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

BEFORE

D.A. WAGNER **C.L. CARVER** **R.E. VINCENT**

UNITED STATES

v.

Larry D. SULLIVAN, JR.
Private (E-1), U. S. Marine Corps

PUBLISH
NMCCA 200302040 Decided 27 March 2006

Sentence adjudged 15 November 2002. Military Judge: P.J. Betz, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 5th Marines, Camp Pendleton, CA.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Maj WILBUR LEE, USMC, Appellate Government Counsel

WAGNER, Senior Judge:

A military judge, sitting as a special court-martial, convicted the appellant, contrary to his pleas, of wrongful use and possession of methylenedioxymethamphetamine (ecstasy), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 106 days, forfeiture of $700.00 pay per month for 3 months, and reduction to pay grade E-1. The military judge properly noted that the reduction in pay grade had no practical effect, as the appellant was already serving in the lowest enlisted pay grade. Following trial, the military judge attached an appellate exhibit to the record of trial purporting to be a proceeding in revision that entered a not guilty finding to the specification of possession of ecstasy. The convening authority approved the remaining finding and the sentence as adjudged.

The appellant asserts four assignments of error. In his first two assignments of error, the appellant claims that the military judge erred by admitting a prior inconsistent statement of a co-accused as substantive evidence of appellant's guilt to both specifications and by allowing highly prejudicial and

irrelevant scientific evidence testimony of an investigator regarding laboratory testing of suspected ecstasy. In his third assignment of error, the appellant claims that he was subjected to double jeopardy in violation of the Fifth Amendment of the United States Constitution and Article 44, UCMJ, when he was convicted of and sentenced for an offense for which he had been previously convicted and punished. In his final assignment of error, the appellant claims that the evidence was legally and factually insufficient to prove his guilt beyond a reasonable doubt.

We have considered the record of trial, the appellant's four assignments of error, and the Government's response. We conclude that the military judge erred in considering a prior inconsistent statement for substantive use on guilt or innocence and that his post-trial attempt to cure that error was both procedurally and substantively defective and, therefore, ineffective in negating the resulting prejudice to the substantial rights of the appellant. These fatal errors require that we set aside the findings and sentence. Arts. 59(a) and 66(c), UCMJ.

Facts

The specifications of wrongful use and possession of ecstasy arose from an undercover drug operation conducted by the Naval Criminal Investigative Service (NCIS) on 13 July 2002. The appellant and two fellow Marines, Lance Corporal (LCpl) McKinney and Private (Pvt) Shelnut, traveled to an off-limits nightclub, where, unbeknownst to the appellant, law enforcement officers were conducting undercover operations in an attempt to ferret out illegal drug activity. Also unbeknownst to the appellant, Pvt Shelnut was acting as a cooperating witness for NCIS as a part of that operation. While at the club, LCpl McKinney was openly purchasing and re-selling ecstasy. As a result of these operations, the appellant was identified by Pvt Shelnut as having purchased ecstasy from LCpl McKinney.

Pvt Shelnut testified that he and the appellant had purchased ecstasy from the same stash of pills that LCpl McKinney kept in a pack of cigarettes. Pvt Shelnut testified that he turned over the two pills he had purchased from LCpl McKinney to the lead investigative agent. The pills were later tested as positive for ecstasy. In addition to testifying that he saw the appellant purchase ecstasy from LCpl McKinney, Pvt Shelnut testified that he observed physical characteristics that indicated the appellant was under the influence of ecstasy at the club and that the appellant admitted to him that he was "rolling," a term commonly used to indicate the use of ecstasy. In addition, Pvt Shelnut testified that he observed the appellant crush a tablet of ecstasy and snort it in Pvt Shelnut's vehicle on the return trip from the club.

