UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TANYA M. SALTIS
United States Air Force

ACM S31300

28 May 2008

Sentence adjudged 22 January 2007 by SPCM convened at Lajes Field, Azores. Military Judge: Adam Oler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 100 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Tiaundra Sorrell.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Roberto Ramirez.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

SOYBEL, Judge:

The appellant was tried at Lajes Air Field, Portugal, before a Special Court-Martial comprised of a military judge sitting alone. In a mixed plea case[1], she was convicted of one charge and two specifications of wrongfully distributing marijuana and one charge and one specification of making a false official statement, in violation of Articles 112a and 107, UCMJ, 10 U.S.C. 912a and 907, respectively. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 100 days, and reduction to E-1.

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[1] The appellant initially pleaded guilty to all charges and specifications, but subsequently withdrew her plea of guilty under circumstances discussed below.

On appeal, the appellant claims that the evidence offered by the government was legally and factually insufficient to prove her guilty of the two specifications of wrongfully distributing marijuana, because, she argues, the government failed to overcome the defense of entrapment by proving she was predisposed to distribute marijuana. We find adversely to the appellant and affirm the approved findings and sentence. Because the appellant's pleas are relevant to the disposition of her claims on appeal, they are discussed in the factual summary below.

Background

Initially, the appellant entered a plea of guilty to one charge and two specifications of distributing marijuana and one charge and one specification of making a false official statement.[2] However, during the *Care*[3] inquiry, the military judge concluded that the appellant's statements raised the affirmative defense of entrapment, and rejected the appellant's plea of guilty to wrongfully distributing marijuana. The appellant thereafter withdrew her plea of guilty to those specifications and the judge accepted her plea of guilty to making a false official statement. During the litigated portion of the appellant's court-martial, the following facts were received into evidence.

The appellant was assigned to the 65th Communications Squadron and worked in the Network Control Center (NCC) at Lajes Field, Azores, Portugal. In June 2005, the appellant met SSgt H, who, unbeknownst to her, was an OSI informant. The two worked together at the NCC and became friends. Approximately one month after the appellant and SSgt H met, the appellant and her husband, DS, had a conversation with SSgt H about drug use and which illegal drugs the appellant liked to use. A few months later, SSgt H brought up the subject of drugs to the appellant again, this time at work. During this conversation, the appellant imparted that she had last used marijuana while on leave with DS in San Diego, CA, and during that trip she had also obtained a large quantity of methamphetamine. The appellant used some of the methamphetamine but had a large amount left over, and so discussed selling it with DS. However, she ultimately decided against selling the drugs because neither she nor DS knew anyone in the area who might buy the drugs.

SSgt H then told the appellant that he had not been able to get high since arriving at Lajes Field. The appellant commiserated with SSgt H, stated she was asking DS to obtain drugs for her, and offered to have DS obtain drugs for SSgt H as well. SSgt H took the appellant up on her offer and for approximately one month after that, SSgt H discussed the details of this agreement with the appellant or DS, depending on who he could contact.

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[2] The false official statement charge was completely unrelated in both time and subject matter to the charges of distributing marijuana.

[3] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Ultimately, the appellant provided marijuana to SSgt H on two occasions. The first occasion occurred in November 2005. On that occasion, DS called SSgt H and said he had the marijuana SSgt H had requested. SSgt H asked DS to have the appellant bring the marijuana to base, where SSgt H would obtain it. The appellant provided the marijuana to SSgt H just inside the parking lot of the NCC building a short while later.

The second occasion occurred approximately one month later, in December 2005. This time, SSgt H asked the appellant if she would provide him with additional marijuana, and she agreed. Again, DS informed SSgt H that he had marijuana to provide SSgt H, and again, SSgt H asked DS to have the appellant bring it to base, and, finally, again the appellant provided the marijuana to SSgt H in the parking lot of the NCC building.

In August 2006, the appellant was questioned by OSI and confessed to distributing marijuana to SSgt H. At trial, the appellant unsuccessfully argued that she had been entrapped by SSgt H into distributing marijuana to him. This brings us to the current issue of legal and factual sufficiency.

Standard of Review

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found [proof of] 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)). For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *Turner*, 25 M.J. at 325.

Discussion

"It is a defense [to an offense charged] that the criminal design or suggestion to commit the offense originated in the [g]overnment and the accused had no predisposition to commit the offense." Rule for Courts-Martial (R.C.M.) 916(g). SSgt H was an agent of the government at the time of the distributions and therefore R.C.M. 916 applies to this case. *See* R.C.M. 916(g), Discussion.

