UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ALAN W. HEIFNER
United States Air Force

ACM 36576

12 March 2007

Sentence adjudged 17 November 2005 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: Lance B. Sigmon (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Major Kimani R. Eason (argued), Colonel Gerald R. Bruce, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BROWN, Chief Judge:

Contrary to his pleas, the appellant was convicted by officer members sitting as a general court-martial, of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Consistent with his pleas of not guilty, those same members found him not guilty of divers uses of Percocet, in violation

of Article 112a, UCMJ; one specification of assault with a loaded firearm in violation of Article 128, UCMJ, 10 U.S.C. § 928; one specification of wrongfully communicating a threat, and one specification of wrongfully using Flexeril on divers occasions, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to a bad-conduct discharge, reduction to E-1, and to be reprimanded. The convening authority approved the findings and the sentence as adjudged.

The appellant raises one assignment of error[1] and asks this court to set aside his conviction for wrongful use of cocaine and the sentence. On 4 January 2007, we heard oral argument in this case.

Background

Appellant's trial began on 15 November 2005. The evidence presented by the prosecution concerning the wrongful use of cocaine showed that on 5 March 2005, the appellant provided a urine sample as part of a unit inspection and that his urine subsequently tested positive for the metabolite for cocaine, benzoylecgonine (BZE), at 534 nanograms per milliliter. The Department of Defense's cutoff level for BZE is at least 100 nanograms per milliliter. The government called an expert witness to discuss the urinalysis results and the testing procedures at the drug testing laboratory. The accuracy of the urinalysis was not contested or questioned by the defense at trial and is not contested on appeal.

Appellant's defense at trial was that even though the cocaine metabolite was in his urine, he did not knowingly use cocaine and was therefore not guilty of wrongful use of cocaine. Appellant called several witnesses to testify as to his truthful character and he also testified about all the charges and specifications in this case. Appellant testified he did not know how the cocaine had gotten into his urine. He said that between February and March of 2005, he had dated a woman named Lydia who was a waitress at a local restaurant. They dated for about a month ending in mid-March 2005. During his direct testimony he said that although he did not take part in any illegal drug use, he witnessed Lydia on several occasions use marijuana with some of her co-workers. The appellant said he did not use drugs because he did not want to jeopardize his career and that he counseled Lydia several times, telling her that she should stop using drugs. He said the reason he stopped seeing Lydia was because she would not stop using drugs.

[1] Appellant contends the military judge erred because during his instructions to the court members after approving the trial counsel's requested delay at the close of the defense's case-in-chief, the military judge insinuated that the accused's testimony was false.

During cross-examination, the appellant said he never witnessed Lydia use cocaine, however, he did hear her talk about it. Appellant indicated he did not know her address, but he gave the prosecution an idea of how to get to her house. The appellant also indicated that he thought Lydia worked at a local restaurant in Fayetteville, North Carolina. After the appellant testified, the defense rested. The government was granted a recess at 1315 hours on 16 November 2005. During the recess the prosecution asked for and was granted an Article 39a, UCMJ, 10 U.S.C. § 839a, session. During that session the prosecution asked the military judge to grant a recess so it could try to locate Lydia who it felt was a potentially material witness to the cocaine charge.

In response, the defense noted Lydia's name had been mentioned in the Report of Investigation, and argued the prosecution should not be granted a delay to try and locate Lydia since the report indicated she had been "contacted" nearly 7 months prior, around 7 April 2005. The military judge expressed frustration with the completeness of the investigation and particularly the fact that investigators had not followed-up on a lead regarding Lydia now causing the prosecution to ask for time to locate her. Ultimately he decided to grant the prosecution's request to recess but told the parties the recess would only be until the following morning at 0830 hours.

