UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic TITO E. MATOS JR.
United States Air Force

ACM S32107

31 December 2013

Sentence adjudged 23 August 2012 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Jefferson B. Brown.[1]

Approved Sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Lauren N. Didomenico; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

The appellant was tried by a special court-martial composed of officer members. Contrary to his plea, the appellant was found guilty of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The members sentenced the appellant to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

[1] The Court notes that the Court-Martial Order (CMO), dated 5 Nov 2012, incorrectly identifies the military judge as Jefferson D. Brown, whereas the correct name is Jefferson B. Brown. The Court orders the promulgation of a corrected CMO.

On appeal, the appellant argues that the evidence is legally and factually insufficient to support his conviction for wrongful use of marijuana. The appellant also asserts that his rights were violated because the record of trial does not indicate that the convening authority considered his clemency submissions. The appellant asks this Court to "return the case to The Judge Advocate General to remand to the convening authority for a new Action." Finding no error, we affirm.

Background

The appellant was selected for a random urinalysis inspection and provided a urine sample for testing on 12 December 2011. The sample was subsequently tested at the Air Force Drug Testing Laboratory (AFDTL) and tested positive for marijuana. When the positive test result was reported back to the appellant's command, he was required to provide another urine sample for testing pursuant to a base policy based on *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990). The second urine sample provided by the appellant, collected on 13 February 2012, also tested positive for marijuana. As a result of these two positive urinalysis tests, the appellant was punished under Article 15, UCMJ, 10 U.S.C. § 815.

Following his second positive urinalysis, the appellant was ordered to provide another urine sample for testing in accordance with the base's *Bickel* policy. This sample was collected on 12 March 2012 and also tested positive for marijuana. Based on this positive urinalysis, the appellant was again punished under Article 15, UCMJ.

The appellant was required to submit yet another urine sample for drug testing based on the base's *Bickel* policy after his third positive urinalysis. This sample, collected on 5 April 2012, also tested positive for marijuana. As a result, a single charge and specification alleging wrongful use of marijuana was preferred against the accused and referred to a special court-martial.

At trial, the Government presented expert witness testimony from Dr. HN of the AFDTL. Based on her review of the testing, Dr. HN testified to her opinion that the appellant's 5 April 2012 sample contained the metabolite for marijuana at a level of 193 nanograms per milliliter (ng/mL). Dr. HN testified that the reported ng/mL level was consistent with a one-time recreational use of marijuana approximately four days prior to the collection of the urine sample. Dr. HN further testified that the metabolite for marijuana could still be detectable in the urine 30 to 32 days after use for a chronic user.

On cross-examination, Dr. HN acknowledged the existence of a single study which detected the metabolite for marijuana in the urine 77 days after use. Dr. HN pointed out, however, that this study involved a single subject who was a 10-year chronic user of marijuana and that the testing involved a cut-off level below that employed by the Department of Defense.

The defense also questioned Dr. HN about the impact of hydration on a urinalysis result and a process known as "normalization." Dr. HN explained that normalization can be used when there is more than one positive urinalysis result and could possibly eliminate the risk that the positive urinalysis was the result of previous drug use. Dr. HN testified that the AFDTL did not perform normalization but could have sent the appellant's sample to another lab to be normalized.

The defense theory at trial was that the positive result on the 5 April 2012 urinalysis was the result of residual marijuana metabolite in the appellant's system from prior use rather than evidence of an additional use after the 12 March 2012 urinalysis. To support this theory, the defense introduced copies of the appellant's two previous Article 15, UCMJ, actions for marijuana use. The military judge instructed the members that the evidence of prior marijuana use by the appellant could only be used (1) to determine whether the appellant's 5 April 2012 urinalysis was the result of prior marijuana use for which the appellant had already been punished; and (2) to show that the appellant has access to, or the opportunity to use, marijuana.

In findings argument, trial counsel sought to counter the defense theory that the fourth positive urinalysis was caused by residual marijuana metabolite in the appellant's system from the use that caused his third positive urinalysis. Trial counsel referred to the appellant's response to his second Article 15, UCMJ, action and asked, "Do you believe he has quit? Maybe that's his wake up call." The military judge sua sponte interrupted the argument and advised trial counsel to "move on to another argument." The military judge then reminded the members of his instructions pertaining to the proper use of the uncharged misconduct. Immediately following this exchange, trial counsel argued, "Even if he quit, and you believe that, he still used marijuana during the charged timeframe." Trial defense counsel objected to this statement on the basis that it misstated the military judge's instructions to the members.[2] The military judge again reminded the members of his previous instructions and advised the members they would have written copies of the instructions to consult in order to properly consider the evidence.

In findings rebuttal argument, trial counsel argued, "there is nothing that says he stopped on 11 March 2012." Trial defense counsel objected, asserting that trial counsel was arguing criminal disposition and stated the Government needed to "prove new use not that he stopped using." The military judge referred the members to his instruction on the burden of proof. Thereafter, trial counsel referred to the appellant's previous Article 15, UCMJ, actions and stated they "only support[ed] the evidence that he did use." Trial defense counsel objected again, arguing that trial counsel was misusing the evidence and

[2] The military judge had previously instructed the members that "any of the alleged uses that the Accused was previously punished for in the 19 March 2012 and 13 April 2012 non-judicial punishment actions . . . were specifically not charged in this case and may not be considered as proof of the charged offense."

instructions. When trial counsel attempted to respond to the objection, the military judge said, "[s]top, stop, stop, stop. Go to your next--- . . . hit your next point."

