UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman HERSEY F. SEARS III
United States Air Force

ACM 34490

16 January 2002

Sentence adjudged 5 January 2001 by GCM convened at Tinker Air Force Base, Oklahoma. Military Judge: Israel B. Willner and John J. Powers (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Matthew J. Mulbarger.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

PER CURIAM:

The appellant, pursuant to his pleas, was convicted of absence without leave, failure to go to his appointed place of duty, wrongful use of marijuana, and wrongful use of cocaine, in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a. His approved sentence included a bad-conduct discharge, confinement for 8 months, forfeiture of all pay and allowances, and reduction to E-1. On appeal, the appellant avers that his plea to wrongfully using cocaine was not provident. He also complains, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that he was subjected to illegal pretrial confinement. We affirm.

According to the appellant, the trial judge failed to resolve the inconsistency between his pretrial statement denying the use of cocaine, and his admission during the

guilty plea inquiry that he used cocaine on a single occasion. At trial, the appellant told the judge he used cocaine once on a Friday night between 1 and 9 September 2000. The appellant said a friend produced a white powder that he recognized as cocaine. The cocaine was then placed on a card, and the appellant told the judge he sniffed it through his nose. The appellant said it made him feel "woozy" and that the television picture seemed funny afterward. In addition, the stipulation of fact indicated urine taken from the appellant on 9 September 2000 tested positive for the presence of a metabolite of cocaine. In our experience it is not unusual for an accused to be less than candid with investigators about the extent of his drug use. This human failing does not create a substantial conflict, which would render his plea on the specification improvident. *United States v. Smauley*, 42 M.J. 449 (1995); *United States v. Prater*, 32 M.J. 433 (C.M.A. 1991).

The appellant's claim of illegal pretrial confinement is also without merit. The military judge made extensive findings of fact, which we adopt as our own. While pending trial for wrongful use of marijuana and cocaine, the appellant's commander allowed him to go home to see his family before Christmas. The appellant rewarded this compassion by going absent without leave at the expiration of his approved leave. After he returned, the appellant failed to go to work on his first duty day. In the interim, the squadron also learned that he continued to use marijuana while awaiting trial. The appellant's commander testified that based on all these facts, he considered the appellant a flight risk and that he would continue to engage in serious misconduct. We agree with the judge that this constituted sufficient grounds to impose pretrial confinement under Rule for Courts-Martial (R.C.M.) 305. The judge did not abuse his discretion. *United States v. Gaither*, 45 M.J. 349, 350 (1996).

The 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court