UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JONATHAN C. MOSS
United States Air Force

ACM 36849

19 February 2008

Sentence adjudged 26 July 2006 by GCM convened at Langley Air Force Base, Virginia. Military Judge: David Brash.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Major Christopher L. Ferretti.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Carrie E. Wolf, and Major Donna S. Rueppell.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Appellate Judge:

Contrary to his plea, the appellant was convicted by general court-martial of one specification of larceny, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The approved sentence, adjudged by a panel of officers, consisted of a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant raises two assertions of error:[1] 1) The military judge improperly denied a defense motion to suppress evidence seized during an illegal search of the appellant's closed shaving kit; and 2) The evidence is legally and factually insufficient to support his conviction.[2] Finding no error, we affirm.

Background

In September 2005, the appellant was assigned to the 94th Aircraft Maintenance Unit (AMU), 1st Aircraft Maintenance Squadron, Langley Air Force Base, Virginia, as an F-15C crew chief. The 94th AMU operated twenty-four hours a day, seven days a week. Weekend and holiday duty was on a rotational basis. Approximately twenty-four members, including the appellant, were scheduled to work all or part of the holiday weekend preceding and encompassing Labor Day, which in that year fell on Monday, 5 September.

Members of the 94th AMU ran a private organization to support unit social functions. The organization, designated as the Hat-in-the-Ring Top-Four Association (hereinafter Top-Four), operated a robust unit snack fund as its primary fund-raising activity. Income from the snack fund was stored in a small safe, located in the nearby office of Technical Sergeant (TSgt) DF, who at the time served as the Top-Four Treasurer. When TSgt DF left work on Thursday, 1 September 2005, the safe was in his office. When he returned to work on Tuesday, 6 September 2005, the safe was missing. After a brief, unsuccessful inquiry within the unit, TSgt DF concluded it had been stolen and turned the matter over to the local security forces unit for investigation. At the time the safe was stolen, it contained a variety of property belonging to the Top-Four, including approximately $5,500 in cash, consisting of various denominations of bills and slightly more than $200 in change.[3]

Detective CA was assigned to investigate the theft. Based on an apparent lack of forced entry, he concluded it was probably an inside job and started looking at everyone in the unit who worked over the weekend the safe was stolen. Attention quickly focused on the appellant. On 7 September 2005, a consensual search of the appellant's truck turned up a deposit slip for the Langley Federal Credit Union. It indicated the appellant had deposited $1,200 in cash the day before, consisting of nine $100 bills and fifteen $20 bills. The cash in the stolen safe included nine $100 bills and large numbers of $20 bills.

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[1] The wording used by the appellant differs from that set forth above, which more succinctly states the asserted errors. Additional details asserted by the appellant are addressed in the discussion below.

[2] Raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The evidence is unclear as to exactly how much change was in the safe. Although TSgt DF indicated there was roughly $200 in change, he in the same breath went on to describe that change as consisting of: ". . . $140 in quarters, probably say like $50 to $60 in dimes, $30-$40 in nickels, and $250 in pennies." If that description was accurate, it obviously would have amounted to considerably more than $200. Neither the trial counsel nor the trial defense counsel attempted to clarify the discrepancy.

At the time of the theft, the appellant shared a residence with his then girlfriend, Ms. JH, and two others. An initial consensual search of the residence, also on 7 September 2005, found nothing of relevance. That search was limited to common areas of the home and to areas controlled by the appellant. Although the appellant shared his bedroom with Ms. JH, he told Detective CA that some areas of the bedroom (two dresser drawers and a night stand) were not under his control, but were for the exclusive use of Ms. JH. Based on the appellant's representation, Detective CA did not at that time search the areas designated as belonging to Ms. JH.

On 9 September 2005, Detective CA sought and obtained consent from Ms. JH to conduct another search of the residence she shared with the appellant. As before, the search encompassed all common areas of the home. It also covered all areas of the bedroom Ms. JH shared with the appellant, to include areas the appellant had previously indicated were under Ms. JH's sole control. While searching the appellant's and Ms. JH's bedroom, Detective CA found and opened a shaving kit later determined to belong to the appellant. Inside were three bundles of cash, totaling $2,801, in denominations very similar to that described by TSgt DF as being in the safe at the time it was stolen. Detective CA seized the shaving kit and cash and they were introduced as evidence at the appellant's trial.

Search of Appellant's Shaving Kit

At trial, the appellant moved to suppress the bundles of cash, arguing the shaving kit was his exclusive property, which he had intentionally hidden from view, and that his live-in girlfriend, Ms. JH, therefore could not consent to a search of the kit bag. After an extensive evidentiary hearing, the military judge denied the motion. The appellant renews his arguments before this Court, and asserts the judge erroneously denied the motion to suppress. We do not agree.

We review rulings on motions to suppress for abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007). The trial judge's conclusions of law on such motions are reviewed de novo and his findings of fact will be upheld unless clearly erroneous. *Id.* When conducting such a review, "we consider the evidence 'in the light most favorable to the' prevailing party." *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996).

The Fourth Amendment[4] protects individuals against unreasonable searches and seizures and, with limited exceptions, evidence obtained in violation thereof is inadmissible. Mil. R. Evid. 311. Warrantless searches of an accused's private property are not unreasonable if they are conducted with the consent of a third party who exercises common authority over the premises to be searched. *United States v. Matlock*, 415 U.S.

[4] U.S. CONST. amend. IV.

164, 165-70 (1974); *Rader*, 65 M.J. at 32. Common authority exists when there is "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 172 n.7; *Rader*, 65 M.J. at 32-33. The control a third party exercises over the property to be searched is a question of fact. *Rader*, 65 M.J. at 33. Whether that control equates to "joint access or control for most purposes" within the meaning of *Matlock* is a question of law. *Id.*

Even if the third person purporting to give consent lacks actual authority to consent, the search may still be reasonable "if the facts known to the police when the purported consent is given 'would [warrant a man of reasonable caution to conclude]' that the consenting party had authority over the premises." *United States v. White*, 40 M.J. 257, 258-59 (C.M.A. 1994) (quoting *Illinois v. Rodriquez*, 497 U.S. 177, 188 (1990)).

The military judge made detailed findings of fact. Recognizing that the evidence presented was not without some conflict, such findings are nonetheless supported by the evidence of record, are not "clearly erroneous," and are hereby adopted as our own for purposes of this review. We also find the military judge correctly stated and applied the law to these facts and did not abuse his discretion by denying the defense motion to suppress.

At the time of the search, the appellant and Ms. JH lived together in a house shared with two other roommates. All of the occupants shared access to certain common areas of the home, including the dining room. In addition, the appellant and Ms. JH shared a bedroom. Ms. JH testified that within that bedroom, she and the appellant "shared everything," including "the same closet, same bed, . . . same TV, dresser, couch – everything," and that the two had unrestricted access to each other's personal property. The shaving kit was found on the floor of their shared bedroom, lying between two pieces of furniture. Neither the appellant, during the earlier consensual search he authorized on 7 September 2005, nor Ms. JH, during the consensual search she authorized on 9 September 2005, delineated the shaving kit as off-limits.

Notwithstanding the above, the appellant asserts several factors indicate Ms. JH did not have authority to consent to a search of the shaving kit and prevented Detective CA from reasonably believing she had such authority. First, he asserts, and Ms. JH confirmed, that the kit belonged to the appellant alone and that he alone stored belongings in it. Second, he asserts he hid the shaving kit from view, and that doing so evidences his intent not to let Ms. JH have access to it. Third, when the appellant consented to the first search, he made clear that some areas belonged exclusively to Ms. JH and could not be searched. By doing so, he effectively put Detective CA on notice

that the two did not jointly share everything and, by implicit extension, that Ms. JH therefore could not authorize a search of areas or items controlled by the appellant.

We find no merit in the appellant's arguments. First, the mere fact that an item in a common dwelling is primarily, or even solely used by one of the co-habitants does not mean that another co-habitant cannot consent to a search of that item. The real key is whether the consenting party exercises "joint access or control for most purposes." *Matlock*, 415 U.S. at 172 n.7. In other words, whether they routinely did so or not, could the joint occupant have accessed that property if desired or needed? Ms. JH's testimony indicates that she could. Indeed, at one point in the past, she had done so, looking through the shaving kit while it was laying out in the common-use dining room, where even the other roommates had access to it.

