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UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JASON A. HUCHEL
United States Air Force

ACM 34824

16 June 2003

Sentence adjudged 29 June 2001 by GCM at Peterson Air Force Base, Colorado. Military Judge: Patrick M. Rosenow and Steven A. Hatfield.

Approved sentence: Dishonorable discharge, confinement for 54 months (of which 12 months were suspended for one year), forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

On 18, 19, and 25-29 June 2001, the appellant was tried at Peterson Air Force Base (AFB), Colorado, by a general court-martial consisting of officer and enlisted members. Contrary to his pleas, he was found guilty of ten drug offenses, including divers uses of lysergic acid diethylamide (LSD), marijuana, and ecstasy; wrongful possession of ecstasy, LSD, and ketamine with the intent to distribute; divers distributions of ecstasy and LSD; and wrongful introduction of ecstasy and LSD onto Peterson AFB on divers occasions with the intent to distribute. These offenses are in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He pled not guilty to an additional

four specifications involving drug distribution and introduction, and the government withdrew these specifications after arraignment. Court members sentenced him to a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority reduced the confinement period to 54 months, otherwise approving the sentence as adjudged. With the exception of the dishonorable discharge, the convening authority ordered the sentence executed, but he suspended the execution of the sentence extending to confinement in excess of 42 months for a period of one year, at which time, unless sooner vacated, the suspended part of the sentence would be remitted without further action. The suspended confinement was intended to ensure the appellant's continued cooperation in the investigation of other drug cases.

Appellant raises five issues for our consideration. For the reasons set forth below, we conclude that these issues are without merit and affirm.

I. Suppression Motion

In December 2000, law enforcement agents focused on the appellant as a possible drug suspect. Accordingly, on 21 December 2000, the appellant's first sergeant escorted him to the Air Force Office of Special Investigations (AFOSI) detachment on Peterson AFB. He arrived at about 0930 and soon thereafter was advised of his rights under Article 31, UCMJ, 10 U.S.C. § 831. He waived his rights and provided a written statement denying any drug activity. The appellant then consented to a search of his body, vehicle, cell phone, and off-base apartment. After completing the cell phone search and providing a urine specimen, the appellant, his first sergeant, and two AFOSI agents drove to the appellant's apartment.

Upon arriving at the appellant's apartment complex, the agents searched his car. The appellant then unlocked his apartment for the agents and a search ensued. Although no drugs were found, the agents seized the appellant's computer to search for evidence of drug activity. The parties returned to the AFOSI detachment, and the appellant was again placed in an interview room. Soon thereafter, the agents entered the room and reminded the appellant of his rights. In an apparent ruse, the agents told the appellant they had found incriminating evidence. Upon hearing this, the appellant responded, "Well, then you must have also found the drugs." The agents responded by saying something to the effect, "Yeah, but you're going to show us where they are." The appellant immediately realized the agents had not found any drugs and that he had been tricked. Neither the ruse nor the appellant's verbal response were challenged at trial or on appeal. Instead, it is what happened after this point in the interrogation that gives rise to the appellant's first claim of error.

According to the military judge's findings of fact, the agents then asked the appellant if he would consent to a second search of his apartment. The appellant asked

why they needed his consent a second time when he had previously provided written consent, and the agents advised him that the first consent was good for only one search. When the appellant asked what would happen if he did not grant consent, the agents told him they "would just get a warrant and we'll have it real quick," or words to that effect. After hearing this statement, the appellant consented in writing to a second search of his apartment. With his assistance, the agents located and seized 15 ecstasy pills and a small plastic vial of liquid LSD from the appellant's bedroom.

The parties returned to Peterson AFB by late afternoon. They ordered a pizza. After everyone finished eating, the agents gave the appellant additional rights advisements and obtained a detailed written statement divulging extensive drug activities. Several weeks later, the appellant agreed to return to the AFOSI detachment to answer additional questions and to meet with agents from the Drug Enforcement Agency (DEA), who wanted to learn more about the appellant's civilian drug suppliers and associates.

At trial, the parties provided extensive evidence concerning the motion to suppress. The government called the two AFOSI agents and the first sergeant. The appellant testified on his own behalf. After reviewing all the evidence, the military judge concluded that the appellant's consent was knowing and voluntary under the totality of the circumstances.

