UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NICHOLAS M. KHAN
United States Air Force

ACM 37307

19 March 2010

Sentence adjudged 30 May 2008 by GCM convened at Scott Air Force Base, Illinois. Military Judge: Bruce Ambrose and W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances for 2 years, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Jennifer J. Raab, Major Tiffany M. Wagner, Major Lance J. Wood, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Senior Judge:

In accordance with his pleas, a military judge found the appellant guilty of five specifications of divers wrongful possession of a controlled substance, one specification of wrongful possession of a controlled substance, one specification of divers wrongful use of a controlled substance, two specifications of wrongful use of a controlled substance, one specification of larceny of insurance proceeds of a value of more than $500, and one specification of divers forgery of drug prescription forms, in violation of

Articles 112a, 121, and 123, UCMJ, 10 U.S.C. §§ 912a, 921, 923. Contrary to his pleas, a panel of officer members sitting as a general court-martial found the appellant guilty of one specification of wrongful possession of a firearm in violation of 18 U.S.C. § 922(g)(3), in violation of Article 134, UCMJ, 10 U.S.C. § 934. The members sentenced the appellant to a bad-conduct discharge, 26 months of confinement, forfeiture of all pay and allowances for 26 months, and reduction to the grade of E-1.

The convening authority disapproved findings on four of the divers wrongful possession of a controlled substance specifications, disapproved findings on the divers wrongful use of a controlled substance specification, disapproved findings on the divers forgery of drug prescription forms specification, disapproved the sentence, and ordered a combined findings and sentence rehearing.[1] On 28-30 May 2008, a combined rehearing was held and in accordance with his pleas a military judge found the appellant guilty of the four divers wrongful possession of a controlled substance specifications, the divers wrongful use of a controlled substance specification, the divers forgery of drug prescription forms specification, and another wrongful possession of a controlled substance specification that had been referred to the combined rehearing. A panel of officer members sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, two years of confinement, forfeiture of all pay and allowances for two years, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

On appeal, the appellant asks this Court to: (1) set aside the findings of guilty on the wrongful possession of a firearm specification, set aside the sentence, and order a sentence rehearing and (2) set aside the findings of guilty to all charges and specifications and the sentence.[2] As the basis for his request, he opines that: (1) the military judge in his first court-martial abused his discretion by allowing a witness to testify regarding information of which the witness had no personal knowledge; (2) the Air Force lacked in personam jurisdiction over him because he had received a lawful discharge; (3) the evidence is legally and factually insufficient to support his wrongful possession of a firearm conviction; (4) the military judge in the first court-martial abused his discretion by giving the members an erroneous constructive possession instruction; and (5) the cumulative errors warrant relief. Finding no prejudicial error, we affirm the findings and the sentence.

Background

Doctors prescribed the appellant several controlled substances, to include Marinol, oxycodone, Diazepam, Alprazolam, and morphine to help him manage pain following a

[1] Additionally, the convening authority excepted the language "on divers occasions" from Specification 1 of Charge I, wrongful possession of a controlled substance.

[2] Alternatively, the appellant requests that this Court set aside those portions of the specifications of the charges that included offenses before 6 August 2006, and order a sentence rehearing.

severe back injury. On approximately 48 occasions after his prescriptions had expired, the appellant forged prescriptions for the aforementioned drugs and obtained the drugs by improperly using TRICARE as the source of reimbursement. On several occasions during this time period, the appellant used the oxycodone that he had wrongfully obtained. Additionally on two occasions between November 2006 and January 2007, the appellant snorted cocaine at a friend's off-base residence. A few months later, the appellant purchased a "baggie" of cocaine from an individual off-base. On 17 October 2007, local law enforcement officials searched the appellant and found six heroin capsules in his cargo pocket.

During his first court-martial, the appellant moved to dismiss the charges for lack of in personam jurisdiction. After hearing arguments by counsel, the military judge denied the motion. Over defense objection, Special Agent SM testified that pursuant to a civilian search warrant, he, several agents with the Air Force Office of Special Investigations, local law enforcement officials, and Drug Enforcement Agency officials searched the appellant's bedroom at his father's residence and found and seized, inter alia, forged prescription forms, prescription bottles associated with forged prescription forms, a handgun, and ammunition. In instructing the members on constructive possession of the handgun, the military judge stated, inter alia, that "[t]he government can prove constructive possession by showing that the accused had dominion and control over the premises where the firearm is located by showing, for example, that the firearm was seized at the accused's residence."

Discussion

Special Agent SM's Testimony

Mil. R. Evid. 602 provides that no witness may testify about a matter "unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Mil. R. Evid. 602. The rule further provides that "[e]vidence to prove personal knowledge may, but need not, consist of the testimony of the witness." *Id.* In the case at hand, Special Agent SM testified that he was present for, participated in, and directed the search of the appellant's bedroom. He also testified that he participated in the inventory of the items seized from the appellant's bedroom. It is abundantly clear from Special Agent SM's testimony that he was not speculating about items seized from the appellant's bedroom but was testifying from personal knowledge. We find that there was an adequate basis for the military judge to conclude that Special Agent SM was testifying from personal knowledge. Accordingly, we conclude that the military judge did not abuse his discretion in allowing Special Agent SM's testimony.

