-car video recording systems.

Upon reaching the police station, the appellant was removed from the patrol car and taken into the booking area. Once inside, all of the appellant's personal items were removed and placed on a shelf, including the Altoids container. Officer JP removed the appellant's handcuffs, at which time the appellant grabbed the Altoids container off the shelf and placed it back in his pocket. Noticing the appellant's movement, Officer JP asked the appellant if he had anything else on his person. The appellant denied having any other items, but Officer JP decided to search the appellant again and discovered that the Altoids container that he had removed from the appellant's pocket moments earlier was back in the appellant's pocket. Officer JP removed the Altoids container from the

[2] The appellant had two charges preferred against him at different times. The first or "original" charge for violating Article 112a, UCMJ, 10 U.S.C. § 912a, was preferred on 19 February 2010. The second or "additional" charge for violating Article 134, UCMJ, was preferred on 28 May 2010.
[3] The appellant has raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[4] The appellant has raised this issue pursuant to *Grostefon*.
[5] Chapter 29, Section I.A.1. of Fort Walton Beach Police Department Written Directives establishes the following procedures for arrestee searches prior to transport:

> An officer transporting a prisoner/detainee will ensure he/she is properly searched for weapons and contraband prior to transport. The officer will confiscate all weapons, contraband, evidence of dangerous articles found during this search prior to transport. Other personal property will remain with the prisoner/detainee.

appellant, opened it, and examined the contents. Inside, he found several pills that appeared to be controlled substances. Officer JP checked the pills into evidence.

The booking room at the FWBPD had a motion activated video system. The video system was in place for officer protection. The FWBPD allowed the video system to continuously loop and re-record over itself. The video typically aged off the system after three to four weeks unless someone chose to preserve a section of the recording. The FWBPD did not consider the appellant's booking video to be of any potential evidentiary value and allowed the video to age off the system. Preservation requests from the litigants arrived after the booking room video had already been deleted.

The suspected controlled substances found on the appellant, 23 pills in all, were sent to the Florida Department of Law Enforcement (FDLE) for forensic analysis. All the pills tested positive as either (1) a Schedule I drug, 4-Bromo-2, 5-dimethoxyphenethylamine (commonly known as "2C-B"), or (2) a Schedule IV drug, Diazepam. The appellant did not have a medical justification or excuse for possessing either of the controlled substances.

The trial defense counsel filed a motion to suppress the evidence seized from the appellant during the 6 November 2009 search. Defense counsel averred that the evidence should be suppressed because its admission, in light of the destruction of the booking room video, would violate the appellant's due process rights; his rights under Article 46, UCMJ; and Rule for Courts-Martial (R.C.M.) 703. The military judge denied the motion to suppress and issued detailed findings of fact and conclusions of law.[6]

[6] In so ruling, the military judge found and concluded that: (1) Officer JP stopped the appellant for suspicion of driving under the influence on 6 November 2009 and, prior to transporting him to the FWBPD station, conducted a search pursuant to written directives; that search was recorded on Officer JP's in-car recording or "dash camera" system; (2) Officer JP removed an Altoids container from the appellant's front pocket, momentarily inspected it, and placed it back in the appellant's pocket after the appellant told him it contained cold medicine; (3) upon arriving at the FWBPD booking room, Officer JP searched the appellant again and seized the Altoids container and its contents as evidence; (4) the booking room had three motion activated video cameras with limited visibility over the room; the video feeds are recorded on a hard drive that loops and re-records over previously recorded material unless the recording is specifically recorded to a CD and saved; (5) officers processing individuals through the booking room do not request the recordings to be saved as a matter of standard operating procedure; FWBPD procedures only require patrol officers to be responsible for their dash mounted cameras; (6) the booking room video cameras were not installed for the purpose of evidence collection; (7) the mere fact that evidence no longer exists for confirmation testing or viewing by the defense does not make it, by definition, exculpatory; (8) the appellant failed to show that the booking room video was "potentially useful" and that the government acted in bad faith in destroying the video; (9) the appellant had the ability to obtain comparable evidence by other means, such as cross-examining Officer JP; and (10) the appellant failed to show that the booking room video was essential to a fair trial under R.C.M. 703, and waited nearly three months after the booking room video was made before filing a formal discovery request to have the video preserved.

Destruction of Evidence

This court reviews a military judge's ruling on a motion to suppress for an abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). A military judge abuses his discretion when his "findings of fact are clearly erroneous, when he is incorrect about the applicable law, or when he improperly applies the law." *United States v. Seay*, 60 M.J. 73, 77 (C.A.A.F. 2004) (quoting *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004)).

This court reviews claims of improper loss or destruction of evidence de novo. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999). Destruction of, or failure to preserve, evidence does not entitle an appellant to relief on due process grounds unless the appellant meets the conditions set forth by the Supreme Court in *California v. Trombetta*, 467 U.S. 479 (1984). Specifically, the appellant must show that the evidence possesses an exculpatory value that was apparent before it was destroyed; and the evidence is of such a nature that the accused would be unable to obtain comparable evidence by other means. *Id*. at 488-89. The Court refined the *Trombetta* test in the case of *Arizona v. Youngblood*, 488 U.S. 51 (1988). Under *Youngblood*, a due process violation based on the Government's failure to preserve evidence requires the appellant to establish that the evidence was "potentially useful" and the Government acted in bad faith. *Id*. at 58. *See also United States v. Bohl*, 25 F.3d 904, 909-910 (10th Cir. 1994); *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). To be entitled to an Article 46, UCMJ, 10 U.S.C. § 846, discovery violation, the appellant must make the same showing. *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986) (holding that the rule announced in *Trombetta* satisfies both constitutional and military standards of due process and should therefore be applicable to courts-martial).[7] *See also United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995). Finally, to be entitled to relief under R.C.M. 703(f), the appellant must show that (1) the evidence is "relevant and necessary"; (2) it is "destroyed, lost, or otherwise not subject to compulsory process"; (3) it is of such "central importance to an issue that it is essential to a fair trial"; (4) there is "no adequate substitute for such evidence"; and (5) the appellant is not at fault or could not have prevented the unavailability of the evidence. R.C.M. 703(f)(1), (2).

We have reviewed the record and find the military judge did not abuse his discretion in denying the appellant's motion to suppress. We find that the appellant has not met the requirements of the *Trombetta* test. The record fails to show that (1) the exculpatory nature of the evidence was apparent before it was destroyed, (2) the evidence was of such a nature that the appellant would be unable to obtain comparable evidence by other reasonable means, and (3) the Government destroyed the evidence in bad faith. Instead, the record clearly shows that Officer JP acted consistent with FWBPD policy and

[7] We will refer to the tests outlined in *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988); and Article 46, UCMJ, 10 U.S.C. § 846, as the *Trombetta* test.

procedures when he searched the appellant prior to transporting him to the booking room, and that this search was preserved on Officer JP's in-car video recording system. Furthermore, the record does not show any bad faith on the part of Officer JP or the FWBPD in not saving the appellant's booking room video; rather, the record shows that both Officer JP and the FWBPD acted consistent with department policy, which was not to save these videos as a matter of practice. The record shows that the video system was in place for officer protection and that the booking room video system did not cover the entire room. Finally, the appellant had other available evidence from which to present his version of events. This evidence included Officer JP's in-car video of the pre-transport search and a vigorous cross-examination of Officer JP to discredit his version of events.

In addition, the record fails to support a finding that the R.C.M. 703(f) test has been met. On this point, we agree with the military judge that the booking room video was not essential. As we noted above, the appellant had alternative forms of evidence to substitute for the booking room video, which counter his argument that the destroyed video was essential to a fair trial.

We have considered the evidence in the record, paying particular attention to the matters raised by the appellant. We find that the military judge did not abuse his discretion in denying the appellant's motion to suppress.

Factual Sufficiency of the Evidence

We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). *See also United States v. Sills*, 56 M.J. 239 (C.A.A.F. 2002). 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, 10 U.S.C. § 866(c); *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

We find the evidence factually sufficient to uphold the appellant's conviction for violating Article 112a, UCMJ, by wrongfully possessing controlled substances. The evidence included the following: (1) Officer JP stopped the appellant for erratic driving and arrested the appellant for driving under the influence of drugs and/or alcohol after the appellant failed the field sobriety tests; (2) Officer JP twice found the Altoids container in the appellant's pocket after his arrest; (3) forensic testing concluded that the pills in the Altoids container were controlled substances; and (4) the appellant did not have a medical justification or excuse to possess either controlled substance. This evidence is supported by the testimony of Officer JP, the in-car video recording systems, the FDLE laboratory results and testimony of the forensic expert, and the medical officer who

reviewed the appellant's medical records. Moreover, the appellant's trial defense counsel vigorously cross-examined Officer JP and argued that he manufactured the case against the appellant. Ultimately, the members, having the opportunity to weigh and evaluate the credibility of all the evidence presented at trial, determined the appellant wrongfully possessed the controlled substances.

We have considered the evidence produced at trial with particular attention to the matters raised by the appellant and are convinced beyond a reasonable doubt that the appellant is guilty of the charge and specifications for which he was found guilty: wrongful possession of 4-Bromo-2, 5-dimethoxyphenethylamine and Diazepam.

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.

OFFICIAL

STEVEN LUCAS
Clerk of the Court