UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Master Sergeant SAMMY L. MOORE JR.
United States Air Force

ACM 35747

18 October 2005

Sentence adjudged 18 September 2003 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Patrick M. Rosenow.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Lieutenant Colonel Craig S. Cook, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MATHEWS, Judge:

The appellant was convicted, despite his pleas, of wrongful use of marijuana and cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence consisted of a bad-conduct discharge, confinement for 90 days, and reduction to E-1. The prosecution's evidence largely consisted of the appellant's positive urinalysis for both drugs, supplemented by comments and actions by the appellant that the prosecution argued evinced a consciousness of guilt. The appellant did not seriously contest the

urinalysis results, but contended that they were the product of his unknowing ingestion of the illegal drugs in question.

The appellant asserts that the military judge erred by deviating from the standard instructions contained in the Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook* (15 Sep 2002). The appellant contends that the military judge's instructions, as given, failed to properly instruct the members on the elements of the charged offense. Finding no error, we affirm the findings and sentence.

During a hearing conducted in accordance with Article 39(a), UCMJ, 10 U.S.C. § 839(a), prior to seating the members, the appellant's trial defense counsel expressed concern over the adequacy of the standard instructions regarding the elements of Article 112a, UCMJ. The military judge then inquired:

> MJ: Well, what you're saying is, you would like the court to do a little more of an explanation of what it is?
>
> DC: Exactly.
>
> MJ: Well, that's not unfair. I will do that. If I don't remember to do that, remind me and I'll be glad to do that.

During his preliminary instructions to the members, the military judge informed the members that to prevail, the prosecution would have to prove the appellant knowingly used illegal drugs and the use was wrongful. He further explained:

> And basically, what the "knowing" means is that the individual had to know that he was doing it. So, it means a knowing ingestion, not accidental, not somebody snuck up from behind me and put it in my drink. It has to be, I know I'm drinking something on purpose.

In another Article 39(a), UCMJ, hearing, following the presentation of evidence on findings, the military judge provided counsel for both parties with a copy of his proposed findings instructions. Those proposed instructions contained the following passages:

> Use also means that the individual knew he was ingesting [the drug]. So for example if someone snuck a white powder into an airman's nose while he was sleeping, he might be ingesting it, but it wouldn't qualify as use under the law because he didn't know it was there.
>
> To be punishable under Article 112a, [UCMJ,] the use of a controlled substance must be wrongful. There are two aspects to the concept of

> wrongfulness. First is that he must have known of the nature of the substance he was using. So, for example, if he put a white powder into his nose, he would be using it because he knew it was there. On the other hand if he thought it was sugar (even if it was in fact cocaine) his use would not be wrongful because he didn't know of the illegal nature of the substance.

Trial defense counsel did not object to these passages during the Article 39(a), UCMJ, session, and the military judge subsequently provided them substantially verbatim to the members of the court. Trial defense counsel also did not object to, or request any additions or clarifications to the instructions prior to the members' entry into closed-session deliberations.

We review the adequacy of the military judge's instructions de novo. *United States v. Smith*, 50 M.J. 451, 455 (C.A.A.F. 1999). In doing so, we consider the instructions in their entirety. *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996) (citing *United States v. Snow*, 82 F.3d 935, 938-39 (10th Cir. 1996)). The appellant contends that the military judge's instructions amounted to plain error under *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988). We disagree. *Mance* established a prospective rule requiring military judges to inform the members that, "in order to convict, the accused must have known that he had custody of or was ingesting the relevant substance and also must have known that the substance was of a contraband nature." *Id.* at 256. The challenged instructions fully complied with this rule.

The appellant further argues that, even if technically accurate, the instructions were nonetheless unfair, because they presented the members with a scenario in which the appellant was subjected to "outright sabotage" by an unknown person who introduced the illegal drugs into his drink or directly into his body—scenarios the appellant now describes as "farfetched." We decline to speculate whether these scenarios are inherently more or less farfetched than any other theory of unknowing ingestion, and perceive no unfairness that would serve to prejudice the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We further note that the appellant did not object at trial despite ample opportunity to do so. This issue was waived. Rule for Courts-Martial 920(f); *United States v. Henderson*, 29 M.J. 221, 223 (C.M.A. 1989); *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986).

The 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court