UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class ADRIAN R. WATSON
United States Air Force

ACM 36699

15 August 2007

Sentence adjudged 28 February 2006 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Nancy J. Paul (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major John N. Page III

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Captain Jefferson E. McBride, and Captain Jamie L. Mendelson.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

The appellant was convicted, in accordance with his pleas, of conspiracy to possess cocaine with the intent to distribute, and possession of cocaine with intent to distribute, in violation of Articles 81 and 112a, UCMJ, 10 U.S.C. §§ 881, 912a. The military judge, sitting as a general court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 20 months, and reduction to E-1. On appeal, the appellant asserts that the appellant's plea of guilty to the possession charge was improvident in that

the appellant's responses during the *Care*[1] inquiry did not demonstrate his actual or constructive possession of cocaine. We disagree.

Background

There being no stipulation of fact in this case, the soul source of facts upon which the military judge made her determination consisted of the testimony of the appellant during the guilty plea inquiry. Either as a result of nervousness or a desire to downplay his participation in the alleged drug-trafficking, or both, the appellant's testimony lacked a certain consistency. Nonetheless, as a result of the military judge's persistent efforts, a cogent fact pattern eventually emerged.

In February 2003, the appellant was approached by a co-worker, Staff Sergeant (SSgt) B, who inquired whether the appellant wanted to make some extra money by accompanying him. On 11 February 2003, the appellant and SSgt B met on base and drove to the base bowling alley where they met with Specialist (SPC) A in the latter's vehicle.[2] During the meeting, SPC A disclosed that they were to transport 20 kilos of cocaine in a couple of days from Tucson, Arizona to Phoenix, Arizona using government owned vehicles (GOV). The participants were to wear their military uniforms to lessen the likelihood of being stopped by the police. The appellant was offered $3,000.00 for his assistance, and agreed to assist in picking up and delivering the cocaine.

Following the meeting, SSgt B informed the appellant that they were to pick up the cocaine at "Eegee's on Speedway," located in Tucson, Arizona. On 13 February 2003 the appellant drove to "Eegee's" where he met with SSgt B. After SPC A arrived, the appellant entered a GOV along with SSgt B, a civilian named Debo, and SSgt N.

They then drove to a hotel in Tucson where they were joined by other vehicles. There were six vehicles engaged in the operation – four of which were GOVs. SSgt B exited their GOV to talk with some of the other individuals. While seated in the back seat of the GOV, the appellant recalled that the trunks of the vehicle he occupied and one of the other vehicles which was in his line of sight were open. The appellant then observed SSgt B holding two "A-bags", described by the appellant as a standard issue military bag. SSgt B placed one bag in the car parked nearest to them and he believed the other bag was placed in their vehicle, since the trunk had been opened, but did not recall actually seeing the bag being placed in their trunk by SSgt B. Based on his knowledge of SSgt B's personality, being "not the kind of guy that would allow something like this to take place and him not be a part of it," he believed SSgt B would have wanted to have cocaine in the car he was driving. Based on the totality of his observations, the appellant concluded that there was cocaine in the GOV in which he traveled to Phoenix.

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[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

[2] Testimony presented during the sentencing portion of the trial established that SPC A was acting as an undercover operative for the FBI at all times referenced above.

After SSgt B reentered their GOV, they drove to a hotel in Phoenix where they were joined by the other vehicles. The appellant observed an "A-bag" in the trunk of the vehicle parked in front of them, as he exited his vehicle in the company of the other occupants and proceeded to a room in the hotel. While in the hotel room, he observed the cocaine for the first time. The cocaine was wrapped in silver-colored foil in a package about the size of a brick. There were at least five packages on the table. The appellant did not recall seeing any "A-bags" near the cocaine. Based on the police report and FBI video recording of the events at the hotel in Phoenix, the appellant believed that the amount of cocaine involved was 15 kilos. Appellant was paid for his participation in the transporting of the cocaine while at the Phoenix, Arizona hotel.

Discussion

On appeal, we review the military judge's acceptance of the plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). A providence inquiry into a guilty plea must establish "not only that the accused himself believes he is guilty but also that the factual circumstances as revealed by the accused himself objectively support that plea." *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994) (quoting *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)). *See also United States v. Rothenberg*, 53 M.J. 661, 662 (A.F. Ct. Crim. App. 2000).