There are three well-established rules governing the defense of entrapment. *United States v. Vanzandt*, 14 M.J. 332, 343 (C.M.A. 1982). First, in order for the defense to be raised at all, the government must prove beyond a reasonable doubt that an

accused committed all the elements of the charged offense, and there must be some evidence that the government induced or suggested that the accused commit the offense. *Id.* Second, "once the defense is raised, the [g]overnment must prove that the accused was predisposed to commit" the charged offense. *Id.* Third, with one exception not applicable here, once raised, the defense of entrapment is an issue that must be resolved by a fact-finder. *Id.* Government agents are given more latitude in inducing many actions in contraband cases such as this one, which have been characterized as essentially "'victim-less' crimes," than in cases where commission of certain acts might bring injury to the public. *Id.* at 344. "A government agent's repeated requests for assistance in acquiring drugs do not in and of themselves constitute the required inducement" to raise the defense of entrapment. *United States v. Howell*, 36 M.J. 354, 360 (C.M.A. 1993) (citations omitted).

The appellant does not dispute that her conduct meets all of the elements of wrongful distribution of marijuana in violation of Article 112a, UCMJ, but rather she claims that the evidence raised the defense of entrapment and the government failed to prove beyond a reasonable doubt that she was predisposed to distribute marijuana. We disagree.

We can easily dispose of the issue of legal sufficiency. Trial defense counsel conceded that a rational fact-finder could infer the appellant was predisposed to distribute marijuana based on the evidence offered by the government. We agree, and find the evidence legally sufficient to sustain the appellant's conviction.

With respect to factual sufficiency, the specific facts of this case leave a question as to whether the defense even raised the issue of entrapment, because there is little if any evidence of actual government inducement. SSgt H testified very specifically that prior to the first distribution, he did not ask the appellant to provide him with drugs – he only commiserated with her that it was difficult to "get high" at their current base. It was the appellant who offered to enlist her husband, DS, to obtain marijuana for SSgt H. *See United States v. Fergurer*, 43 M.J. 871 (Army Ct. Crim. App. 1996) (holding undercover agent's non-specific inquiry into whether an accused knew where to obtain marijuana, followed by an accused's offer to obtain marijuana and agent's follow-up requests for same, does not amount to improper inducement); *Howell*, 36 M.J. at 360 ("Inducement cannot be shown if government agents merely provide the opportunity or facilities to commit the crime or use artifice and stratagem.") (quoting *United States v. Stanton*, 973 F.2d 608, 610 (8th Cir. Ark. 1992)) (internal citations omitted). With her offer, the agreement for the distribution of drugs was made. While it is true that SSgt H thereafter asked the appellant if she had the marijuana and when she could provide it, these inquiries were characterized by SSgt H as "just trying to work out the details." We are mindful of the rule that the government is given more latitude in inducement in contraband cases like this one, and the rule that mere repeated inquiries are not, in and of themselves, enough to raise inducement. *Howell*, 36 M.J. at 360; *Vanzandt*, 14 M.J. at

344. Furthermore, the ultimate acts of distribution, which in and of themselves met the elements of an Article 112a, UCMJ, violation, were immediately solicited by DS, the appellant's husband, not a government actor. *See United States v. Jones*, ACM 36596 (A.F. Ct. Crim. App. 25 Jan 2008) (unpub. op.). SSgt H asked DS to give marijuana to the appellant, and thus induced DS to distribute marijuana to the appellant, but his request does not constitute inducement for purposes of the entrapment defense. The appellant's subsequent distribution to SSgt H indicates that DS induced the appellant to distribute marijuana to SSgt H. However, DS was not a government agent, and so this transaction may not have even constituted government inducement.

However, we do not need to answer the question of whether entrapment was raised, because we are convinced beyond a reasonable doubt that, even assuming the defense of entrapment was raised, the appellant was predisposed to distribute drugs to SSgt H. *See United States v. Hall*, 56 M.J. 432 (C.A.A.F. 2002) (holding exclusion of evidence of inducement harmless where evidence showed predisposition beyond a reasonable doubt). This appellant's ready acquiescence to provide drugs to SSgt H shows predisposition. *See United States v. Bell*, 38 M.J. 358 (C.M.A. 1993) (holding instantaneous assent to a request to obtain drugs is evidence of predisposition); *Howell*, 36 M.J. at 360. Especially in light of *Bell*, a reasonable fact-finder could conclude that the appellant was predisposed to distribute drugs. *Bell*, 38 M.J. at 360 (citations omitted); *see also Turner*, 25 M.J. at 325. In fact, given that the appellant, not SSgt H, originally suggested distributing marijuana, the evidence of predisposition is even clearer than in *Bell*. Furthermore, the appellant contemplated selling methamphetamines in Las Vegas, deciding against it because she and DS did not know anyone in the area to whom they could sell the drugs. We are not persuaded by the appellant's argument that her decision to not sell the drugs evidences a lack of predisposition. On the contrary, "[t]his is not evidence of a lack of predisposition to sell drugs but rather evidence of a predisposition of [the] appellant to sell drugs only on [her] own terms." *Howell*, 36 M.J. at 360 (citation omitted).

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 findings and sentence are

AFFIRMED.

OFFICIAL

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