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

Before
M.D. MODZELEWSKI, E.C. PRICE, C.K. JOYCE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOHN F. WILLIAMS II
AVIATION BOATSWAIN'S MATE (HANDLER) AIRMAN (E-3), U.S. NAVY

NMCCA 201200508
SPECIAL COURT-MARTIAL

Sentence Adjudged: 31 July 2012.
Military Judge: CAPT Tierney M. Carlos, JAGC, USN.
Convening Authority: Commanding Officer, USS ENTERPRISE (CVN 65).
Staff Judge Advocate's Recommendation: LCDR E.M. Baxter, JAGC, USN.
For Appellant: CAPT Ross L. Leuning, JAGC, USN.
For Appellee: CAPT Janis D. Monk, JAGC, USN; LT Philip S. Reutlinger, JAGC, USN; LT Ann E. Dingle, JAGC, USN.

27 August 2013

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 military judge, sitting as a special court-martial, convicted the appellant, pursuant to his pleas, of one specification of conspiracy to wrongfully introduce and distribute synthetic cannabinoids (spice) onto a U.S. vessel, and one specification of violating a lawful general order, in violation of Articles 81 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 881 and 892. The military judge sentenced

the appellant to confinement for 5 months, reduction to pay grade E-1, and a bad-conduct discharge. A pretrial agreement (PTA) provided that all confinement in excess of 30 days would be suspended. However the convening authority (CA) withdrew from the sentence limitation prior to taking action due to the appellant's additional misconduct following trial. As a result, the CA approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

The appellant avers that the CA improperly withdrew from the PTA by relying on insufficient evidence to conclude that he engaged in post-trial misconduct, and requests that we exercise our authority under Article 66(c), UCMJ, and take action on his sentence. After careful examination of the record of trial and the pleadings of the parties, we are satisfied 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.

Background

Pursuant to a PTA, the appellant pled guilty at a special court-martial to conspiring with his wife to introduce and distribute a synthetic cannabinoid commonly known as spice on board USS ENTERPRISE (CVN 65). The appellant also admitted that by wrongfully introducing, with the intent to distribute, approximately 15 grams of spice, he violated paragraph 5(c) of Secretary of the Navy Instruction 5300.28E, dated 23 May 2011.

Immediately following the appellant's court-martial, during brig check-in on 31 July 2012, a small plastic bag filled with a green, leafy substance was found under a Velcro strap on the appellant's shoe, located within his sea bag. A field test of the unknown substance revealed "characteristics of marijuana." Government's Response to Court Order of 1 Jun 2013 providing Memorandum for the Record (MFR) by the Discipline Officer, USS ENTERPRISE of 14 Oct 2012; Special Court-Martial Convening Order (SPCMCO) No. 2-12 of 26 Nov 2012 at 2.

A hearing was held on 1 August 2012 "in accordance with" Article 72, UCMJ, and RULE FOR COURTS-MARTIAL 1109, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). SPCMCO No. 2-12 at 2. At the hearing, the appellant apparently claimed that "he did not know the green, leafy substance was in his shoe, that he had worn the shoe multiple times that month for physical training, and that he had been subjected to multiple sea bag inspections by his division prior to his trial." Appellant's Clemency Letter of 10

Sep 2012 at 2. The CA, having determined that the appellant "knowingly possessed marijuana . . . [,] withdrew from the sentence limitation provisions of the pretrial agreement in accordance with paragraph 12 of Part I of [the PTA]."[1] SPCMCO No. 2-12 at 2. The withdrawal from the agreement caused the appellant to serve an additional 100 days in confinement. Government's Response to Court Order of 1 Jul 2013 providing Affidavit of Confinement of 26 Jun 2013. The CA approved the sentence as adjudged and, with the exception of the bad-conduct discharge, ordered the sentence executed. SPCMCO No. 2-12 at 2.

Discussion

The appellant's sole assignment of error alleges that the CA improperly withdrew from the PTA because he relied on insufficient evidence "in two critical respects:" (1) the field testing process employed by the command did not meet "the necessary scientific testing required to be admissible at court-martial"; and (2) "[w]ithout establishing exclusive control [of the substance], the command failed to demonstrate that Appellant put the alleged contraband in his bag or knew of its presence." Appellant's Brief of 21 Feb 2013 at 5-7. We disagree.

