

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.**

BEFORE

E.E. GEISER

F.D. MITCHELL

J.G. BARTOLOTTA

UNITED STATES

v.

**Clarence R. LACY
Airman (E-3), U.S. Navy**

NMCCA 200600273

Decided 21 August 2007

Sentence adjudged 28 February 2005. Military Judge: C.D. Connor. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Helicopter Combat Support Squadron TWO, Norfolk, VA.

Col CALVIN BOLES, USMCR, Appellate Defense Counsel
LT AIMEE M. SOUDERS, JAGC, USN, Appellate Defense Counsel
Capt JAMES WEIRICK, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial with enlisted representation, of using marijuana and larceny of United States currency totaling approximately \$5,000.00, in violation of Articles 112a and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 921. The appellant was sentenced to a bad-conduct discharge and confinement for three months. The convening authority approved the sentence as adjudged.

The appellant raises five assignments of error. First, he asserts that his right to a fair and impartial panel was prejudiced by the Government's preemptive strike of the sole African-American member without a non-racial rational basis. Second, the appellant avers that the evidence relating to Charge I (wrongful use of marijuana) was insufficient to support application of a permissive inference of wrongfulness. Third, the appellant argues that the military judge erred when he instructed the members that the appellant's unsworn statement was an "unauthorized" method to put information before the members.

Fourth, the appellant asserts that the military judge erred to the material prejudice of the appellant when he excluded crucial defense evidence. Finally, the appellant asserts that the cumulative impact of "numerous errors" deprived him of a fair and impartial trial.

We have examined the record of trial, the assignments of error, and Government's response. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Improper Preemptive Strike

A defendant has an equal protection right to be tried by members from which no cognizable racial group has been excluded. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986); *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988). Upon timely objection, trial counsel must provide a race-neutral explanation for a preemptory challenge of any member of the same race as the appellant. *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989). Trial counsel's reasons need not rise to a level justifying a challenge for cause. A trial counsel's rationale may include "intuition and other objectively unverifiable considerations." *United States v. Thomas*, 40 M.J. 726, 731 (N.M.C.M.R. 1994). In essence, trial counsel's factual reasons simply cannot be "unreasonable, implausible, or otherwise make no sense." *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997). The rationale must be something more factual than a simple assertion of good faith. *Id.* at 288. Regarding the trial counsel's credibility, appellate courts accord great deference to a military judge's factual determination that trial counsel's explanation for a preemptory challenge was not a subterfuge based on intentional or purposeful discrimination. *Thomas*, 40 M.J. at 731. We will only set-aside a military judge's factual finding in this area if it is clearly erroneous. *Id.*

In the instant case, the Government exercised its preemptory challenge to excuse Petty Officer First Class Riley, the only African-American in the pool of potential panel members. Following a defense objection to the challenge, the Government factually cited to Petty Officer Riley's prior legal experience, familiarity with the urinalysis collection program, and the fact that she had been a victim of a theft, identity fraud, and rape. Record at 253. The military judge observed that the reasons offered by the Government were justifications normally applicable to a defense preemptory challenge, but acknowledged that "some of the reasons" were valid, non-*Batson* type bases for challenge and overruled the defense objection. *Id.* at 257.

On appeal, the appellant argues that the Government's rationales for the challenge were "specious" and that the military judge failed to articulate which of the asserted rationales constituted a valid non-*Batson* type of basis.

Further, the appellant argues that the evidence of the larceny specification hinged significantly on two Caucasian witnesses who identified the appellant from "blurry photographs" of a black male at a bank teller's desk. Citing to *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998), the appellant argues that our superior court has commented on the "pernicious flaws" inherent in cross-racial identifications.

