UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DARRYL W. VODA
United States Air Force

ACM 35337

26 January 2004

Sentence adjudged 16 August 2002 by GCM convened at Robins Air Force Base, Georgia. Military Judge: Thomas G. Crossan.

Approved sentence: Bad-conduct discharge, forfeiture of $737.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Major Andrew S. Williams (argued), Colonel Beverly B. Knott, and Major Terry L. McElyea.

Appellate Counsel for the United States: Major Shannon J. Kennedy (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel Robert V. Combs, and Major Linette I. Romer.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

The appellant was tried at a general court-martial convened at Robins Air Force Base (AFB), Georgia, from 13 to 16 August 2002. Contrary to his pleas, a panel of officer and enlisted members convicted him of the wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Consistent with his pleas, he was found guilty of the drunken operation of a vehicle, in violation of Article 111, UCMJ, 10 U.S.C. § 911. The court members sentenced him to a bad-conduct discharge, restriction to base for 2 months, forfeiture of $1,005.00 pay per month for 2 months, and reduction to E-1. The convening authority approved only that portion of the punishment that extended to a bad-conduct discharge, forfeiture of $737.00 per month for 2 months, and reduction to E-1.

The appellant raises two issues, both relating to the charge alleging wrongful use of cocaine. In his first assignment of error, he claims the military judge's findings instructions were constitutionally flawed. In his second assignment of error, he argues the evidence is legally and factually insufficient to support the findings. For the reasons set forth below, we find the military judge's instructions were confusing and incomplete on a vital point, and set aside the findings as to that charge and its specification. We therefore do not address the appellant's second assignment of error.

I. Background

On 25 September 2001, the appellant was randomly selected to provide a urine sample for drug testing. He reported in a timely fashion and provided his urine sample without incident. The sample was properly packaged and sent to the Air Force Drug Testing Laboratory at Brooks AFB, Texas, where it tested positive for the cocaine metabolite benzoylecgonine (BE). The level of concentration detected was 135 nanograms per milliliter (ng/mL). The Department of Defense cutoff for this metabolite is 100 ng/mL.

Dr. Laura I. Haley testified on behalf of the government as an expert in forensic toxicology and analytical chemistry. According to Dr. Haley, the level of BE detected in the appellant's urine was consistent with the use of cocaine on the weekend prior to the urine collection date. However, based upon the urinalysis test results alone, she could not say that the appellant knowingly and consciously used cocaine, nor could she say how the cocaine got into the appellant's system or that he would have felt the effects of cocaine.

The appellant testified on his own behalf and denied that he knowingly or wrongfully used cocaine. He was a radar technician with 11 years of service, and had served more than two years of service deployed to Southwest Asia and Bosnia. He testified that when confronted with the positive drug results, he cooperated fully with agents from the Air Force Office of Special Investigations (AFOSI) by providing another urine sample and authorizing whatever searches the AFOSI requested. The appellant also provided evidence of his good military character and his character for truthfulness and law-abidingness. This evidence included nine affidavits and the testimony of three witnesses, to include the accuser, who testified the appellant had good military character and a character for truthfulness.

The appellant's ex-wife testified she was with him during the relevant time frame and that she did not see him use any drugs. She and the appellant testified it was their practice to go out to local nightclubs and bars several times a week. Because she usually served as the designated driver, she minimized her alcohol consumption such that if a friend or bar patron purchased a drink for her, she would often give it to the appellant.

Finally, the appellant called Mr. Kenneth Berry, a bouncer at one of the nightclubs frequented by the appellant and his ex-wife. He testified that sometime generally near the relevant time frame he saw a bar patron walk past a drink and make a movement with his hand suggesting to Mr. Berry that he may have dropped something into the drink.

According to Mr. Berry, when he attempted to confront the unidentified bar patron, he ran away.

II. Instructional Error

Before closing arguments in findings, the military judge reviewed his proposed instructions with the parties. The military judge indicated that at an earlier conference with the parties conducted pursuant to Rule for Courts-Martial (R.C.M.) 802, two areas "were up for discussion," one involving an instruction favorable to the defense and another which was not. The record does not explicitly identify these two instructions, but it is apparent they did not involve the language that is the subject of this appeal. Pursuant to the military judge's invitation, the defense counsel noted his objections to the military judge's decision regarding those two instructions, but did not raise any further objections. Thus, any error is waived in the absence of plain error. R.C.M. 920(f).