In Personam Jurisdiction

"[W]e review [jurisdictional challenges] *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record." *United States v. Hart*, 66 M.J. 273, 276 (C.A.A.F. 2008) (quoting *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000)). In the instant case, the military judge's findings of fact are sufficiently supported by the record, are not clearly erroneous, and we adopt them as our own. "*[I]n personam* jurisdiction over a military person is lost upon his discharge from the service, absent some saving circumstance or statutory authorization." *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). "To effectuate an *early discharge*, there must be: (1) a delivery of a valid discharge certificate; (2) a final accounting of pay; and (3) the undergoing of a 'clearing' process as required under appropriate service regulations to separate the member from military service." *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006) (citing *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989)).

Here, the military judge found that the appellant had not been discharged because he had not: (1) received a valid discharge certificate; (2) received a final accounting of pay; and (3) undergone the required clearing process to separate from the United States Air Force. We agree with the military judge's findings that the appellant had not been discharged. While there is evidence that a valid discharge certificate was prepared, there is no evidence in the record that the discharge certificate was delivered to the appellant. Moreover, assuming, arguendo, there was a delivery of a valid discharge certificate, there is no evidence that the appellant received a final accounting of pay and underwent the required "clearing process" to separate from the United States Air Force. Put simply, the government had in personam jurisdiction over the appellant to try him for his crimes.

Legal and Factual Sufficiency

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, 324 (C.M.A. 1987)). In resolving questions of legal sufficiency, this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal sufficiency "is limited to the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

We have considered the evidence produced at trial, in the light most favorable to the government, and find that a reasonable fact finder could have found all of the

essential elements of the wrongful possession of a firearm specification. Specifically, we note that the following evidence legally supports the appellant's conviction on this specification: (1) Special Agent SM's testimony that prior to executing the search of the appellant's bedroom, the appellant, after a proper rights advisement, waived his rights and admitted to being addicted to illegal drugs; (2) Special Agent SM's testimony that they seized a handgun from under the appellant's bed in his bedroom at his father's residence; and (3) a photograph of the seized handgun, admitted as Prosecution Exhibit 13, that highlights the gun was manufactured in Brazil.

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). We have carefully considered the evidence and are convinced beyond a reasonable doubt that the appellant is guilty of this specification.

Military Judge's Constructive Possession Instruction

The question of whether a jury was properly instructed is a question of law we review de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). "Failure to object to an instruction . . . before the members close to deliberate constitutes waiver of the objection in the absence of plain error." Rule for Courts-Martial (R.C.M.) 920(f); *see also United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003). Here, the trial defense counsel failed to object to the constructive possession instruction, thus, any error is waived absent plain error.

"To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F 2000)). Additionally, while the threshold for establishing prejudice is low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Id.* at 436-37 (quoting *Kho*, 54 M.J. at 65).

The military judge's constructive possession instruction is a correct statement of the law. Residency at the location where the handgun was found, albeit temporary residency, and dominion and control over the handgun are sufficient to establish constructive possession. *See, e.g., Williams v. State*, 971 So. 2d 581 (Miss. 2007); *Parramore v. State*, 626 S.E.2d 567 (Ga. Ct. App. 2006); *People v. Brown*, 764 N.E.2d 562 (Ill. App. Ct. 2002); *State v. Turner*, 721 So. 2d 962 (La. Ct. App. 2d Cir. 1998); *People v. Shambo*, 619 N.Y.S.2d 450 (N.Y.A.D. 4 Dept. 1994); *People v. Becoats*, 449

N.W.2d 687 (Mich. Ct. App. 1989); *State v. Tilford*, 599 P.2d 1144 (Or. Ct. App. 1979). In short, the military judge's instruction was not erroneous. Moreover, even if we were to assume error, any error was not plain or obvious and the appellant has failed to make some colorable showing of possible prejudice. As there was no plain error, the appellant's newfound objection to the military judge's constructive possession instruction was waived.

Cumulative Error

We can order a rehearing based on an accumulation of errors that do not individually warrant a reversal. *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996) (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)). "[W]hen assessing the record under the cumulative-error doctrine, [we] 'must review all errors preserved for appeal and all plain errors.'" *Id.* at 242 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1282 (9th Cir. 1993)). We consider each error within the context of the entire case, with particular attention paid to "the nature and number of errors committed; their interrelationship, if any, and combined effect; how the [military judge] dealt with the errors as they arose . . .; and the strength of the government's case." *Id.* (quoting *Sepulveda*, 15 F.3d at 1196).

Additionally, "[c]ourts are far less likely to find cumulative error '[w]here evidentiary errors are followed by curative instructions' or when a record contains overwhelming evidence of a defendant's guilt." *Id.* (second alteration in original) (quoting *United States v. Thornton*, 1 F.3d 149, 157 (3d Cir. 1993)). In the case at hand, we found no errors, thus, the cumulative error doctrine is inapplicable.

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

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Deputy, Clerk of the Court