The appellant submitted matters in clemency on 31 October 2012. Included within the clemency matters was a memorandum from trial defense counsel alleging legal errors at trial. The convening authority took action on 5 November 2012. The record of trial did not contain any evidence that the convening authority considered the appellant's clemency matters before taking action in this case. In response to appellate defense counsel's brief raising this issue, appellate government counsel submitted a memorandum from the convening authority's chief of military justice. The memorandum contains, as an attachment, the addendum to the Staff Judge Advocate Recommendation (SJAR), dated 5 November 2012. The memorandum and the addendum to the SJAR indicate that prior to taking action in the appellant's case the convening authority considered the appellant's clemency submissions. The addendum to the SJAR did not address the legal errors raised by trial defense counsel.

Factual and Legal Sufficiency

In his first assignment of error, the appellant asserts that the evidence is legally and factually insufficient to sustain his conviction for wrongful use of marijuana. As part of his attack on the legal and factual sufficiency of the evidence, the appellant also contends trial counsel made improper findings argument. We will consider both issues under this assignment of error.

We review issues of factual and legal sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). 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] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"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 *Turner*, 25 M.J. at 324). "[I]n resolving questions of legal sufficiency, we are 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) (citations omitted). Our assessment of legal and

factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Evidence beyond a reasonable doubt does not mean evidence free from all conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986) (citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). In a wrongful use case, a properly admitted urinalysis laboratory report with expert interpretation "provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use." *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001).

The appellant contends the Government did not eliminate the possibility that his use of marijuana which caused his third positive urinalysis result was also responsible for his fourth positive urinalysis result. This issue was fully litigated at the trial level. The members were in the best position to determine the weight to be given to the evidence. We are convinced, as were the members, that the evidence proved the guilt of the appellant beyond a reasonable doubt.

We need not determine whether the comments of trial counsel during findings argument constituted improper argument. Each time trial counsel made an argument the appellant alleges was improper, the military judge promptly addressed the issue and advised the members on the proper use of the evidence. Implicit in the appellant's argument is an assertion that because the members heard the statements, they were improperly influenced to reach a finding of guilty despite the lack of evidence establishing the appellant's guilt beyond a reasonable doubt. The military judge instructed the members on how they could use the evidence in question. Any potential danger raised by trial counsel's arguments was purged by the military judge's instructions. Members are "presumed to follow instructions, until demonstrated otherwise." *Washington*, 57 M.J. at 403 (citing *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991)). We find no evidence that the members failed to follow the military judge's instructions.

Post-Trial Processing

In his second assignment of error, the appellant alleges his rights were violated because the record of trial does not indicate that the convening authority considered his clemency submissions. We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989); Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(iii). The preferred method of documenting a convening authority's review of clemency submissions is completion of an addendum to the SJAR. *United States v. Godreau*, 31 M.J. 809, 811-12 (A.F.C.M.R. 1990). While such an addendum is not required, in its

absence this Court "must have some reliable means of verifying that the convening authority actually considered the appellant's submissions." *Id.* at 812 (citing *Craig*, 28 M.J. at 325). "The United States is entitled to enhance the 'paper trail' and show that the information in question was indeed transmitted to and considered by the convening authority. *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989).

As noted above, the Government submitted a memorandum explaining the omission of the addendum to the SJAR from the record of trial and provided the addendum to the SJAR. This memorandum and its accompanying attachment is an approved method to demonstrate compliance with R.C.M. 1107. The memorandum and the addendum to the SJAR plainly demonstrate that the convening authority considered the appellant's clemency submissions prior to taking action in the appellant's case. Accordingly, we find that the convening authority received and considered the appellant's clemency submissions prior to taking action on the appellant's case. This conclusion does not, however, end our consideration of the post-trial processing in this case.

The appellant initially only raised the issue that there was no evidence the convening authority considered the clemency matters submitted by the defense. However, after the Government provided the addendum to the SJAR, the appellant raised the additional issue that the addendum to the SJAR failed to address the legal errors raised by the appellant in his clemency submission.

R.C.M 1106(d) requires the SJAR to comment on any allegation of legal error raised in clemency. When an accused asserts legal error in his post-trial submissions, the SJAR must state, at a minimum, "a statement of agreement or disagreement with the matter raised by the accused." R.C.M. 1106(d)(4).

Distinguished from their role in clemency, the role of the convening authority with respect to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton*, 47 M.J. 32, 35 (C.A.A.F. 1997). The convening authority can, and should in the interest of fairness and efficiency of the system, remedy legal error. The convening authority is not, however, required to do so. *Id.* The failure to address a defense claim of legal error in an addendum to an SJAR can be remedied through appellate litigation of the claimed error. *Id.* Consequently, it is appropriate for this Court to consider whether any prejudice may have resulted from the failure to address the defense claims of legal error. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). An appellate determination that the alleged errors have no merit precludes a finding that the failure to address the alleged legal errors in the addendum to the SJAR prejudiced the appellant. *Hamilton*, 47 M.J. at 35; *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

Here, the addendum to the SJAR failed to address the appellant's allegations that the evidence was legally and factually insufficient to support his conviction or that trial counsel made improper findings argument. Even though two of the asserted legal errors are not referenced in the addendum to the SJAR, we do not find error. As discussed above, there was no merit to the appellant's claim of legal error relative to the legal and factual sufficiency of the evidence or trial counsel's findings argument. Because there was no legal error in this case, the appellant cannot make a showing of possible prejudice.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859 (a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist