UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUAN H. SALAS
United States Air Force

ACM 38120

08 October 2013

Sentence adjudged 31 January 2012 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved Sentence: Dishonorable discharge, confinement for 22 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of a military judge sitting alone, convicted the appellant, in accordance with his pleas, of: conspiracy to distribute ecstasy; wrongful use of marijuana, ecstasy, psilocybin (mushrooms), cocaine, morphine, and amphetamine (Adderall); wrongful distribution of marijuana and ecstasy; disobeying a lawful order by wrongfully using spice; and dereliction of duty by introducing Dextromethorphan, an intoxicating substance, into his body, in violation of Articles 81, 92, and 112a, UCMJ, 10 U.S.C. §§ 881, 892, 912a. Contrary to his pleas, the appellant was convicted of attempted wrongful distribution of amphetamine (Adderall) and oxycodone (Oxycontin),

as well as wrongful distribution of cocaine, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a.[1] The court sentenced the appellant to a dishonorable discharge, confinement for 22 months, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

Before this Court, the appellant raises two assignments of error: (1) The conviction for attempted wrongful distribution of amphetamine (Adderall) and oxycodone (Oxycontin) is legally and factually insufficient; and (2) The conviction for wrongful distribution of cocaine is legally and factually insufficient.[2] For the reasons below, we set aside and dismiss the finding of guilty to that part of the Specification of Charge III pertaining to the attempted wrongful distribution of amphetamine. However, the remaining findings and the sentence, as reassessed, are affirmed.

Background

The following facts pertain to the two offenses in dispute. Around October 2010, Airman First Class (A1C) TS engaged in a conversation with the appellant about drugs. Unbeknownst to the appellant, A1C TS was working as a confidential informant for the Air Force Office of Special Investigations. A1C TS testified that when she indicated to the appellant that there was nothing to do around Malmstrom Air Force Base, he mentioned that he hung out off base with some friends who used drugs. A1C TS asked the appellant if he knew where she could obtain some drugs. The appellant stated that he did, so they exchanged phone numbers and started texting each other regarding various drugs. At some point the appellant texted that he could get Adderall and Altrin and quoted some prices to A1C TS. When A1C TS replied that she wanted to wait until the next payday, the appellant responded, "sounds good to me itll [sic] give me time to find something dank."[3]

The appellant also informed A1C TS that he could get her oxycodone from his girlfriend. However, the appellant later told A1C TS that he could not acquire the oxycodone because his girlfriend was upset about a situation with his drug dealer.

Mr. AA, a civilian who knew the appellant through mutual friends, testified under a grant of immunity that the appellant sold him cocaine in August 2010 while they were at an off-base residence they both frequented and where drug usage routinely occurred.

[1] The appellant found not guilty of a second specification of conspiracy, in violation of Article 81, UCMJ, 10 U.S.C. § 881. Additionally, a second specification of dereliction of duty was withdrawn and dismissed.
[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] Special Agent CS testified that the term "dank" is slang for "really good."

Legal and Factual Sufficiency

The appellant claims his convictions for attempted wrongful distribution of amphetamine and oxycodone, as well as the wrongful distribution of cocaine, are legally and factually insufficient.

Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence 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. Humphreys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). In resolving legal sufficiency questions, we are "bound to draw every reasonable inference from the evidence in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)); *see also United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

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] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

The Specification of Charge III, alleged a violation of Article 80, UCMJ, in that the appellant: "Did, at or near Great Falls, Montana, between on or about 1 May 2010 and on or about 8 December 2010, attempt to wrongfully distribute some amount of amphetamine, also known as Adderall, a Schedule II controlled substance and oxycodone, also known as Oxycontin, a Schedule II controlled substance." In order to establish an attempt offense, the Government must prove: (1) That the accused did a certain overt act; (2) That the act was done with the specific intent to commit a certain offense under the code; (3) That the act amounted to more than mere preparation; and (4) That the act apparently tended to effect the commission of the intended offense. *Manual for Courts-Martial, United States (MCM*), Part IV, ¶ 4.b. (2012 ed.). "Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense." *MCM*, Part IV, ¶ 4.c.(2). Merely soliciting another to commit an offense does not constitute an attempt. *MCM*, Part IV, ¶ 4.c.(5). Our superior court has held that the substantial step must

"unequivocally demonstrat[e] that the crime will take place unless uninterrupted by independent circumstances." *United States v. Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011).