Analysis

In *United States v. Kitts*, 43 M.J. 23, 27-28 (1995), our superior court established a framework for reviewing a military judge's determination that an accused voluntarily consented to a search. When the government relies on consent, it has the burden of proving consent by clear and convincing evidence. *Id*. at 28 (citing Mil. R. Evid 314(e)(5)). On appeal, we review the military judge's ruling on a motion to suppress for an abuse of discretion. His or her findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record. We review conclusions of law de novo and will reverse only if the military judge's decision was influenced by an erroneous view of the law. *United States v. Richter*, 51 M.J. 213, 220 (1999). *See also United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994), *aff'd*, 46 M.J. 349 (1997); *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981).

A search cannot "be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he [or she] possesses a warrant." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). *See also* Mil. R. Evid. 314(e)(4) ("mere submission to the color of authority . . . is not a voluntary consent"). In such a case, the purported consent is mere acquiescence to authority. *Bumper v. North Carolina*, 391 U.S. at 549. "On the other hand, mere mention of an intent to obtain a warrant or command authorization does not vitiate consent. The question in each case is whether, under the totality of the circumstances, the consent is

truly voluntary." *Richter*, 51 M.J. at 221. "An official seeking consent from a servicemember may explain that he [or she] will attempt to obtain from an appropriate commander or military judge a search authorization based upon probable cause if consent is not forthcoming, but it must be done in an appropriate manner so as to make the resulting consent truly voluntary." *United States v. McClain*, 31 M.J. 130, 133 (C.M.A. 1990). *See United States v. Faruolo*, 506 F.2d 490, 494 (2d Cir. 1974) (consent voluntarily given even though a Federal Bureau of Investigation agent said warrant would be sought and probably would be given).

The question whether the consent to a search was voluntarily given "is a question of fact to be determined [by] all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973). "In evaluating the totality of the circumstances, courts should consider, among other things, such factors as the accused's age, education, experience, length of military service, rank, and knowledge of the right to refuse consent, as well as whether the environment was custodial or coercive." *United States v. Radvansky*, 45 M.J. 226, 229 (1996) (citing *United States v. Goudy*, 32 M.J. 88, 90-91 (C.M.A. 1991)).

In ruling on the suppression motion, the military judge deter ermined that the appellant was an articulate, intelligent, senior airman with more than four years of military service. Although the appellant was in custody all day, the military judge concluded that fatigue, thirst, or hunger were not significant factors affecting the appellant's decision to consent. The military judge found that the agents acted calmly and professionally and that they not only formally advised the appellant of his rights on multiple occasions throughout the day, but they had also periodically reminded him of these rights.

The military judge concluded that the appellant knew he could say "no" to the request for consent, and therefore his consent was knowing. Citing *Goudy*, the military judge further held that the appellant's consent was also voluntary. Based upon the appellant's own testimony, the military judge concluded the appellant's consent was simply "resignation to the inevitable." The appellant testified that after he blurted out, "Well, I guess you found the drugs," he knew the cat was out of the bag. He said he then consented "because it would help things go faster so [he] wouldn't have to wait another hour" while the agents applied for a search authorization and because it was the best thing for him to do.

The military judge's findings, supported by ample evidence in the record of trial and his ruling that the appellant knowingly and voluntarily consented, were based on a correct view of the law. Under the totality of the circumstances, we are also clearly convinced that the appellant knew his options and made a voluntary decision to give the agents consent to search his apartment. The appellant simply acquiesced to his circumstances rather than having his will overborne by the AFOSI agents. Accordingly, we hold the military judge did not err in denying the motion to suppress.

II. Motion for a Finding of Not Guilty

At the end of the prosecution's case-in-chief, the appellant made a motion pursuant to Rule for Courts-Martial (R.C.M.) 917 to dismiss the charge and three specifications alleging divers uses of ecstasy, LSD, and marijuana. The appellant argued that the portions of his confession dealing with drug use were insufficiently corroborated by independent evidence. After the military judge denied the motion, the appellant presented his case-in-chief. He testified on his own behalf and duly admitted he committed the objective acts constituting all of the allegations, to include the use of these three drugs. Having admitted the underlying circumstances of all the offenses, he then raised the special, affirmative defense of duress. Because his drug activities occurred over a seven-month period and because the appellant had very limited knowledge about the person or persons who posed the threat to him or his family, this defense was unconvincing and failed to persuade the court members.

