UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant ESAU TUBERVILLE, JR.
United States Air Force

ACM S31139

19 March 2008

Sentence adjudged 09 February 2006 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: Gary M. Jackson.

Approved sentence: Bad-conduct discharge, a reprimand, and reduction to E-3.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Anthony D. Ortiz, and William E. Cassara, Esquire (Civilian Counsel).

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, and Captain Ryan N. Hoback.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

The appellant was convicted, contrary to his plea, of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His approved sentence consists of a bad-conduct discharge, reduction to E-3, and a reprimand.

Background

The appellant was selected for a random urinalysis on 6 Jul 2004. His sample was tested the Air Force Drug Testing Division, Brooks City-Base, Texas. The results were

positive for the presence of benzoylecgonine at a concentration of 130 ng/ml. The sample was placed in long-term storage according to standard operating procedures and Air Force Instruction 44-120, *Drug Abuse Testing Program* (1 Jul 2000). The sample was retested by the Armed Forces Institute of Pathology in Oct 2004 where it also tested positive for the metabolite of cocaine.

The trial defense counsel requested a forensic toxicologist as a consultant and that request was granted on 9 Aug 2005. The sample, in long-term storage at Brooks City-Base, was destroyed on 23 Aug 2005 in accordance with applicable procedures and regulations. The first trial date in the case was scheduled for 2 May 2005. In Jan 2006, the trial defense counsel requested a retest of the sample, and found out the sample had been destroyed.

The government's evidence consisted of the test results for the urinalysis and the permissible inference. The defense, prevalent throughout the trial, was the innocent or unknowing ingestion because of the very low nanogram level and the fact that there were no eye witnesses.

I. The Trial Judge Violated the Liberal Grant Mandate Regarding Challenges

During voir dire at the appellant's trial, Lt Col H, a potential court member, informed the trial court that he had a squadron member upon whom he potentially would be preferring a cocaine use charge based upon a positive urinalysis result. Because of this information, the defense counsel challenged Lt Col H for cause based upon actual and implied bias. The trial judge denied the challenge. The trial defense counsel then exercised his peremptory challenge against Lt Col H stating for the record he would have used the challenge against another member but for the denial of his challenge for cause.

A discussion of actual and implied basis standards is unnecessary under the facts of this case. Rules for Court-Martial (R.C.M.) 912 (f) (4)[1] specifically states "[W]hen a challenge for cause has been denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of the excused member upon later review."[2]

II. The Prosecution Destroyed Evidence Denying the Appellant Equal Access

The appellant's counsel, at trial, made a motion to suppress the results of the urinalysis based upon the destruction of the sample. We review a trial judge's ruling on a

[1] Contrary to the appellant's reply brief, we decline to find R.C.M. 912(f)(4) unconstitutional as it applies to the appellant.

[2] As cited in the *Manual for Courts-Martial, United States* (2005 ed.) and amended by Exec. Or. 13387, 70 Fed. Reg. 60697 (Oct. 17 2005).

motion to suppress under an abuse of discretion standard, considering the evidence in the light most favorable to the prevailing party. *United States v. Rodriguez,* 60 M.J. 239, 246 (C.A.A.F. 2004) (citing *United States v. Monroe,* 52 M.J. 326, 330 (C.A.A.F. 2000); *United States v. Reister,* 44 M.J. 409, 413 (C.A.A.F. 1996)). An abuse of discretion occurs when the trial judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law. *United States v. Quintinilla*, 63 M.J. 29, 35 (C.A.A.F. 2006); *See United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005). The Court conducts a de novo review on questions of whether an appellant's due process rights were violated by the government's failure to preserve evidence. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999).

Destruction of evidence does not entitle the appellant to relief on due process grounds unless three conditions are present. They are: (1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the accused would be unable to obtain comparable evidence by other reasonably available means; and (3) the government destroyed the evidence in bad faith. *Id.* (internal cites omitted).

The burden is on the appellant to demonstrate the evidence in question possessed an exculpatory value that was or should have been apparent to the Government before it was lost or destroyed and that the appellant is unable to obtain comparable evidence by other reasonably available means. *United States v. Kern*, 22 M.J. 49, 51-52 (C.M.A. 1986). As in *United States v. Garries*, 22 M.J. 288, 292 (C.M.A. 1986), the appellant had the ability to challenge the test results by attacking the procedures and the people involved in the process.

We find no error here. The trial judge's findings of fact were thorough, detailed, and amply supported by the evidence, and we adopt them as our own. Further the defense has failed to demonstrate that any of the three conditions, let alone all of them, were present. Considering the trial judge's application of the law, de novo, we concur in his conclusion that the destruction of the urine sample did not entitle the defense to suppression of the testing results. Additionally, the appellant was not denied due process. *See also United States v. Madigan*, 63 M.J. 118, 121 (C.A.A.F. 2006).

III. The Trial Judge Erroneously Excluded Evidence[3]

Next, the appellant avers the trial judge erred when he precluded the defense from offering innocent ingestion and exposure studies. We review a trial judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J.

[3] If this Court finds the trial defense counsel failed to preserve this issue and does not find plain error, the appellant requested this issue be treated as ineffective assistance of counsel.

426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). In the case sub judice, the trial judge cautioned the trial defense counsel when he was questioning the government's expert about studies on innocent and unknowing ingestion. The trial defense counsel never offered any studies into evidence and in fact, cross-examined the expert extensively about numerous studies. Consequently, there is no decision by the trial judge for this Court to review.

The appellant requests if this Court finds the issue is not preserved, we find the actions of the trial defense counsel tantamount to ineffective assistance of counsel. We decline to do so, and further discussion is below.

IV. Legal and Factual Sufficiency

We review claims of legal and factual insufficiency de novo, examining all the evidence properly admitted at trial. *See* Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). In resolving questions of legal sufficiency, we must "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). 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 ourselves are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. We are convinced of the appellant's guilt, and find this issue to be without merit.

V. Ineffective Assistance of Counsel

The appellant avers that he submitted a statement to his trial defense counsel for submission with his clemency matters which was not included in that submission. It is clear from the record that the appellant's statement was not submitted.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight,* 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Specifically, the Supreme Court set out a two-prong test which requires the counsel's performance was so deficient that he

was not functioning as counsel within the meaning of the Sixth Amendment[4] and second, that the deficient performance prejudiced the defense. *Id. at* 687. Counsel are presumed to be competent. It is well established, the appellate court will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland v. Washington*, 466 U.S. at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001).

The appellant and the trial defense counsel have submitted affidavits on this issue and therefore we will decide this issue, as necessary, in accordance with *United States v. Ginn.*[5] From the record, it is clear that even if the conduct of the trial defense counsel was deficient, there was no prejudice. The information contained in the letter of the appellant was included in the clemency submissions made by the trial defense counsel. The appellant has failed to meet his burden on this issue.

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, as reassessed, are

AFFIRMED.

OFFICIAL

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

[4] U.S. CONST. amend. VI.
[5] *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997)