UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman BRYAN L. SMITH
United States Air Force

ACM 34754

23 February 2004

Sentence adjudged 29 June 2001 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Thomas G. Crossan Jr.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jefferson B. Brown, Captain Jennifer K. Martwick, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, Major Steven R. Kaufman, Captain Kevin P. Steins, and Ms Lori M. Jemison (legal intern).

Before

BRESLIN, ORR, and GENT
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial comprised of officers and enlisted members convicted the appellant, contrary to his pleas, of two specifications of wrongful use of cocaine and two specifications of the wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The sentence adjudged and approved was a bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

The case is now before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts that his convictions for three of the specifications are legally and factually insufficient because they were based upon the testimony of an unreliable accomplice. This Court also specified an issue concerning whether this Court may affirm a finding of guilty to Specification 4 of the Charge where the court members found the appellant guilty of only one of "divers" charged uses of marijuana without indicating a particular time. However, our resolution of this case moots the specified issue.

Background

On 22 September 2000, Ms. Dana Wiseman contacted the local police department, and informed them the appellant was using and distributing cocaine, marijuana, and other drugs. The local police referred her to the Air Force Office of Special Investigations (AFOSI). Ms. Wiseman informed the investigators that she saw cocaine and related paraphernalia in the appellant's home earlier that day. The AFOSI agents were also aware the appellant had tested positive for marijuana according to urinalysis results received only days before. The agents obtained a search warrant and took a urine sample from the appellant for drug testing. The second urinalysis was positive for the metabolite of cocaine.

Authorities charged the appellant with two specifications alleging the wrongful use of cocaine: one alleging divers uses between 29 May and 4 September 2000, and the second focusing on a use resulting in the positive urinalysis. The charges also included two specifications alleging the wrongful use of marijuana on divers occasions; one comprised the period 29 May to 6 July 2000, and one comprised the period 8 August to 4 September 2000.

Legal and Factual Sufficiency of the Evidence

Under Article 66(c), UCMJ, we may approve only those findings of guilt we determine to be correct in both law and fact. The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a rational fact finder could have found all the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). According to our superior court, 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," the court is "convinced of the accused's guilt beyond a reasonable doubt." *Reed*, 54 M.J. at 41 (citing *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). Although not specifically raised by the appellant, a discussion of the legal and factual sufficiency of the evidence will be helpful.

A. Use of Marijuana.

Ms. Wiseman testified that she saw the appellant smoke marijuana numerous times. The first time was at a social gathering at the home of Kathy Perry, a mutual friend, in late May or early June 2000. Ms. Wiseman admitted sharing a hand-rolled cigarette with the appellant and positively identified it as marijuana. She recalled seeing the appellant smoke marijuana a second time in late June or early July 2000 at a gathering in her home among a group of friends sitting around the back porch. On direct examination, she testified that she saw him smoke marijuana several more times over the course of the summer, but could not recall specific dates.

On cross-examination, the defense counsel explored in greater detail her allegation that the appellant smoked marijuana on another occasion at a party at Kathy Perry's house in late July or early August 2000.

> Q: Was that one of the evenings that you claim Amn Smith was smoking marijuana?
>
> A: From personal experience, the routine pretty much was to do cocaine and then smoke marijuana later, because it brought you down off of it. So, yes.
>
> Q: Well, by routine. But the seven or eight times you allege that he smoked marijuana in your presence, is that seven or eight times you assumed he did, or that you actually saw him smoking marijuana?
>
> A: I specifically remember the first couple of times. From personal experience, usually once I see somebody do drugs once or twice, I pretty much put it into my mind that's what they do.
>
> Q: So, are you telling us that you assumed he did it seven or eight times, or did you actually see him do it?
>
> A: Well, there may have been one or two times that it was an assumption, but I am almost positive that I saw it on most occasions the seven or eight times. There may have been one or two that I thought I saw it or assumed I saw it.

The prosecution did not introduce evidence of the previous urinalysis result, which was positive for marijuana, and for which the appellant had already received nonjudicial punishment.

The court-martial found the appellant guilty of Specification 3 of the Charge alleging the wrongful use of marijuana on divers occasions between 29 May and 6 July 2000. We find the evidence legally and factually sufficient to support this finding.

The court-martial also found the appellant guilty of Specification 4 of the Charge alleging the wrongful use of marijuana on divers occasions between 8 August and 4 September 2000, but excepted the words "on divers occasions." The only evidence to support the wrongful use of marijuana during this time frame was the somewhat general statements elicited on direct examination, and the responses to cross-examination quoted above. The witness did not make it clear whether she actually saw the appellant use marijuana during the gathering in early August 2000, or whether she inferred it based upon his past practices and the surrounding circumstances. For this reason, we find the evidence factually insufficient to support the finding of guilt for Specification 4 of the Charge. We will take corrective action in our decretal paragraph. This also moots another issue not raised by the appellant: whether the use of marijuana which formed the basis for the appellant's conviction for Specification 4 of the Charge was the same as the use of marijuana between 7 July and 7 August 2000, which formed the basis for his nonjudicial punishment action, admitted in sentencing as Prosecution Exhibit 9.