At trial, the appellant testified to a far-fetched scenario in which he became indebted to a civilian drug dealer named "Ray" in the amount of $10,000 under ostensibly innocent circumstances. This debt was incurred one evening when he and a friend named "Andy" were headed to a rave party. The appellant testified that Andy received a call on his cell phone as they were driving to the party. Andy told the appellant he had to make an unexpected stop at a local hotel. The appellant testified he was told to wait in the car, but became impatient and went up to the room Andy entered. There he encountered a number of people counting a large sum of money. An unidentified girl left with the money, and when she failed to return, others in the room became upset and angry. They insisted he and Andy were responsible for a $10,000 loss and drove them around the entire night making generalized threats to the appellant and his family. The appellant testified that he believed that he or one of his family members would be immediately killed or suffer serious bodily injury if he failed to raise the money, and because he was unable to come up with $10,000 using legitimate sources, he felt his only recourse was to sell drugs. He testified that as his drug distribution scheme unfolded, he used ecstasy and LSD himself in order to determine their potency, quality, and safety, and he used marijuana in order to fit in with the drug crowd and not appear suspicious. In his prior interviews with the AFOSI and DEA, the appellant had not mentioned the debt or any of the circumstances surrounding that evening or the threats to his life.

Military Rule of Evidence (Mil. R. Evid.) 304(g) states that a confession may be considered on the question of guilt or innocence "only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth." The rationale for such a rule is to "ensure that the confession is not false." *United States v. Duvall*, 47 M.J. 189, 192 (1997). In *United States v. Cottrill*, 45 M.J. 485, 489 (1997), our superior court stated:

> The corroboration requirement for admission of a confession at court-martial does not necessitate independent evidence of all the elements of an offense or even the *corpus delicti* of the confessed offense. Rather, the corroborating evidence must raise only an inference of truth as to the essential facts admitted. Moreover, while reliability of the essential facts must be established, it need not be done beyond a reasonable doubt or by a preponderance of the evidence. (Internal citations omitted.)

Indeed, the quantum of evidence "may be very slight." *United States v. Melvin*, 26 M.J. 145, 146 (C.M.A. 1988).

We are convinced that the government provided sufficient corroborating evidence concerning the appellant's drug use. This included: testimony indicating the appellant possessed ecstasy and LSD on a near constant basis during the charged period; testimony from an eyewitness who saw him place a drop of LSD on his tongue; and testimony that he created a homemade pipe from a soft drink can and that he handled it while it was lit and full of marijuana. In addition, the government introduced the physical evidence of the ecstasy and LSD found in the appellant's apartment. *See United States v. Grant*, 56 M.J. 410 (2002) (drug screen report alone sufficiently corroborated confession to drug use).

Moreover, even if the military judge erred in denying the motion for a finding of not guilty, we are not required to set aside the conviction. "If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made." R.C.M. 917(g).

Mil. R. Evid. 304(g) states, "Corroboration is not required for a statement made by the accused before the court by which the accused is being tried." *See also United States v. Crayton*, 17 M.J. 932, 935 (A.F.C.M.R. 1984) ("The conscious tactical decision of the accused and his trial defense counsel that the accused testify must be allowed to stand.") Having admitted the essential facts underlying his drug use in open court, we find it highly unlikely the appellant falsely confessed to investigators. Therefore, considering the evidence presented before findings were entered, to include the appellant's judicial admissions, we conclude there was sufficient evidence to corroborate the appellant's wrongful use of ecstasy, LSD, and marijuana on divers occasions at the times and places alleged.

III. Instruction on Lesser Degree of Guilt

The military judge failed to instruct on "degree of guilt," the third statutory charge found in Article 51(c), UCMJ, 10 U.S.C. § 851(c). The appellant argues he was prejudiced by the omission of this instruction because it would have "indirectly" buttressed his duress defense and led to an acquittal.

