UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANDREW P.L. ROULEAU
United States Air Force

ACM S30568

22 February 2006

Sentence adjudged 21 November 2003 by SPCM convened at Rhein-Main Air Base, Germany. Military Judge: William W. Burd and Thomas W. Pittman.

Approved sentence: Bad-conduct discharge, confinement for 60 days, forfeiture of $400.00 pay per month for 2 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted by a panel of officer and enlisted members of using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the findings and sentence as adjudged.

On appeal, the appellant asserts that the military judge improperly admitted evidence of his pre-service marijuana use. In the limiting instruction he gave to the court members, the military judge explained the evidence was admitted for the limited purpose of its tendency, if any, to show that the appellant had the opportunity to commit the charged offense and to rebut the contention that the appellant's participation in the charged offense was the result of unknowing ingestion. *See* Mil. R. Evid. 404(b).

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004); *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000). "We will not overturn a military judge's evidentiary decision unless that decision was 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *McDonald*, 59 M.J. at 430 (citing *United States v. Miller*, 46 M.J. 63, 65 (C.A.A.F. 1997)).

We are satisfied that this evidence was not admitted to show the appellant's propensity or predisposition to commit the charged offense. *See United States v. Diaz*, 59 M.J. 79, 94 (C.A.A.F. 2003); *Tanksley*, 54 M.J. at 175. We have tested admissibility under the three-pronged test of *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989), and conclude the challenged evidence was admissible: the court members could reasonably find that the appellant engaged in the prior crime or act (use of marijuana with college classmates); the crux of the charged offense, use of cocaine, was made more probable by the evidence;[1] and the probative value was not substantially outweighed by the danger of unfair prejudice. The military judge did not abuse his discretion by admitting evidence of the uncharged misconduct. *See McDonald*, 59 M.J. at 430.

Even if the military judge admitted the evidence in error, the error was harmless. In light of the strength of the government's case, including a positive urine test for the cocaine metabolite benzoylecgonine and statements by the appellant reflecting consciousness of guilt, there was no error that materially prejudiced the substantial rights of the appellant. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[1] At issue was the appellant's use of marijuana with college classmates before he joined the Air Force. The charged period of cocaine use covered a portion of the appellant's leave in Wisconsin, during which he socialized with some of his former classmates – an opportunity to commit the charged offense, according to the government's theory.