UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class PEDRO R. VENEGAS
United States Air Force

ACM 36913

31 July 2008

Sentence adjudged 12 October 2006 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Jennifer Whittier (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Nikki A. Hall and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Nurit Anderson, and Major Donna S. Rueppell.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Contrary to the appellant's pleas, a military judge sitting as a general court-martial convicted him of one specification of wrongful divers use of methamphetamine, one specification of wrongful possession of methamphetamine[1], and one specification

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[1] The appellant was charged with possession with the intent to distribute but the military judge found him guilty of possession only.

wrongful distribution of methamphetamine[2], in violation of Article 112a, UCMJ, 10 U.S.C. § 912. The adjudged and approved sentence consists of a bad-conduct discharge, four months confinement, and reduction to E-1. On appeal the appellant asserts: (1) that the military judge abused her discretion when she denied the appellant's motion to suppress statements the appellant made to OSI investigators; and (2) that the evidence is legally and factually insufficient to sustain his conviction for use and possession of drugs.[3] Finding no error, we affirm.

Background

On 21 July 2005, agents with the Air Force Office of Special Investigations (AFOSI), summoned the appellant to their office to interview him for the alleged possession, use, and distribution of methamphetamine. After a proper rights advisement, the appellant consented to a urinalysis and exercised his rights to counsel. After taking the appellant's fingerprints, photograph, and urinalysis sample, the AFOSI agents released the appellant to his first sergeant. Shortly after leaving the AFOSI office, the appellant called Special Agent ST and told the agent that he, the appellant, was willing to answer their questions. The appellant completed a "cleansing statement" wherein he acknowledged his voluntary return to the AFOSI office and willingness to answer questions. Special Agent ST re-advised the appellant of his rights, the appellant waived his rights, and confessed to purchasing and using methamphetamine. At trial, the appellant unsuccessfully moved to suppress his confession as being involuntary.

Discussion

Motion to Suppress Ruling

The appellant avers that the military judge abused her discretion when she denied the appellant's motion to suppress statements the appellant made to AFOSI investigators. The basis for the appellant's assertion is that he believed that his confession was involuntary because the AFOSI overbore his will by "trick[ing] him or fool[ing] him into how his statement was going to be used." We disagree.

We review a military judge's decision to deny a motion to suppress evidence for an abuse of discretion. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law. *United States v. Freeman,*

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[2] The military judge acquitted the appellant of the following charges: (1) conspiracy to use, possess, and distribute methamphetamine; (2) wrongful introduction of methamphetamine; and (3) wrongful ingestion of Coricidin Cough and Cold Tablets.

[3] Both issues are raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Rader,* 65 M.J. 30, 32 (C.A.A.F. 2007)).

The voluntariness of a confession is a question of law that we review de novo. *Arizona v. Fulminante,* 499 U.S. 279, 287 (1991); *United States v. Bresnahan,* 62 M.J. 137, 141 (C.A.A.F. 2005). A confession is involuntary, and thus inadmissible, if it was obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States[4], Article 31, UCMJ, 10 U.S.C. § 831, or through the use of coercion, unlawful influence, or unlawful inducement. Mil. R. Evid. 304(a), (c)(3); Article 31(d), UCMJ.

In determining whether a defendant's will was over-borne in a particular case and whether a resulting confession is involuntary, we assess the totality of the surrounding circumstances, considering both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account include: the accused's age; the accused's education; the accused's intelligence; whether any advice was given to the accused concerning his constitutional rights; the length of any detention; the length and nature of the questioning; and the use of any physical punishment such as the deprivation of food or sleep. *Freeman,* 65 M.J. at 453 (internal citations omitted).

In the instant case, the military judge made detailed findings of fact. She found: (1) the appellant was at least of average intelligence; (2) there was no evidence that the appellant suffered from any mental disability; (3) the AFOSI agents properly advised the appellant of his constitutional rights; (4) the appellant understood his constitutional rights and demonstrated the ability to invoke his rights when desired; (5) the appellant was not subjected to a lengthy interrogation; (6) the AFOSI agents did not make physical contact with the appellant during the interrogation; and (7) the AFOSI agents did not threaten the appellant or make any promises to the appellant. The military judge's findings of fact were amply supported by the evidence and we concur with her determination that the appellant's statements were voluntary—the product of his free and unconstrained choice. In summary, we find no abuse of discretion.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to support his findings of guilt on the use and possession of drugs charges. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United*

[4] U.S. CONST. amend V.

States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002); (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In resolving questions of legal sufficiency, we are "bound to 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). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). We have considered the evidence produced at trial in a light most favorable to the government and find a reasonable fact finder could have found, beyond a reasonable doubt, all of the essential elements of the specifications of which the appellant was convicted. Specifically, we note that the appellant's confession and testimony from Special Agent CT, Ms. SM and Airman First Class CW are legally sufficient evidence that supports the appellant's conviction.

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] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973). We have carefully considered the evidence under this standard and are convinced beyond a reasonable doubt that the accused is guilty of the charges and specifications of which he was convicted.

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, 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

STEVEN LUCAS, YA-02, DAF
Clerk of the Court