"The test for the legal sufficiency of evidence to support a finding of guilty is whether, when the evidence is viewed in the light most favorable to the prosecution, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Quintanilla*, 56 M.J. 37 (C.A.A.F. 2001) (quoting *United States v. Jackson*, 443 U.S. 307, 319 (1979)). An accused's guilt may be established by circumstantial evidence, and the standard of proof in a circumstantial-evidence case is no higher than that required in a direct-evidence case. *United States v. Gammill*, 13 M.J. 966, 968 (A.F.C.M.R. 1982)

In *United States v. Wilson*, 7 M.J. 290, 294 (C.M.A. 1979), our superior court, in construing the various Federal court decisions dealing with constructive possession, made the following observations: (1) mere presence of the accused on the premises or even his proximity to the drug is not, standing alone, deemed sufficient; (2) neither is the mere association with another deemed enough, though the other is known to possess the drug; (3) where a person is in nonexclusive possession of the premises, it cannot be inferred that he knows of the presence of drugs or had control of them unless there are other incriminating statements or circumstances; and, (4) presence, proximity or association *may* establish a prima facie case of drug possession when colored by evidence linking the accused to an ongoing criminal operation of which that possession is a part. *Id.* (quoting *United States v. Staten*, 581 F.2d 878, 883 (U.S. App. D.C. 1978) (emphasis added.).

A further review of existing Federal case law serves to elaborate on the last of those observations. In *United States v. Starks and McMurtry*, 309 F.3d 1017 (7th Cir. 2002), the defendant was present for at least forty-five minutes in a house where evidence of a significant crack-cocaine manufacturing operation was conspicuously strewn about. As much as $20,000.00 worth of cocaine and cocaine base, and the materials necessary to manufacture and process cocaine base, were sitting out on tables and chairs in plain view. A law enforcement official testified that, based upon her experience it was uncommon for drug dealers to entertain social callers at crack houses, which would increase the drug dealer's risk of being robbed. As such, presence was a privilege reserved only for those who were participating in illegal drug activity. *Id.* at 1023.

The Court conceded that the length of presence coupled with the openness of the illicit conduct may not, in and of itself, be sufficient to defeat the mere-presence doctrine. *Id.* at 1025. However, it determined that the facts that McMurty fled from the police upon their entry into the house and that his license plates were found in the house established "the appropriate nexus between the defendant and the illicit conduct [to] refute the claim of mere presence." *Id.*

In *United States v. Batista-Polanco*, 927 F.2d 14 (1st Cir. 1991), the defendant was present from at least forty-five minutes to two hours in an apartment where a large scale heroin-packaging operation was occurring in open view. Upon entering the apartment, the police discovered 1,500 heroin-filled packets, an assortment of heroin milling and packaging paraphernalia, and bulk heroin sitting in plain view on the kitchen table. There were six chairs at the kitchen table and the police arrested six individuals at the apartment. The court concluded that, although wholly circumstantial, the totality of the circumstances surrounding the defendant's arrest, including the openness and sheer scale of the criminal activity that occurred for at least forty-five minutes in his presence, was sufficient to refute his mere-presence argument. *Id.* at 18-19. As the court observed, "In these circumstances we cannot accept the hypothesis that participants in a distribution scheme would permit a noncontributing interloper to remain for an extended period of time in a small apartment while . . . conspicuous criminal conduct continued unabated." *Id.*

The observations made above have been applied to a vehicle as well as a dwelling. *See United States v. Morando-Alvarez*, 520 F.2d 882 (9th Cir. 1975). We must now determine whether the facts presented were sufficient for the military judge to conclude that the appellant was in constructive possession of cocaine present in the vehicle in which the appellant traveled from Tucson, Arizona to Phoenix, Arizona on 13 February 2003, and that the appellant was a knowing and willing participant in a criminal enterprise involving that cocaine.

The facts adduced during the *Care* inquiry established that, in exchange for the sum of $3,000.00, the appellant agreed to assist in the transportation of 20 kilos (later 15

kilos) of cocaine from Tucson to Phoenix. Based upon his observation of events at the hotel in Tucson and knowledge of SSgt B, he believed that the vehicle in which he traveled to Phoenix contained cocaine. Once reaching Phoenix, the appellant entered a house with other co-conspirators where a large amount of cocaine was on display on a table, stayed for some period of time, and was paid $3,000.00 in cash for his participation.

Based on these facts, it is clear that the accused was a willing and knowing participant in an ongoing criminal operation involving the transportation and possession of cocaine. Accordingly, we find that the military judge had sufficient evidence before her to support a finding of guilty, beyond a reasonable doubt, based on appellant's constructive possession of the cocaine contained in the vehicle occupied by the appellant in Tucson on 13 February 2003.

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.

Judge ZANOTTI did not participate.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of Court