The military judge instructed the court members:

> To be punishable under Article 112a, use of a control [sic] substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if such acts are: a) done pursuant to legitimate law enforcement activities. For example, an informant who is forced to use drugs as part of an undercover operation to keep from being discovered is not guilty of wrongful use; b) done by authorized personnel with [sic] performance of medical duties or experiments; or c) done without knowledge of the contraband nature of the substance. For example, a person who uses cocaine but actually believes it to be a legal substance is not guilty of wrongful use of a controlled substance. *The burden of going forward with evidence with respect to any such exception at any Court-martial shall be upon the person claiming it's [sic] benefit. If such an issue is raised by the evidence presented, then again, the burden of proof is on the United States to establish that the use was wrongful.* Use of a controlled substance may be inferred to wrongful [sic] in the absence of evidence to the contrary. However, the drawing of this inference is not required. Knowledge by the Accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. However, the drawing of any inference is not required.

(Emphasis added.)

The appellant argues that the portion of the instruction highlighted above created a "mandatory rebuttable presumption" that the appellant's use of cocaine was wrongful. The Supreme Court has held that when presumptions have the effect of shifting the burden of

persuasion to an accused on an element of the offense, due process is violated. *Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Citing R.C.M. 920(f), the government argues that this issue is waived absent plain error. The government contends that because the military judge's instructions were taken virtually verbatim from the *Manual for Courts-Martial* they are a correct statement of the law and therefore appropriate to provide to the court members. *See Manual for Courts-Martial, United States (MCM),* Part IV, ¶ 37c(5) (2000 ed.).[*] Moreover, the government contends that the instructions did not relieve the fact finders of their obligation to determine the appellant's guilt beyond a reasonable doubt.

Because the appellant failed to raise this issue below, we review for constitutional plain error. To establish plain error, the appellant must demonstrate that there was error and that it was plain or obvious. *See generally United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998); Article 59(a), UCMJ, 10 U.S.C. § 859(a). When constitutional error is at issue, the burden is on the government to establish beyond a reasonable doubt that any error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 18 (1999); *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

We agree with the government that the military judge's instruction did not explicitly create a mandatory rebuttal presumption. However, the ultimate issue is "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that violates the Constitution." *Boyde v. California*, 494 U.S. 370, 380 (1990) (emphasis added). *See also O'Neal v. Morris*, 3 F.3d 143 (6th Cir. 1993). *But cf. United States v. Loving*, 41 M.J. 213, 277 (C.A.A.F. 1994) (the ultimate issue is "whether there is a *reasonable possibility* that the jury understood the instructions in an unconstitutional manner" (emphasis added)). "Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented." R.C.M. 920(a), Discussion. Confusing jury instructions are subject to a plain error analysis. *United States v. Curry*, 38 M.J. 77 (C.M.A. 1993); *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992).

These instructions failed to draw a distinction between "a burden of production, which only requires that an issue as to an exception be raised by the evidence, and a burden of persuasion, which would require an accused to affirmatively prove by some standard of proof that he [or she] came within the exception." *United States v. Cuffee*, 10 M.J. 381, 382-83 (C.M.A. 1981). The issue of whether the defense of innocent ingestion had been raised is a question of law for the military judge, not a matter for the court members to determine. Injecting this complex legal concept into the instructions was unfortunate--they

[*] It is important to point out, however, that the challenged instructions are virtually identical to Note 6 accompanying paragraph 3-37-2 of the *Military Judges' Benchbook*, a compilation of standardized instructions for courts-martial. *See* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 3-37-2 (1 April 2001). Generally speaking, notes in the *Benchbook* are not intended to be read to court members. Rather, they are intended to prompt the military judge to review and tailor the proposed instructions that follow. *Id*. at ¶ 1-4(a).

were rendered confusing and incomplete on the vital issue of how the burden of proof and the burden of production were allocated vis-à-vis this affirmative defense. *See generally* R.C.M. 916(b) and its Discussion ("the prosecution shall have the burden of proving beyond a reasonable doubt" that an affirmative defense does not apply; such defenses may be "raised by evidence presented by the defense, the prosecution, or the court-martial").

Having found clear error, we now test for prejudice. As Judge Cox stated in *Curry*, "Even if we, as lawyers, can sift through the instructions and deduce what the judge must have meant, the factfinders were not lawyers and cannot be presumed to correctly resurrect the law." *Curry*, 38 M.J. at 81. We conclude there was a reasonable likelihood the court members construed the instructions as placing a burden on the appellant to establish the defense of innocent ingestion by some undefined standard of proof. Therefore, under the unique circumstances of this case, we are not convinced "beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *McDonald*, 57 M.J. at 20 (citing *Neder*, 527 U.S. at 18).

III. Conclusion

The approved findings of the Additional Charge and its specification 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 findings as to the Additional Charge and its specification are AFFIRMED. The findings of the Charge, its specification, and the sentence are set aside. The convening authority may order a rehearing on the Charge and the sentence. If a rehearing on the Charge is not practical, the convening authority may order a sentence rehearing for the Additional Charge and its specification.

OFFICIAL

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