

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

**Before
C.L. REISMEIER, J.K. CARBERRY, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ABRAHAM G. ZAPATAGONZALES
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201100160
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 1 December 2010.

Military Judge: Col Michael B. Richardson, USMC.

Convening Authority: Commanding Officer, Weapons and Field Training Battalion (MCRD), Edison Range, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: Maj Z.W. Keske, USMC.

For Appellant: LT Ryan Santicola, JAGC, USN; Capt Michael Berry, USMC.

For Appellee: Capt Paul M. Ervasti, USMC.

27 December 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 one specification of wrongful use of tetrahydrocannabinol (THC), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant

to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error: (1) that it was plain error for the military judge to instruct the members that they could infer wrongfulness and knowing use from the positive urinalysis related to the appellant; and (2) that the convening authority failed to consider the appellant's clemency request before taking action. Finding both allegations to be unpersuasive, 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 was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant returned from a 10-day leave period and, three days later, provided a urine sample during a unit sweep urinalysis. Testifying at trial, the appellant identified the bottle associated with the sample as his. The sample contained THC at a concentration of 28 nanograms per milliliter (ng/ml), above the 15 ng/ml cutoff established for the Department of Defense. The Government's expert from the drug testing laboratory testified that THC is not naturally occurring in the human body, and that only consumption of THC would produce the THC result found in the appellant's urine sample. She also testified that she could opine neither as to whether the appellant knew that he consumed THC, nor whether he felt the effects, as she had no way of knowing whether 28 ng/ml was a peak concentration or a representation of a declining concentration level.

Plain Error in the Inference of Wrongfulness

To support his plain error argument, the appellant claims that members may infer an element from a fact only if there is a rational connection between the fact proven and the element inferred. His specific allegation is that the Government failed to present a rational connection between the positive urinalysis result and the element of wrongfulness. As a result, he claims that the judge committed plain error by instructing the members, without objection, that they could infer that the appellant wrongfully used THC.

The appellant correctly notes that the question of whether the members were properly instructed is a question of law we review *de novo*. *United States v. Simpson*, 58 M.J. 368, 378

(C.A.A.F. 2003). He is also correct that in the absence of an objection at trial, we will review this issue for plain error. To be plain error, the error must be plain or obvious, and must result in material prejudice to substantial rights. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

However, we cannot agree that there was plain error in this case. The appellant was on leave for 10 days. His urine sample taken three days after he returned tested positive for THC. He testified at trial, stating that the only potential source he could think of was from a "hookah" bar he attended a few days prior to returning to work. He testified that, without checking the contents, he smoked something from a pipe that he assumed was flavored tobacco, but that he neither smelled marijuana nor felt any effects. His answers to questions for specifics concerning the night in question suggested limited recall, or avoidance. He placed his credibility in issue and was confronted with a prior incidence of lying in order to avoid accountability. His conviction rested upon a test, his credibility, and the inference permitted by the instructions.

We take issue with the appellant's claim that "[i]n her testimony, Ms. [M] (the Government's expert) acknowledged that the positive urinalysis provided no evidence proving the wrongfulness of Appellant's ingestion of THC. Ms. [M] testified that the positive urinalysis alone does not prove that the THC was not ingested innocently." Appellant's Brief of 18 May 2011 at 6-7 (footnotes omitted). That actually is not what Ms. [M] said. That is how the appellant interprets the testimony in support of his argument.

In fact, Ms. [M] testified that she, as a forensic toxicologist, had no idea as to whether the person innocently ingested the marijuana. Not to state the obvious, but were that not the case, we would find no reason to be addressing inferences of wrongfulness in urinalysis cases.

But an expert acknowledging that her forensic evaluations do not test for wrongfulness is not the same as "acknowledging that the positive urinalysis provided no evidence of wrongfulness." An expert can acknowledge the scientific limits of a testing methodology without eliminating the availability of an inference as to the conclusion one might draw from those tests. Whether the positive urinalysis provides evidence of wrongfulness is a matter dependent on evidence and inferences beyond the expert competence of a testifying toxicologist. We agree with the appellant that a positive urinalysis, standing

alone, with no inferences, may not prove wrongfulness. But there is a difference, both legally and logically, between a forensic toxicologist testifying that she, as a toxicologist, cannot testify as to the circumstances of ingestion based solely on a urine sample, and a military judge making a determination that the competent testimony of a forensic toxicologist supports a basis for the members to make an inference as to the element of wrongfulness.

We rely on the Court of Appeals for the Armed Forces' decision in *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001) for the conclusion that in the context of permissive inferences, the military judge did not err. The test results were properly admitted, the interpretations were legally sound, and even in the absence of testimony regarding physiological effects or the ability to exclude the possibility of innocent ingestion, there was a legally sufficient basis on which to draw a permissive inference. *Green*, 55 M.J. at 81. We do not agree that there was no rational connection between a positive urinalysis and the element of wrongfulness.

While not raised as an assigned error, because of the relationship between the availability of the inference and the sufficiency of the evidence, we also specifically note that applying the well-known standards for legal and factual sufficiency, we conclude that the evidence satisfies both standards. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

Convening Authority's Action

The appellant correctly notes that the convening authority did not state in his action that he considered the appellant's clemency submission. However, as the Government correctly points out, the clemency petition was both attached to the record and predated the convening authority's action. As we stated in *United States v. Doughman*, 57 M.J. 653 (N.M.Ct.Crim.App. 2002), in the absence of evidence to the contrary, we will presume that the convening authority considered clemency matters submitted when they are attached to the record and predate the convening authority's action. However, as we did in *Doughman*, and as did the Court of Appeals for the Armed Forces in *United States v. Stephens*, 56 M.J. 391 (C.A.A.F. 2002), we again note that the need to continually address these issues could be avoided by following the "sound" practice of noting what has been considered when taking action.

Conclusion

Accordingly, the findings and the sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court