If the procedural protections set forth in R.C.M. 1109 are followed or waived, pursuant to R.C.M. 705(c)(2)(D), a CA may withdraw from a PTA before he takes action on a case when an accused violates its terms or conditions. *See United States v. Hunter*, 65 M.J. 399, 400 (C.A.A.F. 2008). We are satisfied that there is ample evidence in the record to support the CA's

[1] Paragraph 12 of the PTA provides as follows:

> I understand that should I commit any misconduct (i.e. any act or omission in violation of the UCMJ which constitutes a material breach of this agreement) . . . . after the date of trial, but *before the date of the convening authority's action,* the [CA] may, *after first complying with notice and hearing requirements consistent with Article 72, UCMJ, and R.C.M. 1109,* withdraw from the sentence limitation provisions of this agreement. Should the [CA] withdraw from the sentence limitation provisions of this agreement based on misconduct occurring *after the date of trial but before action is taken in my case*, I understand that any provisions in the pretrial agreement relating to suspension of any aspect of my sentence would become null and void in all respects, and that the entire sentence adjudged at my court-martial may be approved and imposed upon me.

Appellate Exhibit IV at 3 (emphasis added). During the providence inquiry, the military judge explained this paragraph to the appellant, who asserted that he understood it. Record at 69-70.

finding that the appellant engaged in post-trial misconduct. It is uncontested by the parties that a green, leafy substance was found in a small dime-size plastic bag, tied in a knot, under the Velcro strap of the appellant's left tennis shoe inside his sea bag. In addition to the testimony from brig and security department personnel as to where the substance was found and who conducted the search, the CA, acting as the hearing officer, was presented with the USS ENTERPRISE Command Criminal Investigative Division (CCID) Report of Investigation of 31 Jul 2012 which included several witness statement summaries, photos of the substance, and the explanation as to the type of field test conducted. This investigation also documented that a named NCIS agent tested the substance with a Narcotic Identification System test kit, and that the test revealed a blue-violet color indicating positive for marijuana or THC. Government's Motion to Attach of 18 Apr 2013 at CCID Report of Investigation of 31 Jul 2012 at 3. After hearing the appellant's statement and trial defense counsel's claim that the marijuana found in the Velcro flap "must have been placed there while the shoes were not in [the appellant's] possession," the CA found the appellant "knowingly possess[ed] marijuana, an act [he] found [the appellant] knowingly committed, which prompted [him] to withdraw from Part II of [the PTA.]" Staff Judge Advocate's Recommendation of 16 Nov 2012, enclosure (24) (CO, USS ENTERPRISE ltr of 25 Sep 2012) to enclosure (2).

The appellant argues that the apparent absence of "the necessary scientific testing required to be admissible at a court-martial" makes the evidence insufficient as to the identity of the substance. However, the standard applicable to the CA's determination is a preponderance of the evidence. *United States v. Englert*, 42 M.J. 827, 831 (N.M.Ct.Crim.App. 1995). Although evidence of certified lab testing of the green leafy substance may constitute more persuasive or reliable evidence of a substance's identity than field test results, the absence of such testing does not render the CA's factual determination deficient.

The appellant contends that the evidence before the CA was also insufficient to conclude that he put the substance in his shoe or knew that the substance was there. The appellant asserts that he "was subjected to multiple sea bag inspections prior to his court-martial" which "calls into question his knowing possession because there were several hours between his last sea bag inspection with his division, which uncovered no contraband, and his brig inspection where his shoe was not in his possession." Appellant's Clemency Letter of 10 Sep 2012 at

2-3. We are not persuaded by this argument. It is not in dispute that the green leafy substance was found in a small dime-size plastic bag, tied in a knot, under the Velcro strap of the appellant's own shoe, inside his own sea bag, shortly after he pled guilty to other drug-related offenses, and that the substance tested positive for marijuana or THC.

Based upon the record before us, we conclude that the CA was presented with sufficient evidence to find, by a preponderance of the evidence, that the appellant engaged in post-trial misconduct, and that the CA's withdrawal from the sentence limitation provisions of the PTA was not improper. We decline the appellant's request to affirm a lesser sentence under our Article 66(c) authority.

Conclusion

The findings and the sentence, as approved by the CA, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court