UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman THOMAS W. PERRY
United States Air Force

ACM 36561

14 December 2007

Sentence adjudged 15 September 2005 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, fine of $200.00, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, Captain Christopher L. Ferretti, and Captain Lance J. Wood.

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

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

FRANCIS, Senior Judge:

A panel of officer members sitting as a general court-martial convicted the appellant, contrary to his plea, of one specification of wrongful distribution of oxycodone, a Schedule II controlled substance,[1] in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court found him not guilty of specifications alleging wrongful use of

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[1] 21 C.F.R. § 1308.12(b)(1)(15) (2004). This is the version of the code that was in effect at the time of the appellant's offense.

oxycodone and wrongful possession of Percocet, also a Schedule II controlled substance.[2] The adjudged and approved sentence includes a bad-conduct discharge, confinement for 14 months, forfeiture of all pay and allowances, reduction to E-1, and a $200 fine.

The appellant raises two assignments of error: (1) The record of trial is incomplete because it does not include a video tape and an audio tape introduced into evidence by the government and used to corroborate the only witness to the offense of which the appellant was convicted; (2) The evidence is legally and factually insufficient to sustain the appellant's conviction for distribution of oxycodone because the government failed to prove the appellant distributed oxycodone or that the appellant was not entrapped into committing that offense. Finding no error, we affirm.

Background

The appellant's conviction for distribution of oxycodone is based on his sale of 10 pills of OxyContin to Senior Airman (SrA) RG for $200. OxyContin is a brand name version of the generic drug oxycodone. The buy was part of an Air Force Office of Special Investigations (AFOSI) sting operation.

The appellant and SrA RG first met in November 2002 and began socializing regularly the following summer. SrA RG testified that in July 2003, the appellant showed him a small pill, told him it was Percocet, and suggested he and SrA RG sell Percocet to other military members. SrA RG's account of this incident served as the sole basis for the specification alleging the appellant wrongfully possessed Percocet, of which offense the court found him not guilty.

SrA RG further testified that during the same conversation, the appellant said he could get OxyContin cheap from his home state of Maryland, and suggested selling that drug also. SrA RG told the appellant he didn't think selling drugs was a good idea and the next day reported the conversation to his supervisor and First Sergeant. The First Sergeant contacted AFOSI and SrA RG agreed to cooperate in investigating the appellant's drug activity.

The AFOSI investigation ultimately led to the sting operation targeting the appellant's sale of OxyContin to SrA RG. The sale occurred in the parking lot of a local McDonald's. Before the sale, AFOSI agents searched SrA RG and his vehicle to make sure he had no contraband and gave him $200 in marked bills. They then followed him to the McDonald's lot and videotaped the transaction. After the sale, the agents followed SrA RG back to a prearranged meeting point, where he gave them the 10 OxyContin pills sold to him by the appellant. AFOSI agents again searched SrA RG and his vehicle thoroughly to confirm he had not retained any of the $200 and that he had no further

[2] Percocet is a mixture of oxycodone and Tylenol, so falls under the same schedule as oxycodone.

illegal drugs. Subsequent laboratory analysis of one of the pills confirmed it contained oxycodone.

The OxyContin sale took place 14 May 2004. Instead of arresting the appellant immediately, AFOSI decided to keep using SrA RG as an informant to identify any additional drug activity by the appellant. In that capacity, SrA RG later reported to AFOSI, and testified at trial, that during a telephone call with the appellant a couple days after the OxyContin sale, the appellant told SrA RG he was in Myrtle Beach, South Carolina for "Bike Week" (a motorcycle rally) and was "getting high" on OxyContin. SrA RG's account of that conversation served as the basis for the specification alleging the appellant wrongfully used oxycodone, of which offense the court also found him not guilty. The findings of not guilty to this offense and the alleged Percocet possession offense, both of which depended on the testimony of SrA RG, figure prominently in the appellant's assertion that the evidence is legally and factually insufficient to support his conviction.

Missing Exhibits

At trial, the government's evidence included a video tape AFOSI made of the OxyContin buy and a compact disc (CD) of a recorded telephone conversation between the appellant and SrA RG. The military judge authorized the government to substitute a Digital Video Disc (DVD) in the record for the video tape, but did not authorize substitution of pictures of these items. However, when the record was assembled, pictures of the DVD and audio tape were included in the final record of trial instead of the actual exhibits, and the record was authenticated in that form. The appellant asserts that failure to include the actual DVD and CD in the record makes the record prejudicially incomplete, in that it is the information on the discs that is important, not the photos of the physical items. The government subsequently moved for admission of the DVD and CD in question as part of the appellate record, along with a certificate of correction from the military judge. The appellant did not oppose the motion and we granted it, thereby rendering this assignment of error moot.[3]

Legal and Factual Sufficiency

The appellant asserts the evidence is insufficient to prove he distributed oxycodone to SrA RG or to prove he was not entrapped. We conclude otherwise on both issues.

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United*

[3] The Court's review of the DVD noted a stray reference to another case on the title screen. The appellant advised the Court that the error had no impact.

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 crime 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). In resolving questions of legal sufficiency, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). 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.

We turn first to proof of the underlying offense, as there can be no entrapment if the alleged criminal act is not itself established. *United States v. Sermons*, 14 M.J. 350, 351 (C.M.A. 1982).

