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

BEFORE

W.L. RITTER **J.F. FELTHAM** **G.A. COOK**

UNITED STATES

v.

Pedro RAMOS, Jr.
Lance Corporal (E-3), U. S. Marine Corps

NMCCA 200401214 Decided 30 June 2006

Sentence adjudged 14 November 2002. Military Judge: S.M. Immel. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2nd Battalion, 5th Marines, lst Marine Division (Rein), FMF, Camp Pendleton, CA.

LCDR REBECCA SNYDER, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
CAPT THOMAS J. DEMAY, JAGC, USNR, Appellate Government Counsel

FELTHAM, Judge:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine and one specification of wrongful use of methamphetamine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of reduction to pay grade E-1 and a bad-conduct discharge.

We have considered the record of trial, the appellant's assignment of error that the evidence was legally and factually insufficient to prove he knowingly and wrongfully used cocaine and methamphetamine, 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.

Sufficiency of the Evidence

The appellant contends that the evidence was legally and factually insufficient to support his conviction for wrongful use of cocaine and methamphetamine. We disagree.

The evidence supporting the charge was a positive urinalysis, and the Government presented standard urinalysis evidence in its case-in-chief. We find that the appellant's urine sample was properly collected by his command and that the chain of custody was sound.

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 crime 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.Ct.Crim.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, as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see also* Art. 66(c), UCMJ. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict. *Reed*, 51 M.J. at 562.

To obtain a conviction under Article 112a, UCMJ, for the wrongful use of a controlled substance, the prosecution must prove the following two elements:

(a) That the accused used a controlled substance; and,
(b) That the use by the accused was wrongful.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37b(2). The use of a controlled substance is wrongful only if the accused has knowledge the controlled substance is present. Knowledge "may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence." *Id*. at Part IV, ¶ 37c(10).

Evidence of a properly conducted urinalysis test, the results of that test, and expert testimony explaining those results are a legally sufficient basis from which to draw the permissive inference of knowing, wrongful use. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *United States v. Harper*, 22 M.J. 157, 159 (C.M.A. 1986). In the instant case, the Government presented direct and compelling evidence that the

appellant's urine sample contained the cocaine metabolite, as well as methamphetamine. On the basis of this evidence, the military judge was free to draw the permissive inference that the appellant knowingly and wrongfully used cocaine and methamphetamine, and to find beyond a reasonable doubt that he violated Article 112a, UCMJ. *United States v. Hildebrandt*, 60 M.J. 642, 646 (N.M.Ct.Crim.App. 2004); MCM, Part IV, ¶¶ 37c(5) and c(10).

Facts

Mr. James E. Callies, an expert witness from the Navy Drug Screening Lab in San Diego, California, testified at the appellant's trial that laboratory analysis revealed the presence of the cocaine metabolite benzoylecgonine (BZE) and methamphetamine in the appellant's urine sample.[1] He stated that the appellant's urine sample from 24 June 2002 revealed a BZE level of 132 nanograms per milliliter (ng/ml) and that the Department of Defense cutoff level is 100 ng/ml. He noted that the same sample also contained 1,727 ng/ml of methamphetamine, and that the Department of Defense cutoff level for methamphetamine is 500 ng/ml.

Mr. Callies testified in detail about the Navy Drug Screening Lab's testing protocols, processes, and quality control checks used to produce the results of the testing of the appellant's urine. He noted that the window of detection for cocaine is "generally considered to be 48 to 72 hours," and two to four days for methamphetamine. Record at 62-63. Despite the fact that the level of methamphetamine in the appellant's sample was more than three times the Department of Defense cutoff level, Mr. Callies opined that "it would be considered on the lower end of the concentration scale." Record at 62. He also noted that the amount of cocaine metabolite in the appellant's urine was "a relatively low level." *Id*.

When asked to explain the meaning of these low levels, Mr. Callies stated, "Well, it indicates it's positive. As far as trying to read any other information into it, that's extremely difficult. We don't know when the drug was ingested, and we don't know the amount ingested. But in general terms, it would be in my opinion that, for both of these, it would be towards the tail end of the excretion curve." Record at 62.

[1] Mr. Callies testified that the Navy Drug Screening Lab detects cocaine ingestion by screening urine samples for the cocaine metabolite BZE, but detects methamphetamine ingestion by screening urine samples for the presence of methamphetamine itself because the actual drug, not a metabolite, is excreted in the urine. Record at 58.

In his case-in-chief, the appellant testified that he drove from Marine Corps Base Camp Pendleton to his parents' house in Huntington Park, California, on Friday, 21 June 2002, and returned to Camp Pendleton early on the morning of 24 June, the same day as the urinalysis. He explained that he and a friend, Corporal M, spent the weekend at his parents' house, leaving once on Saturday to go to a shopping mall, and once on Sunday to go to a taco stand. He testified that he had never used cocaine or methamphetamine at any time since joining the Marine Corps. He did not speculate as to how chemical traces of both drugs might have entered his urine sample.

Four witnesses testified that they were with the appellant at various times during the days immediately prior to the urinalysis, and did not see him use illegal drugs. However, none of them was with the appellant during the entire time window in which the expert's testimony and the urinalysis results indicate he could have ingested the two drugs for which his urine sample tested positive.

Discussion

The testimony of the defense witnesses does not account for the appellant's activities during the entire time period in which he could have ingested the two drugs for which his urine sample tested positive. None of the witnesses observed the appellant one hundred percent of the time, and none testified as to his activities on Thursday, 20 June 2002.

Mr. Callies testified that methamphetamine can be detected in urine for two to four days after ingestion, meaning the appellant could have ingested the methamphetamine in his urine sample as early as Thursday, 20 June 2002, a date not accounted for by the testimony of any witness. Similarly, the appellant could have ingested cocaine on Friday, 21 June 2002, and still had traces of the metabolite BZE in his urine on Monday, 24 June. The Government's expert testified that the cocaine metabolite is detectable for 48 to 72 hours after use.

Although the appellant presented evidence of his good military character, we do not find this evidence strong or persuasive. We note, as did the military judge, that the Government countered this evidence with testimony pertaining to the appellant's having received nonjudicial punishment prior to his trial.

Having reviewed all the evidence in this case, we conclude that the record of trial contains more than sufficient evidence upon which a reasonable trier of fact could have found that all the elements of the crime of wrongful use of a controlled substance were proved beyond a reasonable doubt. In particular, we find the results of the urinalysis testing and the testimony of the Government's expert witness constitute direct and compelling evidence that the appellant's urine sample contained methamphetamine and the cocaine metabolite BZE, indicating his prior ingestion of both proscribed substances. Based on the evidence as a whole, we find that the military judge was free to draw the permissive inference with respect to whether the appellant knowingly and wrongfully ingested cocaine and methamphetamine.

In addition, after weighing the evidence, including that presented by the appellant, and making the necessary allowances for not having personally observed the witnesses, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we find the evidence both legally and factually sufficient to support the appellant's conviction of this offense.

Conclusion

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

Senior Judge RITTER concurs.

COOK, Judge (dissenting):

In the appellant's sole assignment of error, he argues that the evidence is factually insufficient to prove a knowing and wrongful use of cocaine and methamphetamine. I dissent from the opinion of my colleagues, as I find the evidence to be factually insufficient to sustain the conviction.

Facts

The appellant enlisted in the United States Marine Corps on 22 September 1998. He received two meritorious masts. On 24 June 2002, upon returning from a weekend at home, he was administered a urinalysis test. The test was positive for the metabolites of cocaine and methamphetamine.

At trial, the prosecution presented the testimony of the unit's substance abuse coordinator and the urinalysis observer.

They testified as to the collection and observation procedures for the appellant's urinalysis. Although the observer did not specifically testify that he recalled observing the appellant, he did testify that he signed the urinalysis register for the appellant's sample. I am satisfied that the testimony of these witnesses established that the appellant's sample was collected and that the chain of custody to the laboratory was sound.

The Government also called Mr. Jim Callies of the Navy Drug Screening Lab in San Diego as a certified scientist/expert witness. He stated that the metabolite for methamphetamine in the appellant's sample was measured on confirmation at 1,727 ng/ml. The witness considered that level to be a low amount, 500 ng/ml being the DOD testing cutoff for methamphetamine.

The witness further testified that the sample was also positive for benzoylecgonine, the metabolite of cocaine, at 132 ng/ml, with the cutoff being 100. This was also considered a relatively low level. He explained that the human body does not produce the metabolite for methamphetamine nor the compound derivative of cocaine.

He further noted that for most drugs, the metabolite which can be tested has a window of two to four days. In his opinion, the window of detection for cocaine is 48 to 72 hours. For methamphetamine, it is two to four days. He could not state when the drugs were ingested or the amounts.

On cross-examination, Mr. Callies stated that these substances are fairly tasteless. A small amount could be added to food or drink and the person eating or drinking it might not even know that it was there. It is not uncommon to have some results measure in the tens and thousands for methamphetamine and cocaine. The witness could not eliminate the possibility that the drug entered the system without knowledge. At the levels found, it would not be possible to tell whether the person felt the effects of the drug. If methamphetamine were measured at 20,000 ng/ml, such an opinion could be given. The witness agreed that an article in the Journal of Analytical Toxicology, which he found to be an authoritative source, stated that a 25 milligram portion of cocaine, roughly a small fraction of a pack of sugar, dissolved in a six ounce glass of soda and given to a 160 pound man, would not lead to the man feeling any effects. Nevertheless, the person would still test positive under DOD regulations 48 hours later.

The appellant testified in his defense and denied ever using cocaine or methamphetamine while in the Marine Corps. Since reporting on board Camp Pendleton on 13 October 2001, he'd gone home to East Los Angeles almost every weekend to help care for his disabled father. He would also go home during the week on occasion. He went home on the weekend of 19-20 June, the weekend the World Cup was broadcast. He brought Corporal Martinez home with him. They left Camp Pendleton on Friday. They arrived at his home late, ate and watched a movie. On Saturday, they got up late and went to the mall. Most of that day was spent watching the World Cup. On Sunday, they went to a taco stand right next to the corner and came back and watched the soccer game.

He and Corporal Martinez were together the whole time during the weekend. They slept upstairs. The appellant did not go out in the evening. His mother and father were there the whole time, though his mother sometimes went shopping but did not take long. He had no idea how the drugs got in the sample.

Cross-examination revealed that the appellant was reduced in rank from corporal because he lost a pair of night vision goggles. He passed a polygraph test regarding the goggles.

The appellant produced a number of defense witnesses, both regarding the time period when the evidence indicated he would have used the drugs, as well as to his character.

Corporal Wittenborn testified that the appellant was his roommate during June, 2002. During the week prior to the urinalysis test he did not see Lance Corporal Ramos take any drugs, behave strangely, or appear excessively hyper. There was nothing that would lead him to believe the appellant was taking drugs.

The appellant's father testified he remembered his son came home on the weekend of the 21st because he brought a friend with him. They stayed at the father's home. They watched TV and his wife cooked for them. They stayed around the house during the weekend. They did not go out at night. The witness saw them most of the time. They only went out during the day to a parking lot and garden. Most of the time he saw what they were doing. He never saw them using any drugs. He never saw his son acting strangely.

The appellant's mother's also testified that her son came home the weekend of 21 June and brought somebody with him. She

saw what he was doing most of the time. The house was not big, so even if she didn't see him she could hear. Her son didn't act strangely. She didn't see him use drugs. She actually saw her son go to bed because she would check the house and doors afterwards.

Corporal Martinez testified both as to his history with the appellant, commencing with the witness' arrival in the fleet, as well as that weekend. They hung out Friday night and woke up the next morning around lunch time. He slept on the floor of the appellant's bedroom. They had breakfast, hung around for awhile and went to the mall. They drove around and the appellant showed him things. They went home, had dinner, and went to sleep. In contrast to the mother's testimony, he indicated that the two of them outlasted the parents; they were the last two to go to bed. Sunday, they hung around, stayed at the home, and watched soccer. They didn't go out other than on Saturday when they went to the mall. Sunday night, they went to get some food at a taco stand. He did not see the appellant use any drugs, act hyper, or display erratic behavior. He'd never known him to use drugs. In rating the appellant as a noncommissioned officer (NCO), he was inspired by the appellant and he looked up to him. He had never known the appellant to lie to him. The witness did not know if he took the urinalysis test on the 24th.

Staff Sergeant Pereztorres [sic] testified that he served with the appellant about two years previously in another platoon. The appellant performed well above average compared to other NCO's. He was an example to other Marines.

The record also contains a written statement from a sergeant who placed the appellant in the top 30% of all the Marines he had known. He believed that the appellant had a good level of integrity. He did not believe the conduct ever took place or that the appellant would ever do such a thing. The appellant was highly motivated and exhibited a good level of dependability.

The record also contains a statement from a corporal who had known appellant for two-three months. This witness placed him in the top 25% of all Marines. He found the appellant to be a motivated Marine.

It is noted that the Government called the appellant's company lieutenant (LT), LT Biniek. Until the loss of the night vision goggles, he thought the appellant was slightly below average but, basically, an average Marine. He now felt the

appellant lacked integrity because he believed the appellant lied about the loss of the gear.

Discussion

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 crime beyond a reasonable doubt. *See 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.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see* 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 as did the trial court, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from conflict. *See United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The two elements necessary to prove the wrongful use of a controlled substance in violation of Article 112a, UCMJ, are: (1) that the appellant used a controlled substance; and (2) that the use by the appellant was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 37b(2). The Government's case-in-chief was based on the positive results of a single urinalysis test. The prosecution called three witnesses: the command's urinalysis coordinator; the urinalysis observer in the appellant's test; and a forensic chemist from the urinalysis laboratory responsible for testing appellant's sample.

Were it not for the evidence presented by the defense in this case, I would have little difficulty in affirming the appellant's conviction. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001), makes clear that it would be appropriate to rely upon the permissible inference of knowing and wrongful use of cocaine and methamphetamine in this case. The appellant's evidence, however, overcomes my reliance on that inference and gives rise to my reasonable doubt in this case.

There was no evidence presented that anyone had ever seen the appellant either possess or use cocaine or methamphetamine. To the contrary, the appellant denied any such involvement with illegal substances. He produced witnesses who were present during the weekend when he would have used the illicit substances. They denied knowing of such use, though the appellant was with them the majority of the time. He presented

multiple witnesses regarding his good military character and integrity. I realize that my colleagues find the character evidence presented by the defense unpersuasive. My thrust is somewhat different, as I find the Government evidence less than persuasive given the defense evidence. It is the Government upon whom I place the burden of persuasion, not the defense.

In drug cases, as in all cases, an accused comes before the court cloaked with the presumption of innocence and the Government has the burden of proof. In drug cases, however, reliance upon the results of scientific testing alone can create the appearance of drug cases being considered "absolute liability offense[s]." *Green*, 55 M.J. at 86 (Gierke, J., dissenting). Care must be taken to insure that a machine does not determine guilt or innocence. That is all the Government has in this case.

In this case, I find reasonable doubt in light of the appellant's testimony, the character evidence, and the witnesses who were with him during the critical time period. I also note the Government's own evidence that, under the facts of this case, the appellant could have tested positive without ever being aware that he consumed cocaine or methamphetamine.

Premature Convening Authority's Action

Although not raised by the appellant, it is noted that the staff judge advocate's recommendation (SJAR) was signed on 10 June 2003. The convening authority's action was issued on 13 June 2003, with no indication that the SJAR was served on defense counsel, as required by RULE FOR COURTS-MARTIAL 1106(f)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.) and Article 60, UCMJ. Even though my action in this case would moot this issue, I would, nevertheless, find no prejudice as there is no proffer of any clemency matter. *See United States v. Lowe*, 58 M.J. 261, 263 (C.A.A.F. 2003); *United States v. Howard*, 47 M.J. 104, 107 (C.A.A.F. 1997).

Conclusion

I find the evidence factually insufficient to affirm the appellant's conviction. Accordingly, I would set aside the findings and sentence and dismiss the Charge and specification.

For the Court

R.H. TROIDL
Clerk of Court