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

Before
R.Q. WARD, J.R. MCFARLANE, K.M. MCDONALD
Appellate Military Judges

UNITED STATES OF AMERICA

v.

CODY C. COLLIER
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201300237
SPECIAL COURT-MARTIAL

Sentence Adjudged: 14 February 2013.
Military Judge: LtCol Leon Francis, USMC.
Convening Authority: Commanding Officer, Marine Wing Support Squadron 372, Marine Wing Support Group 37, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: LtCol K.C. Harris, USMC.
For Appellant: LT Jessica Fickey, JAGC, USN.
For Appellee: CAPT Franklin J. Foil, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN.

31 October 2013

OPINION OF THE COURT

PER CURIAM:

A panel of members with enlisted representation sitting as special court-martial convicted the appellant, contrary to his pleas, of three specifications of wrongful use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to three months confinement, reduction to pay grade E-1, and a bad-conduct

discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

The appellant raises two assignments of error.[1] First, he avers that the military judge abused his discretion by instructing members on deliberate avoidance where the evidence did not support such an instruction. Second, he claims that the convictions for wrongful use of marijuana are factually and legally insufficient.

Having reviewed the record of trial and the parties' pleadings, 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.

Background

The appellant participated in three separate urinalysis tests with results showing the presence of the Delta 9 Tetrahydrocannabinol (THC) metabolite, commonly found in marijuana. These urinalysis tests were conducted on June 7th, June 29th, and July 6th, 2012.[2] At his trial, the appellant put forth an innocent ingestion defense by arguing the presence of THC in his system was the result of his unwittingly chewing THC laced bubblegum purchased by his wife, an admitted marijuana user. Prior to the members' instructions, the appellant objected to the military judge instructing the members on "deliberate avoidance." Record at 439. The military judge overruled the objection and provided the members with a deliberate avoidance instruction.[3] Record at 452-53.

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[1] The appellant raises both assignments of error pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] The THC nanogram levels in all three tests exceeded the Department of Defense's cutoff level of 15 nanograms per milliliter. The appellant's THC nanogram levels were 59 nanograms in the June 7th test, 71 nanograms in the June 29th test, and 31 nanograms in the July 6th test.

[3] "[I]f you have a reasonable doubt that the accused actually knew that the substance he used was marijuana or of a contraband nature, but you are nonetheless satisfied beyond a reasonable doubt that: A, the accused did not know for sure that the substance was not marijuana or of a contraband nature; B, the accused was aware that there was a high probability that the substance was marijuana or of a contraband nature; and C, the accused deliberately and consciously tried to avoid learning that, in fact, the substance was marijuana or of a contraband nature, then you may treat this as the

Instructions

We review the military judge's decision to instruct on deliberate avoidance for "an abuse of discretion, with all inferences from the evidence of record to be drawn in the Government's favor." *United States v. Brown*, 50 M.J. 262, 266 (C.A.A.F. 1999) (citation omitted). Some evidence permitting an inference of deliberate avoidance must have been admitted before the instruction is given. *Id.* at 266. Such evidence shows "'the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and . . . the defendant purposely contrived to avoid learning of the illegal conduct.'" *Id.* at 266 (quoting *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990)).

We find that the evidence presented, and the reasonable inferences drawn from that evidence, provided a sufficient basis for the military judge to exercise his discretion to give a deliberate avoidance instruction. As noted by the military judge, one can reasonably infer that the THC laced chewing gum, would contain enough THC in each piece to give the average user a "high." Accordingly, one could reasonably infer that after chewing the first piece of gum the appellant felt that high. With that inference in mind, we next consider the fact that the appellant used the chewing gum not just on that one occasion, but on multiple occasions over a more than 30 day period, as demonstrated by his multiple positive urinalysis tests. Lastly, the evidence showed that, despite his awareness of his wife's drug habit, he never questioned her about the bubblegum that somehow appeared in his truck, gum that gave him (at least per a reasonable inference that we must afford the Government) a feeling of being high. Based on these facts and inferences, we find that the military judge did not abuse his discretion by giving the deliberate avoidance instruction to the members.

Legal and Factual Sufficiency

In his second assignment of error, the appellant asserts that the evidence is legally and factually insufficient to sustain a conviction. We disagree.

We review questions of legal and factual sufficiency *de novo*. *United States v. Winckelmann*, 70 M.J. 403, 406 (C.A.A.F. 2011). We review the legal sufficiency of the evidence by determining "whether, considering the evidence in the light most

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deliberate avoidance of positive knowledge. Such deliberate avoidance of positive knowledge is the equivalent of knowledge." Record at 453.

favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173-74 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)). We also review the factual sufficiency of the members' findings. 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 as did the trial court, this court is convinced of the accused's guilt beyond a reasonable doubt." *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007) (citing *Turner*, 25 M.J. at 325 and Art. 66(c), UCMJ). Reasonable doubt, however, does not mean the evidence must be free from conflict. *Id.* In wrongful use cases, a properly admitted urinalysis laboratory report 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) (citation omitted).

The record shows that the appellant tested positive for marijuana on three separate occasions. Multiple Government witnesses testified the collection was conducted in accordance with standard practices and that the appellant's urine was properly collected and transported to the lab. The appellant's THC nanogram levels far exceeded the Department of Defense cutoff. The Government expert interpreted the urinalysis results and testified that it was "most likely that there were three individual ingestions [of marijuana]." Record at 334. Considering these facts and the entire record before us, we find that the evidence is legally and factually sufficient to sustain three convictions for marijuana use. We are convinced of the appellant's guilt beyond a reasonable doubt.

Conclusion

We affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court