UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CARLTON M. JACKSON
United States Air Force

ACM S31471

30 March 2009

Sentence adjudged 29 January 2008 by SPCM convened at McChord Air Force Base, Washington. Military Judge: Ronald Gregory (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall, Major Shannon A. Bennett, Major Lance J. Wood, Major David P. Bennett, and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Major Steven R. Kaufman.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was found guilty by a military judge sitting alone of one specification of wrongfully distributing some amount of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for three months, and reduction to E-1.*

The issue on appeal, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), is whether the evidence is legally and factually insufficient to prove

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* The appellant was also awarded 14 days of credit toward the term of confinement.

beyond a reasonable doubt that the appellant was not entrapped. Finding no error, we affirm.

Background

Sometime during the afternoon of 4 May 2007, while working as an informant for the Air Force Office of Special Investigations (AFOSI), Senior Airman (SrA) BF approached the appellant at a local casino and asked him if he knew anyone who would sell him cocaine. SrA BF knew the appellant as they attended technical school together and had socialized on several occasions. SrA BF told the appellant that he had a new girlfriend and she wanted some cocaine. The appellant replied, "I'll see what I can do." SrA BF observed that the appellant shortly thereafter started sending text messages with his phone. SrA BF then left the casino and went to his apartment. Later that evening, he contacted the appellant two to three times for a status update.

On 5 May 2007, between 0330 and 0500, the appellant called SrA BF and told him that if he still wanted the cocaine, the appellant had some for him. SrA BF stopped by the appellant's apartment prior to going to work to purchase the cocaine. When SrA BF arrived, then-Staff Sergeant (SSgt) TC was also present with the appellant. The cocaine was located on the kitchen counter. SrA BF had arranged at the casino to purchase $40 of cocaine so SSgt TC placed $40 worth of cocaine in a bag and gave it to SrA BF. When SrA BF attempted to pay SSgt TC for the cocaine, SSgt TC told him to give the $40 to the appellant because the appellant had already purchased SrA BF's share for him. The appellant told SrA BF that the $40 was not worth SSgt TC's time so the appellant had to pre-purchase the cocaine for SRA BF. SrA BF paid the appellant $40, left with his bag of cocaine, returned to his apartment, and contacted AFOSI.

On 12 May 2007, the appellant was interviewed by Special Agent (SA) CB, AFOSI, Detachment 305, McChord Air Force Base, Washington. During the interview, the appellant admitted that SrA BF approached him at the casino to purchase some "white" (slang for cocaine) for his girlfriend. The appellant also stated SSgt TC arrived before SrA BF and had gone into his kitchen to cut some cocaine from a 7 by 6 inch sandwich bag. The appellant also confirmed that SSgt TC told SrA BF to pay the appellant $40 for the cocaine because the appellant had previously paid for it.

Entrapment

At trial, the appellant raised the affirmative defense of entrapment. On appeal, the appellant asserts that the evidence is legally and factually insufficient to prove beyond a reasonable doubt that the appellant was not entrapped. In accordance with 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)).

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." *Turner*, 25 M.J. at 325. 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; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Rule for Courts-Martial 916(g) provides, "It is a defense that the criminal design or suggestion to commit the offense originated in the Government and the accused had no predisposition to commit the offense." In *United States v. Whittle*, 34 M.J. 206 (C.M.A. 1992), our superior court explained the burden of proof in entrapment cases as follows:

> The defense has the initial burden of going forward to show that a government agent originated the suggestion to commit the crime. Once the defense has come forward, the burden then shifts to the Government to prove beyond a reasonable doubt that the criminal design did not originate with the Government or that the accused had a predisposition to commit the offense, prior to first being approached by Government agents.

Whittle, 34 M.J. at 208 (citations and quotations omitted).

In *United States v. Howell*, 36 M.J. 354, 359-60 (C.M.A. 1993), our superior court, quoting *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. 1992), explained that the first element of entrapment is an inducement by government agents to commit the crime. Our superior court adopted the *Stanton* definition of an "inducement":

> Inducement is government conduct that creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense. Inducement may take different forms, including pressure, assurances that a person is not doing anything wrong, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy, or friendship. Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.

Howell, 36 M.J. at 359-60 (citations, quotations, and emphasis omitted).

Our superior court also explained that a government agent's repeated requests for drugs "do not in and of themselves constitute the required inducement." *Id.* at 360. "Since the trier of fact found against [the appellant] on the entrapment issue, [he] can only prevail by showing that these findings are incorrect as a matter of law." *United States v. Vanzandt,* 14 M.J. 332, 345 (C.M.A. 1982) (citing *United States v. Albright,* 26 C.M.R. 408 (C.M.A. 1958)).

During the announcement of findings, the military judge made the following specific finding concerning entrapment: "The evidence further shows beyond a reasonable doubt that the accused was not entrapped. Specifically, but not exclusively, the evidence shows that less than 24 hours passed between the time the accused was asked about getting cocaine and when he arranged for and participated in the distribution, and that the accused was a willing participant in the distribution."

We have carefully reviewed the evidence of record in this case. The appellant voluntarily and willingly participated in the distribution of cocaine to SrA BF. He was never threatened, coerced, or pressured by SrA BF and could have elected not to assist SrA BF with purchasing cocaine. He obtained the cocaine less than 24 hours after SrA BF asked for his assistance, he colloquially referred to cocaine as "white" when interviewed by AFOSI, and he permitted cocaine to remain in his apartment after SrA BF received his share. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found the appellant was not entrapped beyond a reasonable doubt, and we are ourselves convinced the appellant was not entrapped and is guilty beyond a reasonable doubt.

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

U.S. AIR FORCE COURT OF CRIMINAL APPEALS

STEVEN LUCAS, YA-02, DAF
Clerk of the Court