**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Technical Sergeant CHARLES S. MORGAN**
**United States Air Force**

**ACM S31026**

**31 August 2007**

Sentence adjudged 09 August 2005 by SPCM convened at Eglin Air Force Base, Florida. Military Judge: Bruce T. Smith.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain John S. Fredland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jamie L. Mendelson.

Before

WISE, BECHTOLD, and HEIMANN
Appellate Military Judges



PER CURIAM:

The appellant was convicted, contrary to his pleas, of two specifications of wrongful use of methamphetamines in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by a panel of officer members to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged.

The prosecution's case at trial relied entirely on the results of two urinalysis tests, approximately 100 days apart, which were positive for methamphetamines. The defense's case relied upon three factors in their effort to convince the members to find the appellant not guilty. Specifically, they asked the members to consider that the appellant testified under oath that he did not use drugs; the appellant had a good military record;

and the government witnesses acknowledged that the methamphetamines could have been "unknowingly ingested" by the appellant prior to the urinalysis.

The appellant raised one issue on appeal.[1] Specifically the appellant contends that the military judge's "Permissive Use" instruction was erroneous in light of *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005). Trial defense counsel raised no objections to the instructions. As there was no objection to the permissive inference instruction at trial, we will provide relief only if we find plain error. *See United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003). To meet the test for plain error, the appellant must show that there was error, the error was plain or obvious, and the error materially prejudiced his substantial rights. *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). If the appellant meets this test, the burden shifts to the government to show that the error was harmless beyond a reasonable doubt. *See United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). The court reviews these questions de novo. *Simpson*, 58 M.J. at 378.

In *Brewer*, the Court of Appeals for the Armed Forces found that the military judge erred when he instructed the members that "[t]he burden of going forward with evidence with respect to any such *exception* in any court-martial shall be upon the person claiming its benefit." *Brewer*, 61 M.J. at 430 (emphasis added). The military judge had previously instructed the members that there are three exceptions when the use of a controlled substance would not be wrongful. They were: legitimate law enforcement activities, medical personnel performing duties, or when done without knowledge of the contraband nature of the substance, i.e. a secretly laced cigar. In *Brewer* the erroneous instruction created confusion because "it [did] not explain the difference between 'a burden of production, which only requires that an issue as to an exception be raised by the evidence, and a burden of persuasion, which would require an accused to affirmatively prove by some standard of proof that he came within the exception.'" *Id.* at 431 (citing *United States v. Cuffee*, 10 M.J. 381, 382-83 (C.M.A. 1981)).

Contrary to *Brewer*, in the appellant's case the military judge did not give the instruction that the *Brewer* court found objectionable. In this case the military judge simply advised the members that:

> Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required. Knowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstance . . . . [Further] the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or to disprove the facts necessary to establish each element of the offense.

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[1] This issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Therefore, this Court finds no error in the instructions given. The members were properly advised when they may draw a permissible inference of wrongfulness.

This Court would also note that in addition to assessing the instructions given in light of *Brewer,* this Court also evaluated the fact that the military judge in this case did not give that portion of the standard Military Judge's Benchbook instruction which provides,

> [t]he accused may not be convicted of the use of a controlled substance if the accused did not know he was actually using the substance. The accused's use of the controlled substance must be knowing and conscious. For example, if a person places a controlled substance into the accused's (drink) (food) (cigarette) without him becoming aware of the substance's presence, the accused may not be convicted of using of the (drink) (food) (cigarette).[2]

*See* Department of the Army Pamphlet (D.A. Pam) 27-9, *Military Judges' Benchbook*, ¶ 3-37-2 (1 Jul 2001). This instruction addresses the element of knowledge on the part of the appellant that he in fact was using methamphetamines. In finding that it was not error for the military judge to exclude this portion of the instruction, this Court found it significant that the appellant and trial defense counsel expressly advised the military judge that they were not raising the affirmative defense of "innocent ingestion." Further, the Court found it significant that the appellant, during testimony, did not raise the possibility of innocent ingestion but limited his testimony to the sole possibility of invalid test results based upon his use of dietary supplements. Finally, the comments by both trial counsel and trial defense counsel in argument, regarding innocent ingestion, not being evidence, did not create the existence of error in the failure to provide the additional instruction regarding knowledge.

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

[2] The military judge did instruct the members that the elements of the offense includes that the "accused actually knew that he used the substance."

approved findings and sentence are

AFFIRMED.

OFFICIAL


STEVEN LUCAS, GS-11, DAF
Clerk of Court