Second, contrary to the appellant's assertion that he hid the kit from view, the judge found the kit, which was lying on the floor between two pieces of furniture, was "not apparently concealed." That finding is supported by the testimony of Detective CA that the kit was readily visible.

Finally, nothing the appellant said during the first search put Detective CA on notice that the shaving kit, or any other areas of or items in the shared bedroom, were subject to the appellant's exclusive control. The appellant only told Detective CA that some areas were under Ms. JH's control. However, the reverse does not necessarily follow. Ms. JH could still have enjoyed unrestrained access to all of the appellant's belongings, and she testified that she did so. The shaving kit was neither noticed nor discussed during the first search. Consequently, the appellant never told Detective CA the shaving kit was his alone or that Ms. JH could not consent to search it. Further, nothing about the kit put the detective on notice it could not be searched. Though closed, it was not locked or otherwise secured, was easily found when the detective looked down between the two pieces of furniture, and was not marked to reflect ownership by the appellant. In fact, when Detective CA picked up the bag to open it, he did not know if it belonged to the appellant or Ms. JH.

Based on the above, the evidence indicates Ms. JH had authority to consent to a search of the bedroom she shared with the appellant and the items therein, to include the shaving kit, or that Detective CA reasonably believed she did. Having obtained that consent, Detective CA was free to seize any evidence found, including the bundles of cash, which he reasonably believed to be part of the stolen funds. Mil. R. Evid. 316(b); *See also Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 303 (U.S. 1967) (stolen property is always subject to seizure).

Legal and Factual Sufficiency

The appellant also asserts the evidence was legally and factually insufficient to support his conviction. We find to the contrary.

This Court reviews claims of legal and factual insufficiency de novo, examining all evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the contested crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The appellant's primary argument is that no evidence was presented at trial directly linking him to the stolen safe or money. No one saw him steal the items, there were no fingerprints, and there was no list of serial numbers for the stolen bills that could be matched to the money found in his possession. In addition, the amounts found by the government were less than the amounts stolen and there was no evidence the safe even belonged to the Top-Four.

We again find no merit in the appellant's position. First, we see little significance in the government's inability to recover all of the stolen cash. Second, contrary to the appellant's assertion, the government did introduce evidence the safe belonged to the Top-Four, through the testimony of TSgt DF. Third, although there was no direct evidence of the appellant's guilt, the government introduced a host of circumstantial evidence, all pointing to the appellant. "It is well accepted that circumstantial evidence is sufficient to sustain a finding of guilt." *United States v. Roberts*, 59 M.J. 323, 327 (C.A.A.F. 2004).

In this case, the evidence established the appellant had access to the office where the safe was located, that he worked the weekend it was stolen, and that he probably knew the safe contained significant amounts of cash. Further, shortly after the safe was stolen, the appellant deposited $1,200 in his personal bank account, using denominations of bills matching, or very similar to, those contained in the safe, including nine $100-bills. Three additional bundles of cash, totaling $2,801, in denominations very similar to those contained in the safe, were found in the appellant's shaving kit. During the same time period, the appellant also suddenly paid back $200 on a prior loan from a fellow airman and cashed out slightly more than $200 in change – an amount of change roughly equal to that believed to be in the safe when stolen. Finally, the broken safe, emptied of

its cash, was found in or near a town where the appellant used to live, in a remote area with which the appellant was familiar as the result of his weekend work with a local landscaping company. Remnants of a cardboard shipping box, big enough to have concealed the stolen safe, were also found, and were traced to a store where the grandmother of one of the appellant's roommates worked.

This evidence, taken as a whole, and considered in the light most favorable to the prosecution, was sufficient for a reasonable factfinder to find beyond a reasonable doubt all essential elements of the offense of which the appellant stands convicted. Further, we ourselves are convinced beyond a reasonable doubt the appellant is guilty of that offense.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court