UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
W.L. RITTER, E.S. WHITE, B.G. FILBERT
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CLYDE J. WILLIAMS
CULINARY SPECIALIST SEAMAN (E-3), U.S. NAVY

NMCCA 200700294
GENERAL COURT-MARTIAL

Sentence Adjudged: 4 October 2006.
Military Judge: LCDR Robert C. Klant, JAGC, USN.
Convening Authority: Commander, Navy Region Southwest, San Diego, CA.
Staff Judge Advocate's Recommendation: CDR N.A. Hagerty-Ford, JAGC, USN.
For Appellant: CDR Sherry King, JAGC, USN.
For Appellee: LT Jessica M. Hudson, JAGC, USN.

15 January 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

FILBERT, Judge:

The appellant was tried by a military judge sitting as a general court-martial. Pursuant to his pleas, the appellant was convicted of failing to obey a lawful order, operating a vehicle while intoxicated, wrongful use of cocaine, and five specifications of wrongful distribution of cocaine, in violation of Articles 92, 111, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 911, and 912a. Contrary to his pleas, the appellant was convicted of attempted distribution of cocaine, wrongful use of cocaine, and introduction of cocaine onto a vessel of the armed forces in violation of Articles 80 and 112a,

Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 912a. The appellant was sentenced to confinement for twenty-six months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments or error. First, he contends the evidence was legally and factually insufficient to convict him of Specifications 3 and 4 of Additional Charge II because the Government did not prove beyond a reasonable doubt the substance in question was cocaine. Second, he argues the convening authority erred by failing to suspend confinement in accordance with the pretrial agreement.

We have carefully examined the record of trial, the appellant's two assignments of error, and the Government's response. We find the evidence was not legally and factually sufficient to support the appellant's conviction of wrongful introduction of cocaine as alleged in Specification 3 of Additional Charge II. We also conclude the convening authority failed to suspend confinement in excess of eighteen months, as required by the pretrial agreement. Following our remedial action, we conclude the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant remains. *See* Arts. 59(a) and 66(c), UCMJ.

Legal and Factual Sufficiency

Facts

Rebekah Pickett, a former shipmate of the appellant's onboard USS TARAWA (LHA 1), testified that during March 2006, she met the appellant outside her berthing area onboard TARAWA, where the appellant offered her cocaine. The appellant told Ms. Pickett during this conversation he could get cocaine for her and her friends. After the appellant made these statements, he and Ms. Pickett entered a vestibule where he pulled out a bag containing a white powdery substance which he identified as cocaine. After showing Ms. Picket the bag and its contents, the appellant snorted the white substance into his nose using a small tube.

Ms. Pickett further testified she had used cocaine on one occasion prior to joining the U.S. Navy, and had witnessed civilian friends using cocaine. Following the incident onboard TARAWA in March 2006, but prior to being questioned by Naval Criminal Investigative Service (NCIS) agents or the trial

counsel, Ms. Pickett used cocaine she had purchased from the appellant.

When she was interviewed by NCIS agents on 18 April and 21 April 2006, Ms. Pickett did not disclose the appellant had offered her cocaine or used cocaine in her presence onboard TARAWA in March 2006. It was not until she met with the trial counsel in June 2006 that she disclosed this incident to authorities.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found that all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Id.* Reasonable doubt does not, however, mean the evidence must be free of conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). A fact-finder may believe one part of a witness' testimony and disbelieve another. *United States v. Lepresti*, 52 M.J. 644, 648 (N.M.Ct.Crim.App. 1999).

The elements of the offense of wrongful introduction of cocaine alleged in Specification 3 of Additional Charge II are:

(1) That in March 2006, the appellant introduced onto TARAWA some amount of cocaine; and

(2) That the introduction was wrongful.

MANUAL FOR COURTS MARTIAL, UNITED STATES (2005 ed.), Part IV, ¶ 37(b)(4).

The elements of the offense of wrongful use of cocaine alleged in specification 4 of Additional Charge II are:

(1) That in March 2006, the appellant used cocaine; and

(2) That the use was wrongful.

MCM, Part IV, ¶ 37(b)(2).

Analysis

The appellant claims the evidence was legally and factually insufficient to convict him of use and introduction because the Government did not prove beyond a reasonable doubt the substance he possessed and used in the presence of Ms. Pickett was cocaine. We disagree with this contention, but find the evidence insufficient to uphold the conviction for introduction.

Ms. Pickett testified the appellant met her outside of her berthing in March 2006 and asked if she or anyone she knew was interested in using cocaine. The appellant also told Ms. Pickett he could "hook" her up with cocaine. Record at 83. After Ms. Pickett said she was not interested in using cocaine, the appellant pulled out a baggy containing a white powdery substance. The appellant had a small tube inside the baggy which he used to snort the substance into his nose. The appellant used the word "cocaine," or some other synonymous term, which made it evident to Ms. Pickett the substance was, in fact, cocaine. Record at 134-35.

Ms. Pickett's familiarity with the appearance of cocaine was also established at trial. She had used the substance on one occasion prior to joining the Navy and had previously witnessed others use it. Additionally, a few weeks after this encounter onboard TARAWA, Ms. Pickett actually used cocaine she had purchased from the appellant.

The appellant argues Ms. Pickett's testimony was not credible because she did not mention the incident onboard TARAWA when she was first interviewed by NCIS agents. It was undisputed, however, that Ms. Pickett did volunteer the information about the incident to the trial counsel. Additionally, Ms. Pickett had already been discharged from the Navy at the time she told the trial counsel about the incident. Thus, she did not stand to benefit by fabricating that the appellant possessed and used cocaine in her presence onboard the TARAWA.

Accordingly, we are convinced that a rational fact finder could have found the appellant guilty of wrongful use of cocaine as alleged in Specification 4 of Additional Charge II. We, too, are convinced beyond a reasonable doubt of the appellant's factual guilt to that offense.

While we are convinced the Government proved that the substance the appellant possessed on board the TARAWA in March

2006 was indeed cocaine, we find the evidence is factually and legally insufficient to prove that the appellant introduced that cocaine onto the TARAWA. Indeed, the record is devoid of any evidence concerning how the drug was introduced onto the vessel or by whom. Accordingly, we will set aside the finding of guilt to Specification 3 of Additional Charge II and reassess the sentence.

Failure to Suspend Confinement

The appellant correctly points out the convening authority failed to suspend confinement in excess of eighteen months as required by the pretrial agreement.[1] This was error.

The appellant concedes, however, he will not be required to serve confinement for longer than the bargained for 18 months. Nor does he claim any specific harm due to the error by the convening authority. Thus, it is apparent the appellant has not been prejudiced by the convening authority's mistake.

Nonetheless, the appellant is entitled to the benefit of his bargain. *See United States v. Olson*, 25 M.J. 293, 296 (C.M.A. 1987). This court can do what the convening authority was obligated to do under the pretrial agreement. *United States v. Cox*, 46 C.M.R. 69, 72 (C.M.A. 1972); *United States v. Carter*, 27 M.J. 695, 697 n.1 (N.M.C.M.R. 1988). We will take appropriate remedial action in our decretal paragraph.

Conclusion

The finding of guilty to Specification 3 of Additional Charge II is hereby set aside and the specification is dismissed with prejudice. The remaining findings are affirmed. Upon reassessment of the sentence, we conclude the sentence would have been no less even without the conviction for the introduction offense. *United States v. Cook,* 48 M.J. 434, 438 (C.A.A.F. 1998); *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305, 307-308 (C.M.A. 1986). Accordingly, we affirm the sentence, as approved by the convening authority. In accordance with the pretrial agreement, all confinement in excess of 18 months is suspended for 18 months from the date of the convening authority’s action, at the conclusion of which time the suspended portion, unless

[1] Although the staff judge advocate's recommendation (SJAR) correctly reflects the terms of the pretrial agreement, the SJAR inexplicably recommends to the convening authority that he "approve the findings and sentence as adjudged."

sooner vacated, shall be remitted without further action. The supplemental court-martial promulgating order shall reflect this correction.

Chief Judge RITTER and Senior Judge WHITE concur.

For the Court

R.H. TROIDL
Clerk of Court