SrA RG was the primary witness to the alleged drug distribution. His testimony covered the entire transaction, from setting up the meeting with the appellant, to the preparatory meeting with AFOSI to get the money, through the actual sale to the appellant and the final post-buy meeting with AFOSI to turn over the oxycodone pills. His testimony was supported by that of one of the AFOSI agents who searched SrA RG before and after the buy and provided him the money for the transaction. The AFOSI agent also testified that AFOSI watched and video taped the transaction as it occurred, and a copy of the video was entered into evidence. Although the quality of the video is very poor, it provides some additional indicia of the truth of SrA RG's version of the transaction. In addition, the appellant's girlfriend testified she owned the same kind of vehicle the appellant purportedly drove when he made the sale to SrA RG and that she sometimes let the appellant borrow it. The government also introduced an audio tape of a phone call made by SrA RG to the appellant a couple months after the buy, during which the appellant appeared to confirm he sold the OxyContin pills to SrA RG for $20 each. Finally, the government introduced the pills themselves and the results of the lab analysis identifying them as OxyContin.

The above evidence, along with all reasonable inferences favorable to the prosecution that may be drawn from it, is sufficient for a rational trier of fact to find all required elements of the appellant's crime beyond a reasonable doubt. Further, we ourselves are convinced of the appellant's guilt.

In reaching this determination, we have considered the fact that the appellant's counsel aggressively attacked SrA RG's credibility at trial, eliciting admissions during cross examination that he had more than once stolen items in the past and had lied to supervisors and others about his own offenses. He also admitted he worked for AFOSI because he believed they would give him money and that he at times passed on unreliable

"crap" to AFOSI just to keep the agents happy with his output. All of this no doubt diminished SrA RG's credibility with the members and likely led to the appellant's acquittal of the possession and use charges, for which SrA RG was the only witness. However, we find no merit in the appellant's assertion that because the court members did not find SrA RG credible on those offenses, they could not logically rely on his testimony to convict the appellant of the distribution offense. Responsibility for determining witness veracity rests with the triers of fact, who are free to believe some, all, or none of the testimony of any given witness. *See United States v. Collier*, 1 M.J. 358, 366 (C.M.A. 1976) ("Determination of the accuracy and the weight of the testimony of each witness is for the trier of the facts."); *United States v. Smith*, 33 M.J. 527, 533 (A.F.C.M.R. 1991) ("[T]he trier of fact . . . [has] the discretion to determine the appropriate weight to accord each item of evidence."). The court members in this case heard all of the evidence, including SrA RG's testimony and obviously found his account of the OxyContin distribution, as supported by the other evidence discussed above, truthful. Mindful that we did not have the opportunity to personally hear and weigh SrA RG's testimony, we also find his account of the OxyContin distribution both credible and convincing.

Entrapment

Entrapment is an affirmative defense that applies only if the government induced the accused to commit the offense; that is, if "the criminal design or suggestion . . . originated in the government and the accused had no predisposition to commit the offense." *United States v. Whittle*, 34 MJ 206, 208 (C.M.A. 1992); Rule for Courts-Martial 916(g). When evidence is offered to show the criminal design originated with the government, the defense is raised and the government must prove beyond a reasonable doubt that the criminal design did not originate with the government, or that the accused was predisposed to commit the offense prior to contact by the government agents. *United States v. Hall*, 56 M.J. 432, 436 (C.A.A.F. 2002). The government is allowed to use undercover agents to ferret out crime and is given considerably greater latitude when investigating drug offenses. *United States v. Howell*, 36 M.J. 354, 358 (C.M.A. 1993); *United States v. Vanzandt*, 14 M.J. 332, 344 (C.M.A. 1982). Illegal inducement does not exist if government agents merely provide the opportunity for the accused to commit the crime. *Hall*, 56 M.J. at 436-37 (quoting *Howell*, 36 M.J. at 359-60).

Applying the above, we find the evidence legally and factually sufficient to prove beyond a reasonable doubt the appellant was not entrapped. SrA RG testified that in July 2003, the appellant told him he could get OxyContin cheap from his home state of Maryland, and suggested the two sell the drug. That testimony, if believed, is alone sufficient to prove beyond a reasonable doubt the appellant's predisposition to distribute illegal drugs. Beyond that, SrA RG also testified that when the appellant finally struck the deal for the buy at issue, it was he who determined the number of pills available (10) and set the price at $20 per pill. These actions demonstrate again that the appellant,

consistent with his initial suggestion to SrA RG in July 2003, was predisposed to distribute illicit drugs, and was not wrongfully induced by the government to commit the crime of which he was convicted. We, like the court members, are convinced beyond a reasonable doubt that the appellant was predisposed to commit this offense and was not entrapped.

We have considered, and agree with, the appellant's assertion that we cannot consider the appellant's purported possession of Percocet. This Court "cannot find as fact any allegation in a specification for which the fact-finder below has found the accused not guilty." *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). However, the finding of not guilty as to possession of Percocet does not preclude consideration of the appellant's purported conversation with SrA RG at the same time concerning the appellant's willingness to distribute OxyContin, a distinctly different offense.

We have also considered the evidence elicited by the appellant's counsel at trial that SrA RG was very aggressive and persistent in his efforts to secure drugs from the appellant and that it took a considerable amount of time before the appellant actually provided the drugs. However, repeated, persistent requests to someone known to be predisposed to sell drugs do not alone rise to the level of entrapment. *Hall*, 56 M.J. at 437; *Sermons*, 14 M.J. at 352. In this case, it is evident from SrA RG's testimony that the appellant's delay in selling the drugs was not due to any reluctance by the appellant to commit the crime, but to his inability to immediately get in touch with his own source to obtain the pills.

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; *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