Article 51(c), UCMJ, provides that the military judge shall instruct court members on the elements of the offense and charge them:

> (1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;
>
> (2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;
>
> (3) *that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt;* and
>
> (4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(Emphasis added.)

It is clear the term "degree of guilt" includes situations where "a lesser included offense is in issue." R.C.M. 920(e)(5)(C). It also embraces offenses which contain "certain factual allegations, [themselves not essential to the basic offense charged, but] which have an operable effect on the permissible sentence," such as the offense of desertion terminated by apprehension. *United States v. Gray*, 37 C.M.R. 957, 959 (A.F.C.M.R. 1967). In *United States v. Morales*, 16 M.J. 503, 505 (A.F.C.M.R. 1983), this Court concluded that even where it was logical to omit this part of the instruction, to do so would be error, subject to testing for prejudice. The government invites us to reconsider the *Morales* decision. On the facts of this case, we decline to do so. We see no need to disturb or revisit its holding because the allegations here not only include lesser included offenses, but also "factual allegations that have an operable effect on the permissible sentence" (i.e., possession and introduction of drugs with the intent to distribute).

Having concluded the military judge erred, we now test for prejudice. First, even though "lesser included offenses" and "factual allegations that have an operable effect on the permissible sentence" were possibly present in this case, the evidence does not logically support reduced findings, and the appellant did not suggest that they had any

meaningful applicability to the allegations. By raising the affirmative defense of duress, the appellant admitted the underlying crimes as charged. *See* R.C.M. 916(a). Second, even if we concluded Article 51(c), UCMJ requires a "degree of guilt" instruction when affirmative defenses are raised, the appellant's duress defense clearly was a long shot and omission of the instruction would be harmless.

Appellant's chance of succeeding on his duress defense disappeared into thin air during the government's rebuttal case when a DEA agent testified about the discussion he had with the appellant several weeks after his house was searched. The agent testified that the appellant said he knew prior to his arrival at the hotel that a drug deal was going to occur and that, in fact, he was there to provide "security" for the transaction, indicating that the appellant was already deeply involved in drug activity before he met those who were extorting money from him. Moreover, even if one believed the appellant's in-court testimony, the alleged threats to the appellant and his family were non-specific and certainly not immediate or continuing throughout this time frame. Third, although the appellant did not argue or suggest at trial that the duress defense applied to only some of the offenses or for only part of the charged time frames, the military judge advised the court members that they could find the appellant guilty by exceptions and substitutions if they thought the duress defense applied in a limited fashion. We are satisfied that the "four corners" of the military judge's instructions fairly and adequately addressed reasonable doubt and the appellant's theory of the case, and that the omission did not materially prejudice a substantial right of the appellant.

IV. Improper Findings Argument

During closing arguments on findings, trial counsel commented on the appellant's inability to provide more specific information about two witnesses who may have indirectly substantiated his duress defense. The first was a female friend who allegedly "tutored" him on how to deal drugs. He was only able to identify her by her first name. The second witness was a military member who would have seen the appellant at work the day after the hotel incident and may have been able to describe the appellant's demeanor after he purportedly drove around all night being threatened and intimidated. When the appellant testified on his own behalf, trial counsel cross-examined him about these two witnesses. Additionally, the court members asked the appellant questions about them. The defense counsel made no objection to the trial counsel's findings argument, nor to the questions posed to his client.

The appellant claims the trial counsel's comments about these two witnesses improperly shifted the burden of proof to him. Because the appellant did not object to the trial counsel's comments, the issue is waived unless we find plain error. R.C.M. 919(c); *United States v. Ramos*, 42 M.J. 392, 397 (1995). The burden of proof is on the appellant to show plain error. *United States v. Ruiz*, 54 M.J. 138, 143 (2000).

Prosecutorial comments must be examined in context, and it is important for both sides in a criminal trial to be afforded an opportunity to fairly meet the evidence and arguments of one another. *United States v. Robinson*, 485 U.S. 25, 30 (1988). In our view, there was no error. Trial counsel's argument did not shift the burden of proof. Instead, it was a legitimate comment on the weaknesses in the appellant's implausible and inconsistent testimony. Trial counsel also commented on the appellant's demeanor as he testified, his motive to lie, and the lack of any evidence of an immediate threat to the appellant over the substantial period of time he said he was under duress. The trial counsel's isolated and limited comments about the two witnesses, when placed in the context of the entire argument, were not misleading as to who held the burden of proof, but rather a "fair response" to appellant's version of events. *Id*. at 32.

Assuming, arguendo, that trial counsel's argument was in error, we hold that the record of trial clearly shows the appellant was not prejudiced. First, failure to object is an important consideration in determining prejudicial impact. *United States v. Gilley*, 56 M.J. 113, 123 (2001); *United States v. Stadler*, 47 M.J. 206, 208 (1997). We further note the issues concerning these two potential witnesses were initially developed through trial counsel's cross-examination and from questions asked by court members--all without defense objection. In addition to the lack of objection, the record demonstrates overwhelming evidence of the appellant's guilt and the weakness of the duress defense. Finally, the military judge properly instructed the members on the burden of proof at appropriate times throughout the trial, thereby curing any prejudice these isolated comments might have had. *Cf. United States v. Vasquez*, 48 M.J. 426, 430 (1998). Indeed, trial defense counsel's closing argument repeatedly reminded the court members that the government had the burden of proof.

V. Improper Sentencing Argument

During his findings argument, the appellant's defense counsel, in an effort to convince the court members that the duress defense was reasonable under the circumstances, asked the court members to consider how their children might have reacted if they were confronted with the type of duress the appellant was under. The assistant trial counsel (ATC) picked up on this comment in the sentencing proceedings. The ATC commented extensively on the appellant's willingness to sell drugs "anytime, anywhere, to anyone." Additionally, the ATC noted:

> This is planned repeated behavior. LSD, Ketamine, ecstasy, marijuana, so it's [sic] a hard core drug dealer. He sold without hesitation to anyone at any time. Now, the defense, in their findings argument, mentioned, "Hey, I know a few of you have children." He mentioned that word [children] to you. Imagine if they had met the accused. He would have sold without hesitation to anyone. He wouldn't have thought twice about it.

Appellant claims that the ATC's argument was inflammatory and entitles him to a rehearing on sentence. No objection was made to this argument at trial, however, thus any claim of improper argument is waived, absent plain error. R.C.M. 1001(g); *United States v. Jenkins*, 54 M.J. 12, 19 (2000). "To overcome waiver, appellant must convince this Court that the argument was error, that the error was plain or obvious, and that the error materially prejudiced his substantial rights." *Id.* (citing *United States v. Powell*, 49 M.J. 460, 464-65 (1998)).

A sentencing argument must be considered in the context of the entire court-martial. *United States v. Young*, 470 U.S. 1, 16 (1985); *United States v. Baer*, 53 M.J. 235, 238 (2000). In this regard, we note that as the ATC developed his argument, he properly suggested that the servicemembers who received drugs from the appellant were victims. Thus, in context, it appears that the ATC was extending this argument and inviting the court members to imagine their own children as "victims" of the appellant's drug distribution efforts. The comment is troubling even though the defense counsel first invited the court members to consider how their children would react under duress.

Although we believe the ATC's comments were improper, we do not grant relief. Our function is not to "mandate artistic advocacy, but only to determine whether [the ATC's] honest efforts fall short of fundamental fairness." *United States v. Mance*, 47 M.J. 742, 746 (N.M. Ct. Crim. App. 1997). We conclude the ATC's comments, as a whole, were not calculated to improperly influence the members' passions or possible prejudices. His overall direction/tone/theme was to highlight the truly aggravated nature of the appellant's drug crimes.

In holding that the appellant's substantive due process rights were not materially prejudiced, we have considered that the appellant's defense counsel was in the best position to judge the impact of the ATC's comments, especially since his counsel was not shy about raising objections throughout the trial. In fact, defense counsel objected at a later point in the ATC's argument on an unrelated matter.

The appellant's indiscriminate distribution of drugs is readily apparent from the record. The maximum confinement that could have been adjudged was 117 years. The ATC asked for eight years, and the appellant's counsel countered by suggesting 24 to 36 months as more appropriate. The sentence appears to be a consequence of the appellant's serious drug crimes rather than from the isolated comment in the ATC's argument. Any error was not prejudicial.

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 (2000). Accordingly the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court