**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman MASON A. STAPLEY**
**United States Air Force**

**ACM 35097**

**26 November 2003**

Sentence adjudged 12 March 2002 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Timothy D. Wilson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

BRESLIN, MOODY, and BILLETT
Appellate Military Judges

BILLETT, Judge:

On 12 March 2002, the appellant was tried by a general court-martial consisting of a military judge sitting alone. Pursuant to his pleas, he was found guilty of one specification of wrongful possession of ketamine, a Schedule III controlled substance, one specification of wrongful possession of methamphetamine with intent to distribute, and one specification of wrongful possession of 3, 4-methylenedioxymethamphetamine, commonly known as "ecstasy," with intent to distribute, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

The appellant asserts one error for our consideration. He claims that during the pre-sentencing portion of the trial, the military judge erred by admitting and considering

government exhibits consisting of pages from two Drug Enforcement Agency (DEA) pamphlets which described two of the drugs in question. While we find error, we affirm the findings and sentence as adjudged.

## *I. Background*

During the pre-sentencing phase of the appellant's trial, government counsel offered into evidence two exhibits (Prosecution Exhibits 9 and 10) that were each excerpts from DEA pamphlets obtained from a computer website. These documents were offered without any sponsoring witness or written authentication. The first excerpt dealt with ketamine and consisted of a single paragraph. It described the legitimate uses of the drug, its physical effects, its appearance, the usual methods of ingestion, and the incidence of abuse, which the excerpt described as increasing. It also stated that accounts of ketamine abuse appear in reports of "rave" parties attended by teenagers. The second excerpt was considerably longer (one and a half pages) and described various aspects of ecstacy. It gave a history of the development of the drug, the methods of ingestion, the physical effects of the drug (including detrimental long-term effects such as brain damage), and the geography and economics of the manufacturing, distribution, and sale of the drug. The ecstacy excerpt concluded by describing the increased incidence of ecstacy use as measured by the number of reported seizures by law enforcement.

In response to the government's proffer of the excerpts, the appellant objected to their admission. Multiple grounds were given for the objection, including lack of notice, lack of relevancy, lack of foundation, lack of authentication, and hearsay. The government's response centered around its assertion that the DEA pamphlet excerpts contained evidence that was highly relevant and were merely taking the place of two live drug expert witnesses whom the government had earlier intended to give evidence and of whom the defense had received prior notice. The military judge elected to admit the excerpts after finding them relevant and noting that the same documents had been introduced in the Article 32, UCMJ, 10 U.S.C. § 832, investigation, thus providing adequate notice to the defense. In response to the other grounds for objection raised by the defense, the judge stated that he was "bearing in mind the loosened rules of whether or not evidence is admissible or not in the sentencing portion of the trial."

## *II. Discussion*

The appellant now argues that the judge improperly admitted the excerpts during the government's portion of the pre-sentencing hearing. He asserts that, notwithstanding the judge's reference to loosened rules of evidence, the only authorization for the relaxing of evidentiary rules during the sentencing phase, Rule for Courts-Martial (R.C.M.) 1001(c)(3), speaks in terms of a relaxing of evidentiary rules for receipt of matters in extenuation or mitigation when offered by the defense. That rule reads as follows:

> *Rules of evidence relaxed*. The military judge may, with respect to matters in extenuation and mitigation or both, relax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers, and other writings of similar authenticity and reliability.

The appellant recognizes that R.C.M. 1001(d) allows the rules of evidence to be relaxed for the prosecution, but then correctly points out that this rule comes into play only after the rules of evidence have already been relaxed under R.C.M. 1001(c)(3) for the defense. R.C.M. 1001(d) provides:

> *Rebuttal and surrebuttal*. The prosecution may rebut matters presented by the defense. The defense in surrebuttal may then rebut any rebuttal offered by the prosecution. Rebuttal and surrebuttal may continue in the discretion of the military judge. If the Military Rules of Evidence were relaxed under subsection (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

The government acknowledges that the military judge's non-specific reference to relaxed rules of evidence was technically incorrect, and admits that the drug pamphlets were hearsay. However, the government offers the following arguments in support of its position that the military judge was correct in admitting the DEA pamphlets: (1) The admission of the drug pamphlet excerpts was authorized by R.C.M. 1001(e)(1) which states in pertinent part, "During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses"; (2) The DEA pamphlets were admissible because they were self-authenticating under Mil. R. Evid. 902(5); and (3) The government should not be required to call an expert witness merely to present "basic information" to the sentencing authority.

The facts of this case are very similar to those present in *United States v. Eads*, 24 M.J. 919 (A.F.C.M.R. 1987). There, our Court recognized that drug information extracts such as those admitted by the military judge had been accepted as sentencing evidence more or less routinely prior to that time. *Id.* at 920. However, focusing on the methodology used in getting extracts from government publications admitted into evidence, the Court concluded that the relaxed rules of evidence applicable to sentencing did not allow for the receipt of such extracts into evidence over a defense hearsay objection. *Id.* at 920-21. While acknowledging that under R.C.M. 1001(e)(1), allowing the substitution of other forms of evidence for live witness testimony provided the most "nearly applicable" basis for allowing direct admission of the government drug excerpts, the *Eads* Court held that such a provision did not overcome a hearsay objection. *Id.* at 921. This rationale was later cited with approval by our Court in *United States v. Kuhnel*, 30 M.J. 510 (A.F.C.M.R. 1990), which pointed out the hearsay problem of the extracts which could be cured by the production of a live witness.

We see no reason to deviate from these precedents. The DEA pamphlets are hearsay, and R.C.M. 1001(e)(1) does not operate to overcome this infirmity. The argument that the DEA pamphlets were admissible because they were self-authenticating under Mil. R. Evid. 902(5) is flawed. Mil. R. Evid. 902(5) goes only to the authenticity of the document; it does not create an exception to the rule against hearsay. Concerning the government's plea that it should not have to call witnesses to place this kind of evidence before the sentencing authority, we do not find such a requirement unduly burdensome, especially since it avoids the problems inherent in hearsay evidence and the resulting inability to confront and cross-examine experienced by the opposing side. Thus, we find the military judge erred in admitting the DEA pamphlet excerpts over a hearsay objection.

Having concluded that the military judge improperly admitted and considered the government drug extracts, we must now assess the impact of this error upon the adjudged sentence. We note, as a starting point in this analysis, the problems inherent in allowing government drug pamphlet excerpts to be considered by court members. Chief among these is the danger that members may confuse general information provided about the drug for actual information about the accused and improperly particularize it to him or her. Additionally, there is the potential that court members could be unduly swayed by the published format of the extracts or their perceived government sponsorship. In the setting of a bench trial, however, there is far less likelihood that a military judge, who is far more knowledgeable and experienced in matters pertaining to drug offenses and drug offenders, will erroneously ascribe negative pamphlet information to the appellant individually or will otherwise be improperly influenced by this evidence. Thus, even though the two drug extracts were improperly admitted and considered, this error was harmless. Of course, we base this conclusion in part on our assessment of the adjudged sentence in light of the entire record. The sentence was entirely appropriate given the nature of the offenses and appellant's overall record.

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

HEATHER D. LABE
Clerk of Court