The appellant's focus on the ultimate quality of the trial counsel's rationale is misplaced. As we observed in *Thomas*, one doesn't have to have a "good reason" for a preemptory challenge, only an honestly held non-racial reason. *Thomas*, 40 M.J. at 730. The trial judge had the opportunity to observe and listen to the trial counsel's explanation. Ultimately, it is the sincerity of the trial counsel's factual articulation rather than the quality of his rationale that is at issue. We find the trial counsel's rationale did not lack a minimal factual basis and was not otherwise so "specious" as to overcome our great deference for the military judge's on-the-spot assessment of the trial counsel's credibility and demeanor. There is no requirement that the military judge expressly articulate which of the trial counsel's reasons for challenging the member was valid but only that he finds at least one factual assertion to be valid.

The appellant's secondary focus on the evidentiary issues in the case is also misplaced. As noted above, it is not the specific impact of the challenge on the facts and circumstances of the case that is pertinent. Rather, it is the trial counsel's sincerity and lack of subterfuge in his factual assertion that determine the outcome. We find no evidence in the record that the trial counsel exercised his preemptory challenge based on Petty Officer Riley's race. We also find that Petty Officer Riley's prior legal experience and knowledge of the urinalysis program are sufficient non-racial rationales to justify a preemptory challenge. Thus, we conclude that the military judge committed no prejudicial error in permitting the preemptory challenge.

Legal and Factual Sufficiency

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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

In the instant case, the appellant challenges the sufficiency of the evidence supporting application of the permissive inference authorized under Article 112a, UCMJ. The appellant correctly notes that when urinalysis evidence is the sole basis used to establish the knowledge/wrongfulness elements of Article 112a, expert testimony interpreting the test results or some other lawful substitute is required in order to provide the rational basis upon which the permissive inference of knowledge and therefore wrongfulness may be drawn. *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001).

In *Green*, our superior court found that the admissibility of urinalysis evidence is determined by the military judge in part by consideration of "whether: (1) the metabolite is naturally produced by the body or any substance other than the drug in question; (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and (3) the testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample." *Green*, 55 M.J. at 80. Other admissibility factors can be considered "so long as they meet applicable standards for determining the admissibility of scientific evidence." *Id.*

The testimony of the Government's expert witness in the instant case met each of these three non-exclusive considerations. The expert testified that the THC metabolite found in the appellant's urine sample is associated with ingestion of marijuana and does not naturally occur in the body. Record 567. She also testified that the applicable Department of Defense cut-off level is 15 nanograms per milliliter and that the appellant's urine tested to a level of over 111 nanograms. Record 557, 562; and Prosecution Exhibit 15. She testified that during her 16 years of experience, concentrations of THC typically came in between 50-100 nanograms, although she acknowledged some few significantly higher atypical results. Record at 589. The expert witness further testified at length about lab processes and quality assurance procedures intended to ensure reliability of the testing process. *Id.* at 548, 598. Finally, the expert testified that while passive inhalation was possible in certain rare circumstances, studies she was aware of never reached the 111 nanogram level. *Id.* at 568-69.

The appellant's implication that more evidence is required to satisfy the reasonable doubt standard is misguided. Contrary to the appellant's position, the reasonable doubt standard does not require the prosecution to exclude every possible explanation for the presence of marijuana in the appellant's system. *United States v. Hildebrandt*, 60 M.J. 642, 647 (N.M.Ct.Crim.App. 2004)(citing *United States v. Gray*, 51 M.J. 1, 56 (C.A.A.F. 1999)).

We are confident the military judge had sufficient evidence to support his decision to permit the court members to consider whether to make the permissive inference provided for in Article 112a, UCMJ. We further find that a rational trier of fact could have found the elements of the Article 112(a), UCMJ, offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 318-19; *Turner*, 25 M.J. at 325; *Reed*, 51 M.J. at 561-62; *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Conclusion

The appellant's remaining three assignments of error are without merit. The approved findings and sentence are affirmed.

Judge MITCHELL and Judge BARTOLOTTA concur.

For the Court

R.H. TROIDL
Clerk of Court