When the members returned, the following instruction (which the appellant contends is reversible error) was given to the members:

> MJ: Well, Colonel Frost, I always seem to give you a plan that always seems to not materialize. So you're not going to believe anything I tell you after a while. Well, I hope so; especially my instructions. But I do my best, but here's what's up. You may recall that during his testimony, Airman Heifner mentioned a person named Lydia. The government has asked for an opportunity to interview this person named Lydia, and based on some things that came out during the trial, they now think they can locate Lydia, and they've asked for an opportunity to interview her. I told them I would give them no more than this afternoon, and that come tomorrow morning, they either needed to proceed with or without Lydia. So they've asked for a recess until tomorrow morning to have an opportunity to contact Lydia. So I've granted that request, but no longer than until tomorrow morning at 8:30. So I apologize. Again, as I mentioned at the beginning, my job is to ensure a fair trial for both sides, and I think giving them a couple of hours this afternoon to see if they have any other evidence to present ensures a fair trial for both sides, so that's what I'm going to do. I apologize if

it's any inconvenience to you, the court members. With that, we'll recess for the day.

MJ: Trial counsel, you'll be prepared to proceed one way or the other tomorrow morning at 8:30.

TC: Yes, Your Honor.

MJ: All right. So we'll be in recess until 8:30.

PRES (LT COL FROST): Sir, what can we expect tomorrow at 8:30 then? Duration-wise, can you give us any kind of a _ _ _ _ [sic].

MJ: I'll give you my best. Either they will or will not present any additional evidence. If they don't, then I'll be ready to instruct you. I've got a draft done, and I'll give that to both sides tonight, so you can review my draft, and then you'd hear their arguments and then start deliberating. If they do have some additional evidence, then they would present that evidence, and then I have told the defense I'll give them an opportunity to present anything they would like, if they want to. Certainly, as I said, they have no obligation to present anything, but if they want to, I'll give them the opportunity to reopen, if the government brings up something.

PRES (LT COL FROST): All right, sir.

MJ: Again, that's where we are, and I thank you for your patience and understanding. We'll be in recess until tomorrow morning at 8:30.

The court recessed at 1350 hours on 16 November 2005. After the members left, there was an immediate Article 39a, UCMJ, session and at that session the defense asked for a mistrial because the military judge mentioned Lydia's name and the fact that the prosecution needed to interview her. The defense argued that if she did not testify the next day, the members could assume that either they could not find her, thereby calling into question her existence or that she did not want to be interviewed. Either way, the defense argued, it looked like the appellant was trying to hide something and therefore his testimony should not be believed.

The military judge denied the motion for a mistrial and informed the parties he would give an instruction to the members that they should not draw any adverse inference from the fact the judge gave the government a recess to look into their case for any rebuttal.

The next morning at an Article 39a, UCMJ, session, the trial counsel informed the military judge the government was not able to locate Lydia and therefore would have no rebuttal evidence to present to the members. The military judge told the parties he would instruct the members not to draw any adverse inference from the recess. The defense did not object to this proposed course of action. When the members returned at 0831 on 17 November 2005, the military judge instructed them as follows:

> MJ: Colonel Frost, members of the court, good morning. Before I turn back to the prosecution, I just wanted to make sure we're all clear on something regarding our recess yesterday. I assume that we are, but I want to make sure. First, you should draw no adverse inference to the accused from my granting the government an overnight recess to interview some witnesses and decide what, if any, additional evidence they wanted to present. It's normal procedure to grant a reasonable recess at that point in the trial, and for that matter, its normal procedure to allow either side a reasonable opportunity to interview a potential witness or witnesses. Further, you should draw no adverse inference to the accused from the government's decisions, [sic] whatever that is, on whether or not to call any additional witnesses. And finally, I emphasize that the government has the burden of proof on each and every element of each offense and the burden never shifts to the defense. Does anyone have any questions at all about that instruction?
>
> [Negative response from all members.]
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> MJ: Does everyone agree to fully follow this instruction? All right, and that's an affirmative response by all. Thank you.

The defense did not object to this instruction. The trial counsel indicated the prosecution had nothing further to present.

Law and Analysis

Appellant contends that the military judge's comments after approving the prosecution's request for delay at the close of the defense's case-in-chief, insinuated that the appellant's testimony was false.

A military judge's decision to inform the members about the reason for a recess should be reviewed for an abuse of discretion. *Cf. United States v. Burton*, 52 M.J. 223, 226 (C.A.A.F. 2000) (when a military judge's impartiality is challenged on appeal, our standard of review is abuse of discretion). A military judge has a sua sponte duty to insure that an accused receives a fair trial. *United States v. Fleming*, 38 M.J. 126, 129 (C.M.A. 1993). We review constitutional claims de novo. *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964). We review a military judge's denial of a motion for a mistrial for an abuse of discretion. *United States v. Diaz*, 59 M.J. 79, 90 (C.A.A.F. 2003). Our superior court has recognized that a mistrial is an unusual and disfavored remedy and should be applied only as a last resort to protect the guarantee for a fair trial. *See id.; see also United States v. Dancy*, 38 M.J. 1, 6 (C.M.A. 1993).

Both sides in their briefs and at oral argument correctly point out that the legal test we must apply on appeal is whether "taken as a whole in the context of this trial," a court-martial's "legality, fairness and impartiality" were put into doubt by the military judge's notification to the members of the prosecution's request to interview Lydia. *See Burton*, 52 M.J. at 226 (quoting *United States v. Ramos*, 42 M.J. 392, 396 (C.A.A.F. 1995)). The test is applied from the viewpoint of the reasonable person. *Ramos*, 42 M.J. at 396.

We conclude judging from the standpoint of a reasonable observer that taken as a whole in the context of this trial, this court-martial's "legality, fairness and impartiality" were not put into doubt by the judge's notification. *Id.*

First, we note the military judge had provided a roadmap to the members prior to the appellant's testimony that implied they would be given the case for decision on findings that day. When the prosecution informed the military judge that it needed additional time to locate Lydia, it was not unreasonable to expect the military judge would explain to the members why they would not get the case that day, and also why they would recess before 1400 hours and not resume until 0830 hours the next morning.[2] Second, to ensure the members did not hold the recess in any way against appellant, the military judge informed the members they could not do so and explained such a recess was a "normal procedure to allow either side a reasonable opportunity to interview a potential witness or witnesses." In addition, the military judge told the members they could not draw any adverse inference to the appellant from the prosecution's decision on whether or not to call any additional witnesses. The members indicated they understood the military judge's instructions and agreed to follow them.

[2] This was not the first time the amount of time needed for a recess had lasted longer than anticipated. This was probably another reason the military judge felt he should explain why the trial would not resume until the next day.

In the absence of evidence to the contrary, court members are presumed to have followed the military judge's instructions. *United States v. Pollard*, 38 M.J. 41, 52 (C.M.A. 1993) (citing *United States v. Ricketts,* 1 M.J. 78, 82 (C.M.A. 1975)). We have no reason in this case to conclude they did not follow the military judge's instructions and presume they did. Third, we note that after the military judge provided the cautionary instructions to the members, the defense lodged no objection to those instructions, nor did it renew its motion for a mistrial. This strongly suggests the defense believed the instructions had cured any perceived problems and the members would follow the military judge's instructions. Fourth, the defense took full advantage of the prosecution's failure to call Lydia to rebut the possibility she was the reason appellant had tested positive for cocaine because she had caused him to unknowingly ingest it. During its argument on findings, civilian defense counsel said:

> Where's Lydia? She could have come in here and said "There is no way I would have ever done anything like that." She didn't do it, and trial counsel didn't bring her in to do that. So what does that leave you with? Maybe it's true. Maybe trial counsel didn't put her on the stand because she confirmed what our suspicions are.

Fifth, as government appellate counsel pointed out in their brief and during oral argument, the cocaine charge is supported by strong scientific evidence and the military judge properly instructed the members on the permissive inference, that is, that if they found the appellant's urine contained BZE, they could infer he knowingly used cocaine. Finally, the members considered all of the testimony and documentary evidence submitted during findings, including the testimony of the appellant. They made a credibility determination concerning the appellant, and concluded they did not believe him when he told them he had not knowingly used cocaine.

We find the military judge did not abuse his discretion when he informed the members he had granted the prosecution's request for a recess so they might have the opportunity to interview Lydia. *See Burton*, 52 M.J. at 226. We also find that the military judge did not insinuate to the members that the appellant's testimony was false. Judging from the standpoint of a reasonable observer, we conclude that the military judge's explanation to the members did not call into question the "legality, fairness and impartiality" of the proceeding. *Id.* The military judge properly denied the motion for a mistrial. The assignment of error is without merit.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator