UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHARLES W. PAUL
United States Air Force

ACM S32025

23 August 2013

Sentence adjudged 5 January 2012 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Jeffrey Ferguson (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Zaven T. Saroyan.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

A special court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of two specifications of violating a lawful general order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. Contrary to his pleas, the appellant was also convicted of wrongfully using 3,4-methylenedioxymethamphetamine, also known as Ecstasy, on divers occasions; wrongfully using marijuana; and wrongfully soliciting others to commit an offense, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The adjudged sentence consisted of a bad-conduct discharge, confinement for 5 months, and reduction to the grade of E-1. The convening authority

approved the sentence as adjudged, but waived forfeitures for two months for the benefit of the appellant's wife.[1]

On appeal, the appellant argues that the evidence is legally insufficient to support his conviction for wrongful use of Ecstasy.

Background

At trial, the Government's evidence supporting the appellant's conviction of divers use of Ecstasy consisted of the testimony of Ms. HK and various text messages between the appellant and his friends. Ms. HK testified she saw the appellant use Ecstasy at his apartment on multiple occasions in the summer of 2011. The numerous text messages sent by the appellant referenced "rolling" (a term associated with Ecstasy use) and "E" (an additional slang term for Ecstasy).

No evidence was introduced during the findings portion of the appellant's trial that Ecstasy is a Schedule I controlled substance, as charged in the specification. The Government neither introduced a copy of the Controlled Substances Act, 21 U.S.C. § 812, into evidence nor did trial counsel ask the military judge to take judicial notice of the statute. There were only two references to Ecstasy being a controlled substance presented at trial. First, the charge sheet stated, in part, "did . . . wrongfully use 3,4-methlyenedioxymethamphetamine, *a Schedule I controlled substance*, commonly known as Ecstasy, Ex, or E." (Emphasis added.) Second, during the Government's closing argument, the title of a Powerpoint slide show stated, "Charge One: Article 112a Wrongful Use *of a Controlled Substance* (Ecstasy)." (Emphasis added.)

Legal Sufficiency

Article 66, UCMJ, 10 U.S.C. § 866, requires this Court to conduct a de novo review of the legal sufficiency of each case. *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 prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

When use of a controlled substance not specifically listed in Article 112a, UCMJ, is alleged, the Government must either introduce evidence that the substance is a

[1] We note that the appellant pled guilty to Specification 1 of Charge I, except the words "on divers occasions;" to the excepted words, not guilty. This plea is not reflected correctly on the court-martial order (CMO). Additionally, the Action signed by the convening authority states that "all of the mandatory forfeitures are waived for a period of 2 months." This is not reflected correctly on the CMO, which states that "all of the mandatory forfeitures are waived for a period of 4 months." Promulgation of a corrected CMO, properly reflecting the plea to this Specification and the Action, is hereby ordered.

controlled substance pursuant to the Controlled Substances Act or request the trial court take judicial notice of that fact.

The fact that Ecstasy is a Schedule I controlled substance is an essential element of the offense charged in this case, however, no evidence of this fact was introduced at trial. While the charge sheet does properly state that Ecstasy is a Schedule I controlled substance, the charge sheet is not evidence. Additionally, though the Government's closing argument referenced Ecstasy as a controlled substance, closing argument is also not evidence. The Government must otherwise prove beyond a reasonable doubt every element of an offense. They failed to do so in this case.

The Government suggests that because a military judge is presumed to know the law and the law states that Ecstasy is a controlled substance, the evidence was legally sufficient to support the conviction. Nowhere in the record did the military judge advise the parties of his intent to take judicial notice that Ecstasy is a Schedule I controlled substance. Thus, if he did take notice, that notice could only have been sub silentio.

As a matter of due process, the taking of judicial notice generally must be done on the record at trial to provide an accused with both notice and an opportunity to challenge such judicial notice. *Garner v. Louisiana*, 368 U.S. 157, 173-74 (1961). Mil. R. Evid. 201A(a) permits a military judge to take judicial notice of domestic law. Thus, the military judge could have taken judicial notice that the Controlled Substances Act provides that Ecstasy is a Schedule I controlled substance. Mil. R. Evid. 201A provides, however, that the procedural requirements of Mil. R. Evid. 201 (except Mil. R. Evid. 201(g)) apply to the taking of such notice. Mil. R. Evid. 201(c) requires the military judge to inform the parties in open court when taking judicial notice of a law essential to establishing an element of the case. Mil. R. Evid. 201(e) mandates that the military judge provide the parties an opportunity to be heard on the propriety of taking such notice.

Nothing in the record of trial evidences compliance with the procedural requirements for judicial notice, in accordance with Mil. R. Evid. 201. A military judge may not take judicial notice implicitly or sub silentio. *United States v. Irvin*, 21 M.J. 184, 186-87 (C.M.A. 1986). We reject the Government's suggestion that the military judge could impliedly take judicial notice and thereby relieve the Government of the duty to present such evidence.

The Government alternatively suggests that because 3,4-methylenedioxymethamphetamine contains within it the word "methamphetamine" and methamphetamine is specifically listed in Article 112a, UCMJ, that Ecstasy is covered as a listed substance. There was, however, no evidence of this "fact" introduced at trial. While 3,4-methylenedioxymethamphetamine may be a derivative or compound of methamphetamine or even amphetamine, this Court also lacks sufficient information to reach such a conclusion. Furthermore, there appears to be at least some disagreement among the experts as to whether this is the case. *See People v. Silver*, 230 Cal. App. 3d

389 (1991) (noting two prosecution experts testified that methylenedioxymethamphetamine had a substantially similar chemical structure to methamphetamine, making it an analog, while two defense experts disagreed, testifying that methylemedioxymethamphetamine and methamphetamine were different chemical compounds that had different effects on the user).

The fact that Ecstasy is a Schedule I controlled substance is indisputable. *See* 21 C.F.R. § 1308.11(d)(11). We have the authority to take judicial notice of indisputable facts. *United States v. Williams*, 17 M.J. 207, 214 (C.M.A. 1984).

The question facing this Court is whether the taking of judicial notice at the appellate level that Ecstasy is a Schedule I controlled substance is appropriate under the facts of this case.[2] In *Williams*, the Court of Military Appeals had, at an earlier stage, deemed it inappropriate to take judicial notice at the appellate level because doing so would have involved the "possible impairment of appellant's statutory right to have his guilt established before the members of a court-martial." *Id.* at 214. *Williams* is distinguishable from the case at hand because in *Williams* there was a real question as to whether the facts subject to the judicial notice request were "'generally known universally, locally, or in the area pertinent to the event" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Id.* (quoting Mil. R. Evid. 201(b)). Those concerns do not exist in the instant case.

Here, the military judge found the appellant guilty of wrongfully using Ecstasy, a Schedule I controlled substance even though he had not taken judicial notice that Ecstasy was listed as a Schedule I controlled substance in the Controlled Substance Act. There are two reasonable possibilities for this omission. One is that the judge failed to state on the record that he was taking judicial notice of this law. The other possibility is that he merely failed to take such notice.

As noted, this situation deals with a question of readily verifiable domestic law, i.e., whether Ecstasy is a Schedule I controlled substance, as opposed to an adjudicative fact. The distinction is important because, in a case involving court members, the military judge instructs the members that they "may, but are not required to, accept as conclusive any [adjudicative fact] judicially noticed." Mil. R. Evid. 201(g). A military judge who takes judicial notice of a domestic law does not provide such an instruction. *See* Mil. R. Evid. 201A(a) (specifically excluding the requirement of Mil. R. Evid.

[2] This Court could also consider whether to take judicial notice that Ecstasy is a derivative or compound of methamphetamine; however, we decline to do so. We lack any information upon which to make such a determination and there appears to be a question whether such a conclusion is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Mil. R .Evid. 201(b). *See also People v. Silver*, 230 Cal. App. 3d 389 (1991). Given the lack of definitive information on this issue, we do not find it to be an "indisputable fact" suitable for judicial notice at the appellate level.

201(g)). Unlike *Williams*, there is no concern here with the accuracy of the information sought to be judicially noticed.

The Government is not ordinarily permitted a second chance to prove an element of an offense which has been overlooked at trial. It is incumbent on trial counsel to properly prepare their case and provide legal and competent evidence on each and every element of the charged offense. The Government should not be in a position of needing this Court to take judicial notice of domestic law on appeal. It is a very rare case where this Court would be willing to judicially notice a matter which could, and should, have been judicially noticed at trial. Because judicial notice in this case involves a question of domestic law rather than an adjudicative fact, and there is no question that Ecstasy is a Schedule I controlled substance under the laws of the United States, we are taking the extraordinary step of judicially noticing domestic law on appeal. We are convinced that, had the Government requested the military judge to take judicial notice that Ecstasy is a Schedule I controlled substance at trial, the military judge would have done so, even over a possible objection by the defense.

Having taken judicial notice of the fact that Ecstasy is a Schedule I controlled substance, we conclude that a reasonable fact-finder could have found the essential elements beyond a reasonable doubt in this case.

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. Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court