UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet RONALD D. OCCENAD, JR.
United States Air Force

ACM 36921

26 February 2008

Sentence adjudged 21 March 2006 by GCM convened at United States Air Force Academy, Colorado. Military Judge: Steven A. Hatfield.

Approved sentence: Dismissal.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Darla G. Orndorff, Major Chadwick A. Conn, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Ryan N. Hoback.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

Contrary to his pleas the appellant was found guilty of one specification alleging a single use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced to a dismissal. On appeal, he asserts the military judge erred by allowing, over defense objection, the members to use a permissive inference in finding the appellant wrongfully used cocaine.

The appellant was convicted after the urine sample he provided during a unit inspection came up positive for cocaine. The positive test result by the Air Force Drug Testing Laboratory was the only evidence of drug use presented by the government.

At trial, the appellant's trial defense attorney challenged the reliability of the test result by introducing various troubles associated with the collection and testing procedures related specifically to the Air Force Academy during periods relevant to the appellant's case, and generally to the Drug Testing Laboratory.

The issue raised by the appellant focuses on the instructions given the members by the military judge. Citing *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005), he claims the military judge "created a mandatory rebuttable presumption because . . . the instruction shifted the burden of proof to the appellant." Specifically, the appellant identifies the part of instructions that read, "use of cocaine may be inferred to be wrongful in the absence of evidence to the contrary" as being problematic.

The standard of review for alleged instructional error is *de novo*. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003). If there is a Constitutional error we may not affirm the case unless the error was harmless beyond a reasonable doubt. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

We disagree with the appellant's argument and find no error. First, the military judge's instruction, identified by the appellant, was immediately followed by, "[h]owever the drawing of this inference is not required." This clearly shows the inference is permissible but not required. Second, the instructions in *Brewer* had additional language that the Court recognized could cause the members to confuse the burden of production with the burden of persuasion. *Brewer*, 61 M.J. at 431. The Court stated this could have resulted in the appellant having to affirmatively prove that he came within one of the commonly recognized circumstances where use of the drug was not illegal (e.g., innocent ingestion, legitimate law enforcement work or authorized medical use). *Id.* No such language, regarding burdens of proof, was part of the instructions in the instant case.

Finally, the error in the *Brewer* case was further compounded by the military judge's denial of four defense witnesses that would have testified the accused did not use illegal drugs. *Id.* at 432. That was not an issue in this case. Given the above, we are convinced beyond a reasonable doubt the burden of proof was not shifted to the appellant by the instructions given by the military judge, and therefore we find no error.

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.

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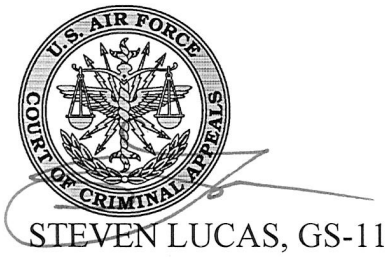

STEVEN LUCAS, GS-11, DAF
Clerk of the Court