IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **D.O. VOLLENWEIDER** **E.E. GEISER**

UNITED STATES

v.

Timorris M. EUTSEY
Corporal (E-4), U. S. Marine Corps

NMCCA 200101213 Decided 16 February 2006

Sentence adjudged 21 October 1999. Military Judge: K.B. Martin. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 3d Marine Aircraft Wing, MarForPac, MCAS Miramar, San Diego, CA.

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
LT CRAIG POULSON, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was convicted, pursuant to mixed pleas, by a general court-martial with officer members of wrongful possession and importation of approximately 86 pounds of marijuana, and of wrongfully abandoning his post prior to being relieved, in violation of Articles 112a and 113, Uniform Code of Military Justice, 10 U.S.C. § 912a and 913.[1] The appellant was sentenced to a dishonorable discharge, confinement for four years, forfeiture of all pay and allowances, and reduction to paygrade E-1. The convening authority approved the sentence as adjudged, but suspended forfeiture of $300.00 pay per month for a period of six months from the date of the convening authority's action (CAA).

[1] Although the members found the appellant guilty of wrongful possession of marijuana, the military judge dismissed that specification as multiplicious with importation of marijuana. Both the staff judge advocate's recommendation and the court-martial order erroneously report the appellant's conviction to specification 1 of the charge.

The appellant raises six assignments of error.[2] First, the appellant alleges that the military judge erred by allowing a United States Customs' inspector to testify concerning the appellant's reaction when he was stopped at the U.S.-Mexican border and the conclusions the inspector drew from the appellant's reaction. Second, the appellant asserts that the evidence was factually and legally insufficient to convict him of wrongfully importing marijuana. Third, the appellant argues that the military judge abused his discretion by allowing a letter containing the appellant's signature (Prosecution Exhibit 21) into evidence over defense objection. Fourth, the appellant alleges that the military judge abused his discretion when he declared a mistrial rather than grant a defense motion to dismiss with prejudice based on the unlawful exclusion of certain enlisted members from the pool of possible court-martial members. Fifth, the appellant avers that he was denied speedy post-trial review of his case due to excessive and inordinate Government delay. Finally, the appellant asserts that the staff judge advocate's recommendation (SJAR) and the CAA fail to mention that the military judge's multiplicity ruling on the specifications under the charge applied to findings as well as sentencing.

We have examined the record of trial, the assignments of error, and the Government's response. We conclude that the findings of guilty to the charge and its specification are not factually supported by the evidence. These findings and the sentence will be set aside in our decretal paragraph, and a sentencing rehearing will be authorized.

Procedural Posture

The appellant was tried by two courts-martial. The first was held in April 1999 and went through findings and sentencing. A post-trial Article 39a, UCMJ, session was conducted prior to issuance of the convening authority's action following a defense allegation of unlawful command influence. After taking testimony and carefully reviewing the documentary evidence, the military judge held that the defense failed to demonstrate the existence of unlawful command influence. Notwithstanding this ruling, it was nonetheless evident that certain mid-grade enlisted personnel had been unlawfully excluded as panel members solely because of rank. Based on this fact, the military judge declared a mistrial. Appellant's Assignments of Error dated 31 Aug 2004. The second court-martial was held in October 1999 before a newly selected panel of members.

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[2] Oral argument is denied. It is important to note, however, that because each judge deciding a case pending before a service court of criminal appeals must be convinced of an appellant's guilt beyond a reasonable doubt, "close" cases are normally ideal cases to argue before this court. Furthermore, much is to be gained by allowing oral argument, not the least of which is the perception of fairness of allowing the appellant his day in court. Such a practice generally promotes the perception of fairness of the military justice system, a perception that all practitioners of military justice should constantly promote. Due to the relief granted the appellant, we found oral argument to be unnecessary in this case.

Dismissal of Charges vs. Mistrial

The appellant contends that the decision of the military judge at the first trial to deny the defense motion for dismissal of the charges with prejudice in favor of declaring a mistrial was error. We disagree. A military judge's decision to grant or deny a mistrial is reviewed on appeal for abuse of discretion. *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004). Our superior court has long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available. *Id.* at 187 (*citing United States v. Cooper*, 35 M.J. 417, 422 (C.M.A. 1992); *see also United States v. Pinson*, 56 M.J. 489, 493 (C.A.A.F. 2002)(citing *United States v. Morrison*, 449 U.S. 361 (1981)(concluding that any action taken "had to be 'tailored to the injury suffered'")). When an error can otherwise be rendered harmless, dismissal is not an appropriate remedy. *United States v. Mechanik*, 475 U.S. 66 (1986). As noted in *United States v. Green*, 4 M.J. 203, 204 (C.M.A. 1978), dismissal of charges is appropriate when an accused would be prejudiced or no useful purpose would be served by continuing the proceedings. *Id.* (citing *United States v. Gray*, 47 C.M.R. 484, 486 (C.M.A. 1973)).

The military judge at the appellant's first trial determined that E-5 and E-6 personnel had been excluded from consideration for service on the appellant's court-martial based solely on their rank. While the military judge held the omission was not a purposeful act by the convening authority, he correctly determined that it was, nonetheless, illegal. The military judge determined that the omission resulted from cumulative administrative errors beginning when the convening authority directed that all subordinate commanding officers, executive officers and sergeants major be included on the list of eligible court members. As the military judge noted, this is not illegal in and of itself. When the list of eligible personnel was created, however, it was apparently limited to officers and enlisted personnel falling into the categories outlined above. The convening authority, using the defective list of names, chose members for the appellant's court-martial using proper Article 25, UCMJ, criteria. The military judge determined that the convening authority knew he could choose from anyone in the command but that he necessarily depended on the defective list as a primary vehicle for carrying out his selection responsibilities. The military judge was clear that there was no evidence that the convening authority had an improper motive. He simply relied on what turned out to be inadequate staff work. We concur with this analysis.

Even assuming *arguendo* that the military judge should have characterized the error as unlawful command influence, his decision to declare a mistrial was reasonable and adequate under the circumstances. By declaring a mistrial and requiring the convening authority to go through the entire panel selection process anew, the military judge erased any possible prejudice to the appellant. The circumstances were not such that "no useful

purpose would be served by continuing the proceedings." *Green,* 4 M.J. at 204. We note that the appellant's assignment of error raises no specific assertion of prejudice. In fact, the appellant expressly requested the military judge to declare a mistrial if the judge was not going to dismiss with prejudice. We find that the military judge did not abuse his discretion when he elected declaration of a mistrial over dismissal of charges with prejudice as an appropriate remedy in this instance.

Legal and Factual Sufficiency

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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. 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). Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

In applying the *Turner* standard to this case, we are not convinced beyond a reasonable doubt that the appellant wrongfully possessed or imported 86 pounds of marijuana. In fact, we are not convinced beyond a reasonable doubt that the appellant possessed any marijuana.

On 11 December 1998 the appellant was standing duty as a barracks noncommissioned officer (NCO) on board Camp Pendleton, CA. It was a 24-hour duty, and he had a lance corporal who was assisting him as the assistant barracks duty NCO (A-Duty). The appellant and the A-Duty had worked out a schedule where they would alternate the watch every 6 hours, even though they were both required to remain in the barracks. The A-Duty relieved the appellant at 2000 and the appellant was supposed to relieve the A-Duty a 0200 the next morning. After being relieved by the A-Duty at 2000, however, the appellant left Camp Pendleton with Corporal (Cpl) Harris and went to Tijuana, Mexico, in Harris' car. The appellant was a passenger in the vehicle and he had never gone to Mexico before. Once in Tijuana, they ate at a Kentucky Fried Chicken restaurant, and then went to a bar to drink beer. While in Tijuana, the appellant saw a Hispanic man

approach Cpl Harris, but he did not pay attention to it because he was looking at a female. Later at the bar, the appellant saw another individual place a key in front of Cpl Harris, but he did not ask Harris about it.

After drinking at the bar for a while, Cpl Harris and the appellant drove back towards the border. Cpl Harris was driving. While waiting to cross back into the United States, a dog trained to detect drugs, alerted on their car. The customs' inspector who dealt with the situation testified that Cpl Harris was acting suspicious because he was too concerned with what was happening. She also testified that the appellant was suspicious because he was too rigid and not reacting to what was going on. The customs' inspector's focus was on Cpl Harris, the driver. She did not constantly watch the appellant, who was on the opposite side of the car from her. Eventually, 86 pounds of marijuana was found secreted, double wrapped, inside a large speaker box, in the trunk of the car. However, there was no noticeable odor of marijuana in the passenger compartment of the car. Had they not been arrested at the border, the appellant had ample time to be back in the barracks by 0200 to resume his duties.

Neither the appellant nor Cpl Harris testified at trial. The appellant did not need to testify because the Government introduced the statement he gave to the Naval Criminal Investigative Service (NCIS), in which the appellant admitted going to Mexico with Cpl Harris. He also stated that he did not know there was any marijuana in the car. The Government also produced the testimony of an NCIS agent who interviewed Cpl Harris. Harris told him that the appellant had no idea of what was going on and he was not involved. Additionally, the Government offered the stipulated testimony of Cpl Harris' wife. Contained within that stipulation is evidence that Cpl Harris had told her that while he was down in Mexico he had been offered money to carry something across the border. Cpl Harris also told his wife that the appellant, "did not know anything about the transaction and was not involved." Appellate Exhibit XXXI. No physical evidence linked the appellant to the marijuana found in the car.

The appellant's conviction rests solely on circumstantial evidence. There are, however, reasonable alternate explanations for the appellant's actions that are consistent with innocence. While his leaving his post is inexcusable, it is not beyond reason that the appellant was simply going with a friend out of curiosity because he had never been to Tijuana before, with the assurance that he would be back in time to resume his barracks duties at 0200. In fact, one of the agents testified that the appellant told them at the border that he needed to be back at that time. The appellant's seeming lack of response at the border could easily be a combination of several things. First, he had been drinking. Second, this was the first time he had ever crossed the border going back into the United States, and he knew that he was supposed to be in the barracks. Though the customs' inspector testified that the appellant's rigidity and

apparent lack of interest was suspicious, those characteristics could just as easily be manifestations of nervousness, totally unrelated to the marijuana hidden in the vehicle.[3]

While an individual may not consciously avoid knowledge of the presence of a controlled substance to escape criminal liability, the Government is still obligated to produce evidence that supports that theory. Here the marijuana was secreted in the trunk of the car, and even those charged with enforcing the law acknowledged that there was no detectable smell of marijuana in the car. The fact that the appellant did not quiz Cpl Harris about someone putting a key on the table in front of him while they were in a bar does not convince the court that the appellant was consciously avoiding the truth. While acknowledging that it would have been reasonable to question Cpl Harris about the key, we are not convinced that the appellant consciously avoided doing so.

Considering the evidence of record, we find it to be factually insufficient to support his conviction for possession of marijuana. Our decision rests primarily upon the evidence presented by the Government that the appellant was not aware of the drug transaction. The appellant specifically denied such knowledge in his statement to NCIS. Further, Cpl Harris told both NCIS and his wife that the appellant was not involved. We find the stipulation of expected testimony of Mrs. Harris to be particularly compelling. Our dissenting colleague focuses on the unreasonableness of the appellant's actions on the evening of 11 December 1998. Even if unreasonable, however, they do not overcome the evidence presented that the appellant was not aware of the presence of marijuana in the car, nor do they rise to the level of consciously avoiding knowledge of the presence of marijuana. Accordingly, we will set aside and dismiss the charge and its specification and set aside the sentence in our decretal paragraph, and authorize the convening authority to order a rehearing on sentence.

Post-Trial Delay

The appellant next asserts that the approximately 1½ years that elapsed between the date he was sentenced the second time and the date of the CAA was excessive and unreasonable. We consider four factors in determining if post-trial delay violates the appellant’s due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant’s assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is

[3] All the Government agents found the appellant to be cooperative. No evidence linking the appellant to the marijuana was found by any of the agents. Not one of the agents thought to ask the appellant why he went to Tijuana to get something to eat. Had they done so, an answer to one of the questions asked by our dissenting colleague would have been obtained.

"facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id*.

Here, the appellant was sentenced on 21 October 1999 and the CAA was not issued until 26 June 2001. We find the delay to be facially unreasonable, triggering a due process review. Since there are no explanations in the record, we look to the third and fourth factors. We find no assertion of the right to a timely review prior to the instant appeal, nor do we find any claim or evidence of prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay. We are also aware of our authority to grant relief under Article 66, UCMJ, but we decline to do so. *Id.; United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 102; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

The findings of guilty of the charge and its specification are set aside. The remaining findings are affirmed. The sentence is set aside.[4] The convening authority is authorized to order a rehearing on sentence, or to reassess the sentence in accordance with *United States v. Reed*, 33 M.J. 98 (C.M.A. 1991). In the event the convening authority reassesses the sentence, the approved sentence may not include a punitive discharge.

Judge VOLLENWEIDER concurs.

GEISER, Judge (concurring in part, dissenting in part):

I concur with the court's resolution of assignments of error IV-VI. I respectfully dissent, however, from my colleagues' conclusion that the evidence is factually insufficient to sustain a conviction for possession or importation of marijuana.

As noted in the majority opinion, 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. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *see also* Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c). Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979).

[4] The appellant's remaining assignments of error are rendered moot by our decision.

The appellant does not dispute that the purposeful importation of marijuana under the circumstances at bar is wrongful. He rests his assignment of error on an assertion that the evidence did not directly demonstrate that he was even aware that marijuana was hidden in the trunk of the car he was riding in. The appellant acknowledged leaving his post as duty noncommissioned officer (NCO) before being properly relieved. Record at 159. He also stated that this was his first time standing watch as duty NCO. *Id.* at 158. He also admitted that at approximately 2100, he left his post and drove approximately 50 miles from his place of duty. *Id.* at 160; Prosecution Exhibit 18. He indicated to investigators that his purpose in abandoning his post was to drive to Tijuana, Mexico with a friend to eat. *Id.* at 374. He also admitted that this was the first time he'd ever crossed the border into Mexico. *Id.* at 428.

Regarding his time in Mexico, he told investigators that he and his friend ate at a Kentucky Fried Chicken restaurant in Tijuana. Prosecution Exhibit 18. Prior to eating, the appellant indicated that an unknown Hispanic man approached his friend to confer. While the appellant denied paying attention to the conversation in favor of looking at a woman, he was nonetheless aware that the two were conferring. The appellant denied having any interest, then or later, in asking questions about the conversation. *Id.* Following their meal, the two men then went to a bar a few doors down from the restaurant and had a couple beers. During this time, an unknown male entered the bar and placed a silver key on the table, which the appellant's friend put into his pocket. Again, the appellant denied having any interest in or asking questions about the mysterious delivery. *Id.* Shortly thereafter, the two men got back in their car and drove to the San Ysidro border checkpoint arriving at about 2300. Record at 335.

While the appellant and his friend were waiting in a line of cars to cross back into the United States, a drug dog alerted on their car. Customs' agents immediately seized the car keys, opened the trunk, and began questioning the appellant's friend, who had been driving the vehicle. A customs' agent in a position to observe the appellant described him as "sitting very straight," "looking straight forward," and "very rigid, scared maybe." Based on her 3 years of experience at this checkpoint, the agent found this behavior "suspicious." Record at 357. The appellant later told investigators that when the dog climbed into the trunk it "started acting crazy." Prosecution Exhibit 18. Notwithstanding the presence of a "crazy" acting dog a few feet behind the appellant, the customs agent noted that the appellant "didn't seem to be paying any attention" to what was going on. Record at 337.

This is all, as the appellant notes, circumstantial evidence. The nature of circumstantial evidence is that there are almost always multiple possibilities to explain a particular event. People reasonably judge each potential explanation for an event as more or less probable based on their common sense and

knowledge of the ways of the world. When someone looks outside in the morning and sees wet pavement, cars and trees, he will most naturally conclude that it rained during the night. This is true in spite of the fact that he personally didn't see the rain. Of course, it is theoretically possible that it didn't rain but instead that a number of big tanker trucks drove by during the night spraying water on the pavement, cars and trees. While this is a theoretical possibility, such an occurrence would be nonsensical, bizarre and outside our normal life experience. It would, in a word, be unreasonable absent other supporting facts and circumstances.

As the majority notes, the appellant could have had an innocent reason for leaving, in the middle of the night, a supervisory post he'd never stood before. He could have innocently wanted to drive 50 miles into Mexico in the middle of the night to eat while he was on duty. He could have innocently been looking at a female while his friend had a quiet conversation with an unknown man on the street in Tijuana and could, after he and his friend went to eat, innocently have had such little interest in the occurrence that he never asked who the man was or what they were talking about. He also could have watched without any kind of natural curiosity or asking any questions while a mysterious stranger later placed a single silver key on the table in front of him. When his friend pocketed the key without a word, the appellant could have theoretically had so little curiosity or interest in the mysterious occurrence that he asked no questions.

Upon arriving at the border, the appellant could have innocently sat staring straight ahead while customs agents descending on their vehicle and seizing the keys. He further could have lacked even the most rudimentary curiosity or concern to ask his companion or the agents what was going on. Finally, he could have had such little interest in the bizarre and unexpected events swirling around him that he sat rigidly looking forward while a drug dog went "crazy" in the trunk a few feet behind his head. The appellant's series of improbable and atypical decisions and reactions convinces me of his guilt of the charge and its specification beyond a reasonable doubt.

For the Court

R.H. TROIDL
Clerk of Court