UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant BRENT J. MIZE
United States Air Force

ACM 37993

15 May 2013

Sentence adjudged 01 July 2011 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Jeffrey Ferguson.

Approved sentence: Bad-conduct discharge, confinement for 60 days, reduction to E-4, and a reprimand.

Appellate Counsel for the appellant: Captain Shane McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Brett D. Burton; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HECKER
Appellate Military Judges

PER CURIAM:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of wrongful use of hashish on divers occasions and wrongful introduction of hashish onto a military installation, all while receiving special pay under 37 U.S.C. § 310, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] Consistent with his pleas, the appellant was found guilty of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 60 days, reduction to the grade of E-4 and a reprimand. On appeal, the appellant asserts the evidence is factually insufficient to

[1] The appellant pled guilty to the lesser included offense of attempt for each of these specifications, but following a litigated trial, the members convicted him of the offense as originally charged.

sustain his conviction for wrongful use and introduction of hashish. Finding no error, we affirm.

Background

While deployed to Bagram Air Base, Afghanistan, the appellant encountered then-Staff Sergeant (SSgt) Ryan Bobholz and then-SSgt Melissa Cordero.[2] According to his guilty plea inquiry, in late October 2007, the appellant learned these individuals had been smoking what they claimed was hashish, a concentrated form of marijuana, while driving to and from the base exchange. They told him they got the substance from an Egyptian contractor named "Ash." The two noncommissioned officers shared this substance with him and he smoked it, believing their representations that it was hashish. SSgt Bobholz put the substance in a commercial cigar and the three would share it. The substance did not smell like cigar tobacco typically found in a commercial cigar. By the time of trial, the appellant did not remember how he felt after smoking the substance, though he did remember everyone acting "kind of goofy." The appellant smoked this substance in Afghanistan on approximately 5-7 occasions between October and December 2007, a time during which he was receiving special duty pay. For this conduct, the appellant pled guilty to attempted use of hashish.

According to his guilty plea inquiry, in early December 2007, the appellant was leaving Afghanistan en route to Al Udeid Air Base, Qatar. Before the appellant left, SSgt Bobholz gave him a small amount of what the appellant thought was hashish. The substance was on a piece of duct tape that was small enough to fit inside the tread of the appellant's uniform boot. The appellant traveled to Qatar on a military C-130 with this substance inside his boot, and exited the plane after it landed on the air base. The appellant was still receiving special duty pay during this incident. For this conduct, the appellant pled guilty to attempted introduction of hashish onto a military installation.

While the appellant and SSgt Bobholz were together in Al Udeid, Qatar, SSgt Bobholz took the substance from the appellant's boot and placed it into a commercial cigar. The appellant, SSgt Bobholz, and a third Airman then smoked the substance. It smelled the same as the substance the appellant had smoked at Bagram and he believed it to be hashish. The appellant was still receiving special duty pay during this incident. For this conduct, the appellant pled guilty to attempted use of hashish.

After returning to the United States in early January 2008, the appellant took a part-time job with a casino in Las Vegas and was required to submit to a hair analysis to test for drugs. After that test returned negative results, the appellant believed what he

[2] Staff Sergeant (SSgt) Bobholz was court-martialed in January 2010 for divers uses of cocaine and received a sentence that included a reduction to E-3. SSgt Cordero was court-martialed in November 2010 for selling and using alcohol at Bagram, importing hashish, using heroin and distributing steroids and received a sentence that included a reduction to E-1.

smoked at Bagram and Al Udeid was not actually hashish. This led him to plead guilty to attempting to use and introduce hashish, instead of actually using and introducing the substance.[3] The Government elected to proceed on the greater offense for each specification. Because of the appellant's admissions during his guilty plea, the parties agreed the sole issue for the members was whether the substance was hashish.

Factual Sufficiency

We review issues of factual 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 observed the witnesses, [we] are [ourselves] 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 appellant argues the evidence is factually insufficient to prove beyond a reasonable doubt that the substance he used and introduced onto a military base was hashish. We disagree.

SSgt Bobholz and SSgt Cordero both testified against the appellant under a grant of immunity. Their testimony tracked with the information provided by the appellant in his guilty plea inquiry regarding how the substance was procured and smoked and both admitted smoking hashish on multiple occasions with the appellant in a hollowed-out commercial cigar while driving various military vehicles around Bagram. SSgt Bobholz also testified about smoking once with the appellant after the appellant brought some with him on their deployment to Al Udeid.

SSgt Bobholz testified that the Egyptian contractor who provided the substance told him it was hashish. He described it as a brownish-tarry substance, almost like a compressed flat piece of mud. According to a forensic chemist with extensive experience in drug testing and analysis who testified at trial, this description is consistent with the appearance of hashish.

Both SSgt Bobholz and SSgt Cordero testified about the effects they experienced after smoking the substance they received from the Egyptian contractor. Both described a "euphoric" feeling, and SSgt Cordero also described feeling "giggly." She indicated the feelings she experienced were similar to how she felt after smoking marijuana on

[3] The appellant also pled guilty to using cocaine in early 2008 after he returned to Las Vegas from his deployment. The appellant and SSgt Bobholz each snorted a line of cocaine in the parking lot of a local restaurant. Because he felt "high" after ingesting this substance and it occurred after his drug testing, the appellant agreed the substance he used as actually cocaine.

other occasions. After the appellant smoked the substance with them, the witnesses described him as acting like them and laughing, which was different than how he normally acted. The forensic chemist testified these effects were consistent with what some users of hashish experience after smoking the substance.

The defense presented evidence that the appellant's hair tested negative for drugs (including marijuana) in January 2008 when it was tested by a laboratory as part of the appellant's civilian employment application. The defense expert, a forensic toxicologist with expertise in the testing of hair for drugs, testified that, in his opinion, based on the length of the appellant's hair when it was taken from his head, the drug test would have been able to detect drug use as far back as October 2007. He also testified that he would have expected a positive result based on the uses described by the appellant if he, in fact, did smoke hashish. However, the expert admitted that the appellant's use of certain shampoos in an effort to remove signs of drugs from his hair could reduce the concentration of marijuana's active ingredient in the hair. He also admitted he could not be sure the hair testing was conducted properly since he was not involved.

The Government's expert testified in rebuttal that hair testing in the employment setting has significant disadvantages as compared to forensic testing done for criminal proceedings, given the less strict chain of custody procedures used. He also pointed out several weaknesses in the testing performed on the appellant's hair, and that a negative test result may stem from a variety of variables, including the chemical manipulation of the hair by the drug user, the level of the drug ending up below the cutoff level, and problems with the collection of the sample. Lastly, he testified that, in his expert opinion, the appellant's hair may have tested negative for marijuana even if he smoked hashish in the manner he admitted to in his guilty plea inquiry.

After weighing the evidence and making allowances for not having observed the witnesses, we are convinced beyond a reasonable doubt that the appellant used hashish on divers occasions and introduced it onto a military base.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a); 866(c).

[4] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court