UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Captain RHONDA C. MCDANIEL
United States Air Force

ACM 36906

26 August 2008

Sentence adjudged 05 October 2006 by GCM convened at Patrick Air Force Base, Florida. Military Judge: W. Thomas Cumbie (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Colonel Raymond J. Hardy Jr., Major John S. Fredland, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta E. Gray.

Before

FRANCIS, HELGET, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted her of one specification of conspiracy to violate a lawful general regulation, and two specifications of failing to obey a lawful general regulation, in violation of Articles 81 and 92, UCMJ, 10 U.S.C. § 881, 892.[1] The adjudged and approved sentence consisted of a dismissal.

The appellant raises the following issues:

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[1] The Article 92, UCMJ, specifications alleged that the appellant committed the offenses on divers occasions; however, the military judge specifically found that the offenses were committed only on 3 April 2000.

I

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN FINDINGS OF GUILTY FOR THE CHARGES AND SPECIFICATIONS BECAUSE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CHARGED MISCONDUCT OCCURRED WITHIN THE APPLICABLE FIVE-YEAR STATUTE OF LIMITATIONS.

II

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION BECAUSE THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT DISTRIBUTED THE CONTENTS OF CONTROLLED TEST MATERIAL "TO OTHER AIR FORCE MEMBERS."

For the reasons stated below, we find the appellant's contentions to be without merit.

Background

The appellant and two other airmen, Airman Basic (AB) JS and Staff Sergeant (SSgt) JK were all testing in March 2000 for promotion to master sergeant under the Weighted Airman Promotion System (WAPS).[2] This system is used by the Air Force to select enlisted personnel for promotion to the next higher grade. There are six parts of the system, consisting of enlisted performance reports, decorations, time in grade, time in service, and two tests, the specialty knowledge test (SKT) and the promotion and fitness examination (PFE). The two tests account for 44 percent of the total possible points available to determine which airmen are selected for promotion.

Under WAPS, there are very strict rules regarding preparing and studying for these tests. The entire process is essentially a competition amongst the enlisted personnel. Each year, there are only a finite number of promotions available for the total amount of personnel eligible for promotion. Group study is strictly prohibited and Air Force members are not allowed to share information or discuss the contents of the tests with anyone. These prohibitions are specifically delineated in the study guide provided to enlisted personnel, when airmen acknowledge their test date on Air Force Form 1566, and on the answer sheet provided for the test itself.

The appellant, AB JS, and SSgt JK had known each other since 1995 when they were all stationed together at Osan AB, Korea. The appellant and AB JS worked in the

[2] At the time, all three airmen were in the grade of E-6. On 12 March 2001, the appellant was commissioned as a First Lieutenant in the Medical Service Corps.

Military Personnel Flight and SSgt JK worked on the Commander's Support Staff. In February and March 2000, they agreed to share any test material that became available, which is specifically prohibited by Air Force Instruction (AFI) 36-2605, *Air Force Military Personnel Testing System*, ¶ 5.7 (17 June 1994 and 1 May 2000).[3]

AB JS had created a data base of controlled test questions and answers for use in preparing for the PFE and the SKT. After the other airmen tested, they would provide AB JS with the questions they recalled from the test for the others to use. This was normally done via e-mail. The appellant tested first, on or about 2 March 2000. The 2000 testing cycle concluded on or about 15 March 2000. From 2 March 2000 to 5 March 2000, the appellant sent a series of e-mails to AB JS and SSgt JK concerning the PFE and SKT. These e-mails were retrieved by Special Agent (SA) Hubert Lesniak, Air Force Office of Special Investigations (OSI), from AB JS's computer and analyzed by SA Dwayne Duff, also of OSI. The e-mails were recovered from AB JS's America Online (AOL) account.

