UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CARL B. MUNFORD
United States Air Force

ACM S30508

27 December 2005

Sentence adjudged 2 October 2003 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and forfeiture of $767.00 pay per month for 6 months.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Major Sandra K. Whittington.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Lane A. Thurgood.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge:

The appellant was convicted, contrary to his pleas, of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 6 months, and forfeitures of $767.00 pay per month for 6 months. On appeal, the appellant asserts that the trial judge erred when he denied a defense motion to suppress the results of one of the appellant's two positive urinalysis tests. We disagree and affirm.

Background

On 5 March 2003, the appellant was randomly selected to provide a urine sample for drug testing. A few weeks later the appellant's unit, the 605th Maintenance Squadron, was informed that the appellant's urine had tested positive for cocaine. The results of this urinalysis are not challenged in the appellant's appeal to this Court.

On Friday, 25 April 2003, the appellant's commander, Lt Col Vroegindewey, received a telephone call from the squadron first sergeant informing him that over $900 had been discovered missing from an office located in and controlled by Raptor Flight. "Raptor Flight" is a subordinate unit of the 605th Maintenance Squadron, and is comprised of approximately 40 of the squadron's 500 total assigned personnel. The appellant was, at the time, a member of Raptor Flight. After discussing the missing money with his first sergeant and becoming concerned with the various possible motives underlying the theft, Lt Col Vroegindewey ordered that a unit sweep urinalysis of all members of Raptor Flight be conducted. The theft, which was reported to law enforcement personnel, has never been solved. Lt Col Vroegindewey testified that his command did not engage in its own, separate investigation of the crime.

The unit sweep urinalysis was conducted the following Monday, 28 April 2003. All members of Raptor Flight who were available, including the appellant, were ordered to submit a urine sample. Those who were not available that day due to leave or temporary duty were ordered to submit urine samples upon their return to the unit. The urine sample provided by the appellant during the unit sweep tested positive for cocaine.

Suppression Motion

The appellant made a motion at trial to suppress the results of the 28 April 2003 unit sweep urinalysis, asserting that the evidence resulted from an unlawful search and seizure. The trial judge denied the motion and made detailed findings of fact. We find those findings of fact to be in full accord with the evidence of record and adopt them as our own. Article 66(c), UCMJ, 10 U.S.C. § 866(c). We review a military judge's ruling on a motion to suppress evidence for abuse of discretion. *United States v. Shover*, 45 M.J. 119, 122 (C.A.A.F. 1996). We review fact finding under the clearly erroneous standard and conclusions of law de novo. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004). On a mixed question of law and fact, a trial judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). A military judge's finding regarding the "primary purpose" of an inspection is a question of fact, which will be sustained on appeal unless clearly erroneous. *United States v. Jackson*, 48 M.J. 292, 295 (C.A.A.F. 1998).

We find that the trial judge did not abuse his discretion when he found the unit sweep urinalysis held on 28 April 2003 was a valid inspection and denied the appellant's motion to suppress evidence.

> An "inspection" is an examination of the whole or part of a unit, organization, [or] installation, . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, [or] installation. . . . An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this rule.

Mil. R. Evid. 313(b).

We agree with the military judge's finding that the primary purpose of the 28 April 2003 unit sweep urinalysis was to ensure the readiness and military fitness of the members of the unit and was clearly not a subterfuge conducted to discover evidence of the theft. The evidence adduced during the motion showed that the theft had been reported to law enforcement personnel. The law enforcement personnel who subsequently investigated the theft had no connection to the unit sweep. The squadron commander testified that he was concerned that members of his unit may have needed a large sum of money for a variety of reasons, one of which may have been to purchase drugs. As a result, he ordered the urinalysis to rule out that possibility. Although the commander was aware of the appellant's prior positive urinalysis and had spoken to his first sergeant about that subject in the past, there is no evidence whatsoever that the appellant was targeted by this sweep. Likewise, we found no evidence that tended to show the appellant was considered a suspect in the theft to a degree exceeding any other squadron member who had access to the office from which the money was stolen.

We note that Mil. R. Evid. 313(b) does not require that an inspection be preplanned or randomly scheduled. Lt Col Vroegindewey, a relatively new squadron commander, testified that he had discussed the procedures and logistics of a unit sweep with his first sergeant prior to the theft, but had not previously ordered one. Even though the theft was a catalyst for the unit sweep, it does not invalidate it. Lt Col Vroegindewey's legitimate concerns about possible drug use in his squadron were heightened by the theft of $900, which he postulated could have been used to purchase drugs. As our superior Court has stated, "[a]ny commander who ignores the potential presence of illegal drugs in the unit does so in disregard of his or her responsibility and accountability for the readiness of the unit." *Jackson,* 48 M.J. at 295. We also note that so long as the primary purpose is unit readiness, not disciplinary action, evidence obtained from an inspection for drugs conducted after a report of drug use within a unit is admissible. *Id.* at 294. *See, e.g., United States v. Brown,* 52 M.J. 565, 570 (Army Ct. Crim. App. 1999).

Finally, the appellant was not exempted from the unit sweep simply by virtue of having tested positive for cocaine the month before. *See United States v. Bickel*, 30 M.J. 277, 287-88 (C.M.A. 1990).

Conclusion

The prosecution established by clear and convincing evidence that the primary purpose of the unit sweep urinalysis was unit readiness and not disciplinary action. The military judge did not abuse his discretion by refusing to suppress the results of the second urinalysis. Accordingly, we conclude 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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator