UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRYAN C. JONES
United States Air Force

ACM S32015

15 July 2013

Sentence adjudged 3 November 2011 by SPCM convened at Buckley Air Force Base, Colorado. Military Judge: Scott E. Harding (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Andrew J. Unsicker and Major Grover H. Baxley.

Appellate Counsel for the United States: Colonel Don M. Christensen and Gerald R. Bruce, Esquire.

Before

ORR, MARKSTEINER, and HECKER
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

At a special court-martial comprised of a military judge, the appellant was convicted, consistent with his pleas, of violating a lawful general regulation and wrongful use of "Spice," in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. He was sentenced to a bad-conduct discharge, confinement for 3 months, forfeiture of $978.00 pay per month for three months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends his plea to violating a lawful general regulation must be set aside because the "Guidance Memorandum" he violated did not constitute a

general order. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant regularly purchased "spice" from several off-base establishments near Buckley Air Force Base, Colorado. In August 2010, he met another Airman in the dormitories and asked her if she wanted to smoke "spice" in his dormitory room, telling her it was not detectable by a military urinalysis test. He retrieved the substance from his closet, rolled it into a cigarette, and smoked it. He passed it to the other Airman and she also smoked it.

In February 2011, after returning from a deployment, he resumed his practice of smoking "spice." On approximately ten occasions, he would smoke it with two fellow members of the Security Forces Squadron while assigned as a sentry or lookout within a restricted area on the base.

In August 2011, the appellant was interviewed by agents from the Air Force Office of Special Investigations under rights advisement and admitted using "spice" on multiple occasions. He consented to a urinalysis, which detected the presence of two synthetic cannabinoids, commonly found in "spice." He also consented to a search of his dormitory room, which revealed a green leafy substance that tested positive for synthetic cannabinolds.

Providence of Plea

We review a military judge's decision to accept a plea of guilty for abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008) (citation omitted). It is an abuse of discretion for a military judge to accept a guilty plea based on an erroneous view of the law. *Id.* at 322 (citations omitted). This Court reviews de novo questions of law. *Id*. at 321; *see also United States v. Goodman*, 70 M.J. 396, 400 (C.A.A.F. 2011). If an accused's admissions in the plea inquiry do not establish each of the elements of the charged offense, the guilty plea must be set aside. *United States v. Gosselin*, 62 M.J. 349, 352–53 (C.A.A.F. 2006). "In determining the providence of a guilty plea, the scope of review is limited to the record of the trial." *United States v. Roane*, 43 M.J. 93, 99 (C.A.A.F. 1995) (citations omitted); *United States v. Joseph*, 11 M.J. 333, 334 (C.M.A. 1981).

The appellant pled guilty to, inter alia, one specification of violating a lawful general regulation, specifically paragraph 3.5.6 of Air Force Instruction (AFI) 44-121, *Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program*, dated 26 September 2001, incorporating Air Force Guidance Memorandum (hereinafter the Guidance Memorandum), dated 9 June 2010. In his guilty plea inquiry, the appellant

admitted the Guidance Memorandum was put into effect by a proper authority and that it and the AFI were general regulations. He also agreed with the military judge that "generally speaking, Air Force Instructions are put into effect and published by the authority of the Secretary of the Air Force." On appeal, he now contends the Guidance Memorandum does not constitute a lawful punitive order.

When it was issued in June 2010, the Guidance Memorandum added an additional provision to AFI 44-121, prohibiting the "possession of any intoxicating substance . . . if done with the intent to use in a manner that would alter mood or function." It provided that:

> These substances include, but are not limited to, controlled substance analogues (e.g. designer drugs such as 'spice' that are not otherwise controlled substances); inhalants, propellants, solvents, household chemicals, an other substances used for "huffing"; prescription or over-the-counter medications when used in a manner contrary to their intended medical purpose or in excess of the prescribed dosage; and naturally occurring intoxication substances (e.g., Salvia divinorum).

The Guidance Memorandum further stated that, "compliance with this Memorandum is mandatory" and that, "[f]ailure to comply with the prohibitions contained in this paragraph is a violation of Article 92, UCMJ." The Guidance Memorandum was signed by Lieutenant General (Lt Gen) Green, the Surgeon General of the Air Force. The appellant was charged with violating "[AFI] 44-121 . . . incorporating [the Guidance Memorandum]" by wrongfully using a controlled substance analogue known as "spice."

The appellant avers that the Guidance Memorandum to AFI 44-121 is not a lawful general order for purposes of Article 92(1), UCMJ, because it was not issued by a "competent authority;" specifically, that its issuer, the Air Force Surgeon General, is not: (a) a General Court-Martial Convening Authority (GCMCA), (b) the appellant's commander, or (c) a commander superior to either (a) or (b). He further argues that the Guidance Memorandum is irregular on its face.