In an e-mail dated 2 March 2000, the appellant indicated how she felt about the tests and that she would be bringing the "goods" on Saturday.[4] On 5 March 2000, the appellant sent three e-mails referencing "3S051skt," which is the specific SKT for their Air Force Service Code, 3S051, the personnel career field. Attached to the e-mails was a document containing answers to nine questions that were on the tests. On 31 March 2000, AB JS sent the appellant an e-mail requesting that she complete an attached file containing controlled test questions and answers. On 3 April 2000, the appellant twice responded to the 31 March 2000 e-mail and provided the questions she recalled being on her PFE and SKT. Although the 2000 testing cycle ended in March 2000, AB JS still maintained his database in case he was not selected for promotion to master sergeant. As a result of this testing cycle, all three airmen were promoted to master sergeant.

Legal and Factual Sufficiency

I

The appellant's first issue is that the evidence is legally and factually insufficient to sustain findings of guilty to the charges and specifications because the government failed to prove beyond a reasonable doubt that the charged misconduct occurred within the five-year statute of limitations. 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

[3] In addition to the appellant and SSgt JK, AB JS also shared controlled testing material with other airmen; however, the appellant was unaware this occurred and was not a part of that agreement.
[4] SSgt JK testified that "goods" meant the Weighted Airman Promotion System material.

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)).

In 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 presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

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).

It is well settled that the government has the burden of proving the accused committed the charged offenses within the limitations period. *United States v. Sills*, 56 M.J. 556, 563 (A.F. Ct. Crim. App. 2001), *set aside on other grounds*, 56 M.J. 239 (C.A.A.F. 2002) (per curiam).

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.

Id. at 559 (quoting *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)).

Under Article 43(b)(1), UCMJ, 10 U.S.C. § 843(b)(1), "a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command." In this case, the charges and specifications the appellant was found guilty of were preferred on 29 March 2005 and properly receipted for by the appropriate convening authority on 29 March 2005. The appellant was found guilty of conspiracy to violate the lawful general regulation against possessing or distributing controlled test material, and of wrongfully distributing and possessing controlled test material on or about 3 April 2000.

The appellant asserts the following: (1) The testimony from the government witnesses, AB JS and SSgt JK, establishes that the charged misconduct occurred no later than March 2000, which is outside the statute of limitations; (2) The same government witnesses failed to establish that the purported dates of the two "3 April 2000" e-mails were accurate; and (3) the government's expert witnesses failed to establish that the purported dates of the two "3 April 2000" e-mails were accurate. The appellant's contentions are without merit. The evidence clearly shows that beginning on 2 March 2000, the appellant, after having just completed the WAPS testing herself, began to share, via e-mail, the questions that were on the test with both AB JS and SSgt JK. This e-mail exchange did not completely end until 3 April 2000, when the appellant sent AB JS the remaining list of questions she remembered were on the tests. The 3 April 2000 e-mail was in response to AB JS's 31 March 2000 e-mail requesting that the appellant update his database of questions and answers. AB JS would have used this information had he not been selected for promotion to master sergeant.

Additionally, SA Duff testified that in response to various legal challenges over time and date stamps that could be set by an e-mail user, approximately two years prior to the year 2000, most of the internet service providers, such as AOL, changed the way they use time and date stamps for e-mails. The major internet service providers defaulted to using time and date stamps that were on their respective servers, which prevented a specific e-mail user from being able to manipulate the time and date stamps.

Considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. 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 appellant's guilt beyond a reasonable doubt.

II

The appellant's second issue is that the evidence is legally and factually insufficient to sustain a finding of guilty for Charge I and its Specification because the government failed to prove beyond a reasonable doubt that the appellant distributed the contents of controlled test material "to other Air Force members."

The appellant's position is that "other Air Force members" does not include AB JS and SSgt JK, her co-conspirators. This position is without merit. AFI 36-2605, ¶ 5.7, prohibits Air Force members from possessing, distributing, or communicating in any way the contents of controlled test material. The fact that AB JS and SSgt JK were also the appellant's co-conspirators does not alter the fact that they were still "other Air Force members." If appellant was in any way uncertain as to the nature of the charge, she could have filed a motion for a *Bill of Particulars* under Rule for Courts-Martial (R.C.M.) 906(b)(6) prior to her pleas. She did not.

Considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. Further, weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Post-Trial Delay

Considering that our appellate review in this case was not completed within eighteen months of docketing before our court on 19 December 2006, a presumption of unreasonable delay arises requiring us to examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

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