UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant WILLIE L. MAY
United States Air Force

ACM 37192

15 January 2009

Sentence adjudged 21 December 2007 by GCM convened at Maxwell Air Force Base, Alabama. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, a reprimand, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Lance Wood, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACKSON, Judge:

Contrary to the appellant's pleas, a panel of officers and enlisted members sitting as a general court-martial convicted the appellant of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, reduction to the grade of E-1, and a reprimand. On appeal the appellant asks this Court to set aside the findings and the sentence. The basis for his request is that he asserts that: (1) he was denied his Sixth Amendment right to confront witnesses against him when the government's case consisted solely of his positive urinalysis; (2) his sentence to a bad-conduct discharge is inappropriately severe; and (3)

the evidence is legally and factually insufficient to sustain his conviction.* Finding no error, we affirm.

Background

On 30 August 2007, the appellant was randomly selected to provide a urine sample. On that same day, in accordance with his selection, the appellant provided a urine sample. On 4 September 2007, the appellant's urine sample was shipped to the Air Force Medical Operations Agency (AFMOA), and the sample subsequently tested positive for benzoylecgonine, a cocaine metabolite, at a level above the Department of Defense cut-off. At trial, the appellant's positive urinalysis test results were admitted without trial defense counsel objection. Those who tested the appellant's urine sample and compiled the results thereof were never called as witnesses.

Discussion

Sixth Amendment Confrontation Right

We find no merit in the appellant's position on this issue. Data entries made by laboratory technicians testing urine samples submitted as part of a random urinalysis inspection program are not testimonial hearsay within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). *United States v. Magyari,* 63 M.J. 123, 127 (C.A.A.F. 2006), *cert. denied,* 166 L. Ed. 2d 156. As a result, such reports are properly admissible, subject to the requirements of *Ohio v. Roberts*, 448 U.S. 56 (1980). *Id.* at 127-28. In this case, the laboratory report qualified as a business record, a firmly rooted hearsay exception, and was therefore properly admitted as evidence at trial. *Id.* at 128 (citing *Roberts*, 448 U.S. at 66 n. 8).

Moreover, *assuming arguendo* that the data entries in the laboratory report are testimonial hearsay, trial defense counsel failed to raise an objection at trial and any future objection is waived absent plain error. *United States v. Brooks,* 64 M.J. 325, 328 (C.A.A.F. 2007). To find plain error, we must be convinced that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). We need not address the last criteria because we find that any error made was not plain or obvious.

Inappropriately Severe Sentence

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the

* The appellant raised the second and third issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

character of the offender, the nature and seriousness of his offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

In the case *sub judice*, the use of illegal drugs is a serious offense which compromises the appellant's standing as a non-commissioned officer and a military member. After carefully examining the submissions of counsel and the appellant's military record, a record marked by four letters of reprimand, and taking into account all the facts and circumstances surrounding the offense of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to support the findings of guilty to the charge and specification. This issue is without merit. In accordance with Article 66(c), UCMJ, 10 USC § 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) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

"[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). 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 a light most favorable to the government, and find a reasonable fact finder could have found all of the essential elements of the specification beyond a reasonable doubt.

On this point, we note that Senior Airman (SrA) KT testified that the appellant was randomly selected to provide a urine sample. SrA KT's testimony is corroborated by the appellant's random selection notification. Moreover, Technical Sergeant (TSgt) JW testified that on 30 August 2007, he observed the appellant provide a urine sample. TSgt JW's testimony is corroborated by the drug testing register and the bottle into which the appellant's urine sample was collected.

Mr. WJ testified that he shipped the appellant's urine sample to AFMOA for testing, and his testimony is corroborated by the drug testing specimen custody document and the specimen shipping checklist. Finally, Dr. NJ, a forensic toxicologist, testified that the appellant's urine sample subsequently tested positive for benzoylecgonine at 171 ng/mL. In short, based on the aforementioned evidence, we find the appellant's conviction to be legally sufficient.

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." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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 under this standard and find ourselves convinced beyond a reasonable doubt that the accused is guilty of the charge and specification.

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

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