

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

**Before
E.E. GEISER, R.G. KELLY, V.S. COUCH
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**BRENT C. MILLER
LIEUTENANT (O-3), MEDICAL SERVICE CORPS, U.S. NAVY**

**NMCCA 200700930
GENERAL COURT-MARTIAL**

Sentence Adjudged: 2 August 2007.

Military Judge: Col Renee Renner, USMCR.

Convening Authority: Commanding General, 3d Marine Aircraft Wing, San Diego, CA.

Staff Judge Advocate's Recommendation: Col V.A. Ary, USMC.

For Appellant: Charles W. Gittins; LT Gregory Manz, JAGC, USN.

For Appellee: LCDR F.L. Gatto, JAGC, USN; Capt G.S. Shows, USMC.

17 July 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

COUCH, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, 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 a dismissal, and the convening authority approved the sentence as adjudged.

The appellant raises two assignments or error, claiming: (1) that the evidence is legally and factually insufficient to support a finding of wrongful use of marijuana; and (2) that the

military judge abused her discretion by instructing on the permissive inference of knowledge and wrongfulness where the Government expert testified that there was no scientific basis to support the inference.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings and 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.

Factual and Legal Sufficiency

The standards of review for legal and factual sufficiency are well-known. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). The appellant contends that there was no scientific basis from which the members could draw a permissive inference of his wrongful and knowing use of marijuana, based upon the following cross examination of the Government's drug lab expert:

- Q. The scientific results obtained in this case provide no scientific basis for a conclusion that ingestion of THC was knowing in this case, correct?
- A. Correct.
- Q. In fact, scientific methodology involved in the [drug laboratory's] detection of metabolites of illegal drugs in no way provides any information about the state of mind at the time of ingestion by a person who provided the sample, correct?
- A. Correct.
- Q. The scientific testing methodology used at [the drug laboratory] on the collection of urine has no bearing on the knowledge or intent of the individual at the time of ingestion, correct?
- A. Correct.
- Q. There's no scientific basis to conclude based on the scientific results in this case showing the presence of THC metabolites in urine that the person who provided the sample knew at the time of ingestion that he ingested THC, correct?
- A. Correct.

Record at 203-04.

In this case, the members had more than a urinalysis to find beyond a reasonable doubt that the appellant wrongfully used marijuana. Lieutenant Colonel Butler, the appellant's executive officer at the time his urinalysis results were returned to his command, testified that, while she was driving the appellant to

the base Criminal Investigation Division (CID) office, he was "very anxious, upset, visibly upset . . . his right elbow was on his right knee . . . [h]e was rocking a little bit. He seemed to be flushed. He seemed to be sweating and he was just making the comments to me that 'I'm so f[*****] up.'" *Id.* at 146. She testified the appellant said a couple of times, "I'm going through some marital problems and there's some things that you just don't know about and I'm very upset and then he would just say again 'I'm all f[*****] up.'" *Id.* After the appellant returned from his interview with CID later in the day, he came into Lieutenant Colonel Butler's office. She described the meeting as follows:

[The appellant] came into my office and he asked me if he could talk to me and if he could shut the hatch. And I told him yes. He came in. He sat down. He told me that he wanted to come in and look me in the eyes and tell me and give me an excuse for *what he had done*, but he has no excuse. He was sitting down . . . the same . . . way he was sitting in the vehicle, in that he was rocking a little and he was wiping his hands on his face and his head. The same type of agitation and he seemed to even have actually been crying

. . . .

I told him that there was no excuse for *what he had done* and that he was a complete embarrassment to the whole officer corps [and] that I was appalled at the decisions he has made

. . . .

He said, "I know." When I told him that he was . . . an embarrassment, he said, "Yes, I know." He . . . hung his head and he just had that defeated look about him.

Id. at 147 (emphasis added). This testimony was admitted without objection.

Considering both the urinalysis test evidence and the testimony of Lieutenant Colonel Butler, our *de novo* review of the record convinces us that the appellant's conviction for the wrongful use of marijuana is both legally and factually sufficient, and we conclude that this assignment of error lacks merit.

Permissive Inference Instruction

Turning to the appellant's second assignment of error, we consider whether the military judge properly instructed the members to be a question of law, which we review *de novo*. *United States v. Schroder*, 65 M.J. 49, 54 (C.A.A.F. 2007). The

appellant now argues on appeal: (1) that the military judge erred by giving the permissive inference instruction, based upon the cross-examination of the Government's drug lab expert; and (2) that the instruction given by the military judge was erroneous. Appellant's Brief and Assignments of Error of 27 Feb. 2008 at 10-13.¹ We disagree with both of these contentions by the appellant.

The drug lab expert's concessions during cross-examination, do not negate the propriety of the military judge's decision to instruct the members on the "permissive inference" they could draw that the appellant knowingly and wrongfully used marijuana. Our superior court has held that a properly admitted urinalysis accompanied by expert testimony interpreting the test results "provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use, without testimony on the merits concerning physiological effects." *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001)(internal citations omitted). We note that the defense did not object to the instruction at trial. Record at 342.

Finding no plain error with the instruction as given, we conclude that this assignment of error is without merit. *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005)(citing *United States v. Simpson*, 58 M.J. 368, 378 (C.A.A.F. 2003)).

Conclusion

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

Senior Judge GEISER and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court

¹ Throughout his brief, the appellant contends that there was evidence adduced at trial that he ingested "hemp seed oil" as a dietary supplement to reduce his cholesterol, which was the culprit for his positive urinalysis test for marijuana. Appellant's Brief at 8-9. Our review of the record reveals no evidence on the merits that the appellant actually ingested hemp seed oil, although he did claim during his unsworn statement before sentencing that his wife had used it while cooking his food. Record at 351. The appellant's wife did not testify at trial.