A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders, or if, for some other reason, it is beyond the authority of the official issuing it. *Manual for Courts–Martial, United States* (*MCM*), Part IV, ¶ 16c(1)(c) (2008 ed.); *see also id*. at ¶ 14c(2)(a)(i), (iii) (providing that "[a]n order requiring the performance of a military duty or act may be inferred to be lawful" and that "[t]he commissioned officer issuing the order must have authority to give such an order. Authorization may be based on law, regulation, or custom of the service"); *United States v. Deisher*, 61 M.J. 313, 317 (C.A.A.F. 2005) (stating that "[t]he

essential attributes of a lawful order include [ ] issuance by competent authority - a person authorized by applicable law to give such an order").

The appellant argues that the presumption of lawfulness and regularity normally given to orders and regulations applies only if the order is lawful and regular on its face, and he submits that the Guidance Memorandum is not regular on its face by virtue of its noncompliance with AFI 33-360, as follows:

(1) it does not contain language that it was issued by order of the SECAF or that Lt Gen Green was authorized to issue punitive orders, as required by AFI 33-360, ¶ 2.12.5.2.13.3;

(2) it does not specify, in its opening paragraph, which parts of the publication contain punitive provisions, as required by AFI 33-360, ¶ ¶ 2.17.1.2 and 2.17.1.3.; and

(3) it does not end with the following verbatim sentence: "The directions of this memorandum become void after 180 days have elapsed from the date of this memorandum, or upon publication of an Interim Change or rewrite of the affected publication, whichever is earlier," as required by AFI 33-360, ¶ 2.12.5.2.13.2.

(4) it is not punitive for purposes of an Article 92, UCMJ, prosecution because it has no effect without further supplementation by other publications, as required by AFI 33-360, ¶ 2.17.1.1.1.

The appellant argues that, under *Deisher* and *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000), his submission of these facial flaws effectively returns the burden to the Government to prove the lawfulness of the order. We disagree. A close reading of *Deisher* and *Ayers* reveals the appellant has misunderstood the meaning of those cases.

Neither *Deisher* nor *Ayers* holds that a regulation's facial irregularity relieves the appellant of his burden to disprove its presumptive lawfulness. *Deisher* simply reiterates the proposition that an order is presumed to be lawful, and the accused bears the burden of rebutting the presumption. *Deisher*, 61 M.J. at 317 (citing *United States v. Hughey*, 46 M.J. 152, 154 (C.A.A.F. 1997)). *Ayers* provides more useful guidance.

Ayers involved a regulation proscribing certain relationships between permanently assigned military personnel and Initial Entry Training Soldiers that was "promulgated for the commander" of the U.S. Army Combined Arms Support Center and Fort Lee, who was the general court-martial convening authority for [the *Ayers*] case." *Ayers*, 54 M.J. at 90. Ayers asserted that the Government failed to prove that the commander personally issued the regulation and challenged the authority of the official authenticating the regulation to do so. The *Ayers* Court stated that a GCMCA "is authorized to publish general orders and regulations," and that "[i]t is not necessary for the commander issuing

a general regulation to sign it personally," and that "[a]n official document, such as the regulation at issue . . . is entitled to a presumption of regularity if it appears regular on its face." *Id*. at 90-91 (internal citations omitted). The *Ayers* Court did not hold that an official document is entitled to the presumption *only if* it appears regular on its face. Indeed, in support of its position, the *Ayers* Court cited *United States v. Johnson*, 28 C.M.R. 196, 202 (C.M.A. 1959), which, in turn, provides that:

> When an 'official record' is offered in evidence, and it appears that it was prepared by a military person charged by regulation with the duty of doing so, it will be presumed that it was prepared in accordance with regulations, and by one who knew, or had the duty to know or to ascertain the truth of, the facts or events recorded . . . . If it can be shown that the data reported are inaccurate, or even that the source of the reporting officer's information was not 'reliable,' these are matters for the defense to bring forward.

Johnson, 28 C.M.R. at 202 (quoting *United States v. Coates*, 10 C.M.R. 123 (C.M.A. 1953)) (internal citations omitted). Here, it appears that the Guidance Memorandum to AFI 44-121 was prepared by a military person (Lt Gen Green) charged by regulation with the duty of doing so (AFI 33-360, ¶ ¶ 1.2.7, 1.2.7.1.2, which is by order of the SECAF). Thus, it will be presumed to have been prepared in accordance with regulations, and the burden remains with the appellant to show that the information it contains is inaccurate or that the source of the information was unreliable.

Furthermore, although the Guidance Memorandum does not contain language that Lt Gen Green was signing or issuing the Guidance Memorandum "for" the SECAF or some other duly authorized commander, it does reference AFI 44-121 and clearly notifies its reader that it serves to "immediately chang[e] AFI 44-121." It therefore can fairly be understood by its reader that it should be read together with AFI 44-121, which contains the SECAF's seal and language that it is issued "BY ORDER OF THE SECRETARY OF THE AIR FORCE." Accordingly, to prevail in his appeal, the appellant must overcome the presumption that the Guidance Memorandum was issued by competent authority.