B. Use of Cocaine.

Ms. Wiseman testified that the first time she saw the appellant use cocaine was at the party described above at Kathy Perry's home in late May or early June 2000. She also saw the appellant use cocaine at a party at her home in late June or early July 2000; she found him with a group of others in her roommate's bedroom, and saw him snort a line of cocaine off a picture frame. In early August 2000 at a party at Kathy Perry's home, she again saw the appellant use cocaine by sniffing it into his nostrils from a counter in the kitchen.

Ms. Wiseman also testified that she went to the appellant's apartment on 22 September 2000 to contact a friend and saw cocaine, small plastic bags, and a short straw on the kitchen countertop. She reported this to the police, and investigators seized the appellant's urine for testing. The prosecution also presented evidence that the appellant's urine sample from 22 September 2000 tested positive for the metabolite of cocaine at a concentration of 12,889 nanograms per milliliter (ng/mL), substantially above the cutoff level of 100 ng/mL. We find the evidence legally and factually sufficient to support the findings of guilt for Specifications 1 and 2 of the Charge alleging the wrongful use of cocaine.

Accomplice Testimony

The appellant argues that the convictions based upon the testimony of Ms. Wiseman are not legally and factually sufficient. He bases this argument upon his

assertion that she was an accomplice because she used marijuana on one or more occasions. He contends her testimony was self-contradictory, uncertain, and improbable.

We considered carefully the evidence presented at trial, keeping in mind that the court members saw and heard the witnesses. Article 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The appellant's allegations regarding the witnesses' credibility and prior inconsistent statements were developed at trial and ably argued to the court members. We are mindful of the special consideration given the testimony of accomplices. *United States v. Williams*, 52 M.J. 218, 221-22 (C.A.A.F. 2000). However, the evidence need not be free of conflict for this Court to be convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Lips*, 22 M.J. 679 (A.F.C.M.R. 1986). We are convinced that the evidence is legally and factually sufficient to support the findings of guilt for the remaining specifications.

Sentence Reassessment

Because we found the evidence legally and factually insufficient to support the appellant's conviction for Specification 4 of the Charge, we must reassess the sentence. In *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002), our superior court summarized the required analysis:

> In *United States v. Sales*, 22 MJ 305 (CMA 1986), this Court set out the rules for sentence reassessment by a Court of Criminal Appeals. If the court can determine that, absent the error, the sentence would have been at least of a certain magnitude, then it may cure the error by reassessing the sentence instead of ordering a sentence rehearing. *Id*. at 307. A sentence of that magnitude or less "will be free of the prejudicial effects of error." *Id.* at 308. If the error at trial was of constitutional magnitude, then the court must be satisfied beyond a reasonable doubt that its reassessment cured the error. *Id*. at 307. If the court "cannot reliably determine what sentence would have been imposed at the trial level if the error had not occurred," then a sentence rehearing is required. *Id*.

Under the unique circumstances of this case, we find that we can reassess the sentence in accordance with the established criteria.

At trial, the appellant faced a maximum punishment of a dishonorable discharge, confinement for 14 years, forfeiture of all pay and allowances, a fine, and reduction to E-1. After setting aside the conviction for Specification 4 of the Charge, the maximum possible punishment would be the same except that the maximum possible confinement would be reduced to 12 years. Thus dismissing Specification 4 of the Charge would have had little impact on the maximum punishment.

We also note that even after setting aside the findings of guilt for Specification 4 of the Charge, there was additional evidence showing the appellant's wrongful use of marijuana on divers occasions. Moreover, the court members also received evidence during the sentencing proceedings that the appellant previously accepted nonjudicial punishment for the wrongful use of marijuana. Thus, there was a substantial amount of evidence demonstrating the nature and extent of the appellant's misconduct, even absent any error.

Considering these factors, we find that dismissing Specification 4 of the Charge does not substantially diminish the totality of the misconduct before the sentencing authority. Indeed, the appellant's sentence may well have remained the same. However, in an excess of caution we will reduce the sentence. We conclude that reducing the appellant's confinement from 1 year to 10 months will cure any error. *Doss*, 57 M.J. at 185. We are satisfied that, absent the error, the sentence would not have been less than a bad-conduct discharge, confinement for 10 months, total forfeitures, and reduction to E-1.

Conclusion

The finding of guilt for Specification 4 of the Charge is set aside and the specification is dismissed. The findings, as modified, and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *Reed*, 54 M.J. at 41. Accordingly, the findings, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator