

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**RICHARD A. GARCIA-TOLSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000610
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 1 July 2010.

Military Judge: CAPT James R. Redford, JAGC, USN.

Convening Authority: Commanding Officer, 3d Assault Amphibian Battalion, 1st Marine Division, FMF, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Col D.K. Margolin, USMC.

For Appellant: LT Ryan Santicola, JAGC, USN; LT Michael Torrisi, JAGC, USN.

For Appellee: LCDR Sergio Sarkany, JAGC, USN; Capt Samuel C. Moore, USMC.

6 September 2011

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using oxymorphone, a Schedule II controlled substance, in violation of Article 112a, Uniform Code of

Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 30 days, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant avers two assignments of error: (1) the military judge erred by instructing the members that they could infer knowing use from a positive urinalysis; (2) the evidence was legally and factually insufficient to support a finding of wrongful use of oxymorphone.¹

After carefully examining the record of trial, the appellant's two assignments of error, and the pleadings of the parties, we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

Facts

On 22 February 2010, during a company-wide urinalysis sweep, the appellant submitted a urine sample that subsequently tested positive for oxymorphone at a Navy drug screening laboratory (NDSL). The appellant presented evidence during his case-in-chief that he innocently ingested an OxyContin pill given to him by his fiancée after she told him it was an over-the-counter pain reliever. His fiancée testified she accidentally gave him the OxyContin pill because it was in the same pill bottle as her prescribed muscle relaxer, Flexeril. The military judge instructed the members that they could infer knowing and wrongful use from the positive urinalysis alone. The members apparently rejected the appellant's innocent ingestion defense and convicted the appellant of wrongfully using oxymorphone.

Permissive Inference Instruction

In his first assignment of error, the appellant avers that the military judge erred by instructing the members that they could infer knowing use of a controlled substance from a positive urinalysis. Despite no objection at trial to the instruction, he now claims that there was no "rational connection" between the positive urinalysis results and the element of wrongfulness. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979).

¹ Appellant's Brief of 3 Feb 2011 at 10, 12.

The military judge's instruction to the members regarding the possibility of drawing the permissive inferences of knowing and wrongful drug use was as follows:

Knowledge by the accused of the presence of the substance and knowledge of the contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of Oxymorphone in the accused's urine that the accused knew he used Oxymorphone; however, the drawing of any inference is not required.

Record at 556.

[T]he weight and effect of this evidence, if any, will depend on all the facts and circumstances as well as the other evidence in the case.

Id. at 563.

The appellant contends that the military judge should not have issued this instruction because the Government's NDSL expert acknowledged during cross-examination that the urinalysis provided no evidence concerning the wrongfulness of or the appellant's state of mind during the ingestion. Appellant's Brief at 9.

As indicated, the appellant did not object to the military judge's instructions at trial. The absence of an objection forfeits any subsequently claimed error in the absence of plain error. To meet the test for plain error, the appellant must show that there was error, that it was plain or obvious, and that it materially prejudiced his substantial rights. *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005).

In order to convict the appellant of wrongful use of a controlled substance under Article 112a, the prosecution must prove beyond a reasonable doubt that the appellant used oxymorphone and that his use was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), Part IV, ¶ 37b(2). Regarding the first element, the Government has to prove that the use was knowing, and in that regard, the manual states:

Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other

circumstantial evidence. This permissive inference may be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c (10)(emphasis added).

A properly admitted urinalysis with expert interpretation "provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use." *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001). A military judge has discretion to determine admissibility, and thus a permissive inference, by considering "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." *Id.* at 80. A permissive inference will violate due process "'only if . . . there is no rational way' that the triers of fact could reach the conclusion suggested by the inference [beyond a reasonable doubt] under the facts of the case. *United States v. Pasha*, 24 M.J. 87, 90 (C.M.A. 1987)(citing *County of Ulster*, 442 U.S. at 157)).

In this case, the appellant's urine contained a measurable amount of oxymorphone that exceeded the cutoff level. Record at 357. The NDSL expert that testified on behalf of the Government ensured the reliability of the testing process, and testified that the oxymorphone found in the appellant's urine does not naturally occur in the body. *Id.* at 338-57. The NDSL expert's testimony addressed the *Green* factors. The expert's concessions, that a positive urinalysis does not show knowing or wrongful use do not negate the propriety of the military judge's instruction on the permissive inference they could draw that the appellant knowingly and wrongfully used the drug in question.

The military judge correctly instructed the members that the Government bore the burden of proving the appellant's guilt beyond a reasonable doubt. It was clear that they could infer knowing and wrongful use from the positive urinalysis, but need not draw either inference. We see no error in this instruction, plain or otherwise, particularly in light of the full instructions given in this case. We are not persuaded by the first assignment of error.

Legal and Factual Sufficiency

The appellant next alleges the evidence was legally and factually insufficient to support a finding of wrongful use of oxymorphone.

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. In contrast, 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. While making these determinations, we are mindful that reasonable doubt does not mean the evidence must be free from conflict. *Reed*, 51 M.J. at 562.

The appellant submitted a urine sample during a company-sweep urinalysis. Multiple government witnesses testified this sweep was in accordance with standard practices and that the appellant's urine was collected and transported to the NDSL. A forensic chemist from NDSL testified that three separate laboratory tests revealed oxymorphone in the appellant's urine. Record at 359-61. The appellant's argument is that the positive urinalysis alone cannot establish the appellant knowingly and wrongfully used oxymorphone. This was not tried, however, solely based on inference. The appellant and his fiancée testified, placing their credibility before the court. As we have explained, the members were free to draw the permissive inference with respect to whether the appellant knowingly and wrongfully ingested oxymorphone using this scientific evidence.

This case, however, involved more than a mere urinalysis presented to the members. In addition to the Government's case, there were various contradictory facts presented to the members by the appellant and his fiancée about the circumstances surrounding his use of the oxymorphone. The members saw and heard the witnesses, but chose not to believe the sworn testimony of the appellant and his fiancée about the circumstances surrounding his claims of innocent ingestion. The facts of this case support a finding that the appellant knowingly ingested oxymorphone.

We find that a rational trier of fact could have found the appellant wrongfully used oxymorphone considering the positive urinalysis and the testimony they heard during the court-martial. Furthermore, after considering the urinalysis evidence along with the testimony of the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

We affirm the findings and the sentence as approved below.

For the Court

R.H. TROIDL
Clerk of Court