The appellant complains that there is no evidence that the Guidance Memorandum was ever coordinated through, signed by, or otherwise directed by the SECAF himself or some other duly authorized person, and it therefore was never "issued by competent authority." Overall, the appellant essentially submits that, because the Guidance Memorandum standing alone is devoid, on its face or through its coordination, of any reference to the SECAF or some other duly authorized commander, it is merely Lt Gen Green's order; and since Lt Gen Green does not qualify as any of the authorities listed under *MCM*, Part IV, ¶ 16c(1)(a), the Guidance Memorandum lacks competent authority to make it lawful. We disagree for two reasons.

First, the alleged failure was not that the appellant disobeyed Lt Gen Green's order, but that he "violated a lawful general regulation, to wit: paragraph 3.5.6, Air Force Instruction 44-121 … incorporating Air Force Guidance Memo to [AFI] 44-121, dated 9 June 2010." For the purposes of Article 92(1), UCMJ:

> ***General*** *orders or* ***regulations are*** [A] ***those*** *orders or* ***regulations generally applicable to an armed force*** *which are* ***properly published by*** *the President or* ***the Secretary*** *of Defense, of Homeland Security, or* ***of a military department***, and [B] those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by: (i) an officer having general court-martial jurisdiction; (ii) a general or flag officer in command; or (iii) a commander superior to (i) or (ii).

MCM, Part IV, ¶ 16c(1)(a) (emphasis added). As emphasized in the above-quoted language, Article 92, UCMJ, makes a distinction between: (A) the failure to obey a general regulation and (B) the failure to obey an order of a commanding officer. The appellant was charged with the violation of a general regulation – thus it is irrelevant that Lt Gen Green is not authorized to exercise command.

Second, the Guidance Memorandum was not "issued" by Lt Gen Green, but by the SECAF, as confirmed and published by Lt Gen Green via the AF Form 673 and the administrative procedures set out in AFI 33-360. AFI 33-360, issued by Order of the SECAF, provides that: "Official Air Force publications . . . are the only approved vehicles for issuing official Air Force policy and/or guidance. Air Force publications are either directive or non-directive in nature." *Id.* at ¶ 1.1.1. Additionally, guidance memoranda to those publications are clearly contemplated as proper appendages, effective on their respective publication dates.[1] *Id.* at ¶ 1.1.3.1. Accordingly, guidance memoranda are proper vehicles for the issuance of the SECAF's policies or orders. Furthermore, paragraphs 1.2.7. and 1.2.7.1.2 provide that approving officials at the Headquarters of the Air Force are heads of functional two-letter/digit offices and that, in signing the AF Form 673, they "confirm[ ] that the information therein is by order of the SECAF or Commander/Director, as appropriate." This procedure is legally sound as "[i]t is not necessary for the commander issuing a general regulation to sign it personally." *Ayers*, 54 M.J. at 90; *see also United States v. Bartell*, 32 M.J. 295, 296-97 (C.M.A. 1991) (quoting *United States v. Breault*, 30 M.J. 833, 837 (N.M.C.M.R. 1990)) ("So long

[1] Air Force Instruction (AFI) 33-360, *Publications and Forms Management*, ¶ 1.1.3.1 (18 May 2006) states: "The publication date is the effective date; Air Force publications, to include AF Policy Memorandums and Guidance Memorandums, are not considered effective until they are released to users in accordance with this Instruction. The publishing activity (AFDPO, Publication Manager, or OPR in rare instances when local websites are used) adds the date to the publication to reflect the day the publication is actually released to users (placed on formal website). The date the approving official signs the AF Form 673, *Air Force Publication/Form Action Request*, may not be the effective date of the publication."

as 'the decisional authority, which is discretionary in nature, remains with the commander . . . the signature authority, which is delegated, is wholly ministerial in nature.'").

In accordance with case law and AFI 33-360, the fact that the AF Form 673 was accomplished satisfies the requirement that the Guidance Memorandum's proscriptions were ordered by the SECAF. It is thereby presumptively lawful, which the appellant challenges by merely alleging that the Government did not produce evidence of proper authorization by a person listed under *MCM*, Part IV, ¶ 16c(1)(a). Because the appellant has not affirmatively shown how the Guidance Memorandum was not issued by competent authority,[2] he has not met his burden. Accordingly, the Guidance Memorandum must be presumed to have been issued by competent authority, and we affirm his conviction for violating its proscriptions.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] For example, he has not shown that the established procedures were not followed here, how that process is not a valid method for publishing punitive regulations, or that other Guidance Memoranda did bear the SECAF's seal or otherwise stated they were by his order or direction.