The appellant argues that his conviction is not factually or legally sufficient because the Government failed to show he committed an "overt act." The appellant claims that A1C TS's testimony only established the appellant inquired if she wanted to obtain drugs, but her testimony did not establish the appellant had sufficiently taken any steps to obtain the drugs or attempt to distribute them to her. We concur, in part.

Concerning the attempted distribution of amphetamine, the Government argues the appellant's texted statement – "sounds good to me itll [sic] give me time to find something dank" – constituted an overt act because it indicated the appellant was going to try and obtain some amphetamine. We disagree. The statement simply indicated he had the intent to obtain the amphetamine, but it did not show he took any steps in the furtherance of obtaining the drug, such as contacting or making arrangements with a dealer to purchase amphetamine. Conversely, we find the appellant committed an overt act for the attempted distribution of oxycodone when he contacted his girlfriend to obtain the drug but was rejected. Had his girlfriend agreed to provide him with oxycodone, A1C TS would have likely acquired the drug.

Accordingly, we find there was insufficient evidence for the appellant to be found guilty of attempted wrongful distribution of amphetamine (Adderall) as alleged under the Specification of Charge III. However, considering the evidence in the light most favorable to the prosecution, we find the evidence legally sufficient to support his conviction for the attempted wrongful distribution of oxycodone. Moreover, we are ourselves convinced of the appellant's guilt as to the attempted wrongful distribution of oxycodone.

Specification 9 of Charge II alleged that the appellant wrongfully distributed some amount of cocaine. The appellant avers that Mr. AA was the only witness against him for this charge, but as an admitted drug and alcohol abuser at the time, his testimony is unreliable. Although Mr. AA's credibility may be questionable, his testimony, both on direct and under extensive cross-examination, concerning the drug activity of the individuals involved was not only consistent with the testimony of the other witnesses, but was also consistent with the appellant's own testimony during his providence inquiry. 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. Further, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Accordingly, we find the evidence legally and factually sufficient to support his conviction for the wrongful distribution of cocaine.

Sentence Reassessment

Having found error regarding the attempted wrongful distribution of amphetamine (Adderall) under the Specification of Charge III, we must consider whether we can appropriately reassess the sentence or whether we must return the case for a rehearing on sentence. This Court may reassess the sentence if we can determine to our satisfaction that, absent the error, the sentence adjudged would have been at least a certain severity, as a sentence of that severity or less will be free of the prejudicial effects of that error. *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). Even within this limit, the Court must determine that a sentence it proposes to affirm is "appropriate," as required by Article 66(c), UCMJ, 10 U.S.C. § 866(c). "In short, a reassessed sentence must be purged of prejudicial error and also must be 'appropriate' for the offense involved." *Sales*, 22 M.J. at 307-08. Under this standard, we have determined that we can discern the effect of the error and will reassess the sentence on the basis of the error noted, the entire record, and in accordance with the principles of *Sales* and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*.

Considering all of the offenses in this case, the attempted wrongful distribution of amphetamine was not one of the more serious charges. Additionally, the conviction for the attempted wrongful distribution of oxycodone under the same Specification still stands. Accordingly, having considered the entire record of trial and the principles of *Sales* and *Moffeit*, we are confident the appellant would have received no less than the sentence he was adjudged at his trial. Furthermore, we find the sentence is appropriate, correct in law and fact, and, based on the entire record, should be approved.

Conclusion

The finding of guilty to that part of the Specification of Charge III pertaining to the attempted wrongful distribution of amphetamine (Adderall) is set aside and dismissed. The remaining findings and sentence, as reassessed, are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court