LCpl McKinney, who was later prosecuted for his drug dealing, initially identified the appellant as someone he had

sold drugs to in the past, but recanted the statement he had provided to investigators during his testimony at the appellant's court-martial. Over defense objection, the military judge then admitted Prosecution Exhibit 1, the sworn statement of LCpl McKinney, into evidence as both a prior inconsistent statement and for substantive use as evidence on guilt or innocence as a statement against interest under MILITARY RULE OF EVIDENCE 804(b)(3) MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). In his sworn statement, LCpl McKinney stated that he first purchased and used ecstasy while attending a rave with the appellant on 31 December 2001. In the statement, he indicated that he sold ecstasy to the appellant every week since then, including several occasions that involved approximately 100 tablets of ecstasy.

Following trial, the military judge, recognizing the error of this ruling, issued a document purporting to be a "proceeding in revision" that reconsidered and reversed his evidentiary ruling. Appellate Exhibit XXVI. That document also indicates that the military judge found the legal sufficiency of the finding of guilty to the specification involving possession of ecstasy to be affected and entered a not guilty finding to that charge. *Id*. Finally, the document indicates that the military judge found that his reconsideration did not affect the legal sufficiency of the adjudged sentence. *Id*.

The defense actively attacked the credibility of Pvt Shelnut's testimony through vigorous cross-examination and by producing evidence that he had made prior inconsistent statements regarding his preservice ecstasy use. The defense also presented testimony regarding Pvt Shelnut's reputation for untruthfulness and presented evidence that the initial reports taken from Pvt Shelnut immediately after the operation at the club did not name the appellant as a participant in any drug transaction.

The trial defense counsel also cross-examined the NCIS special agent extensively about the lack of any evidence, other than the final report from Pvt Shelnut, that the appellant was involved in drug activity at the club. During cross-examination, the agent admitted that none of the other cooperating witnesses and undercover agents participating in the operation at the club reported seeing the appellant use, purchase, or possess illegal drugs.

Erroneous Evidentiary Ruling

The military judge correctly realized the error he committed in considering Prosecution Exhibit 1 for substantive purposes at trial. MIL. R. EVID. 804(b)(3) permits out-of-court statements made against a declarant's penal, proprietary, or pecuniary interest to be admitted into evidence as an exception to the hearsay rule, where the declarant is unavailable to testify at trial. In the instant case, the declarant, LCpl McKinney, was present and testified at trial. During his testimony, he expressly rejected the prior statement as untrue and testified

that, to his knowledge, the appellant had never been involved in any illegal drug activity.

When a witness admits making a prior inconsistent statement, as LCpl McKinney did, that prior statement may only be used for impeachment purposes and the contents of the statement may not be proved by extrinsic evidence. *United States v. Taylor*, 44 M.J. 475, 480 (C.A.A.F. 1996)(citing *United States v. Gibson*, 39 M.J. 319, 324 (C.M.A. 1994) and *United States v. Button*, 34 M.J. 139, 140 (C.M.A. 1992)). The Government is not permitted to use a prior inconsistent statement "'under the guise of impeachment for the *primary* purpose of placing before the [trier of fact] substantive evidence which is not otherwise admissible.'" *United States v. Pollard*, 38 M.J. 41, 50 (C.M.A. 1993)(quoting *United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985)).

Prosecution Exhibit 1 was, therefore, not admissible as evidence relating to guilt or innocence. On the other hand, the military judge was able to consider Prosecution Exhibit 1 as a prior inconsistent statement under MIL. R. EVID. 613, if he limited its use to impeachment of the Government's own witness, LCpl McKinney. *Taylor*, 44 M.J. at 480 (citing *United States v. Severson*, 49 F.3d 268, 272 (7th Cir. 1995)). Accordingly, we conclude that the military judge erroneously admitted Prosecution Exhibit 1 into evidence over defense objection and considered it while deliberating on findings and sentence.

Corrective Action by the Military Judge

The military judge's attempt to correct the evidentiary error discussed above was both procedurally and substantively flawed. RULE FOR COURTS-MARTIAL 1102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), permits a military judge to reopen the court-martial prior to authentication of the record of trial and the convening authority to order the court-martial reopened prior to taking initial action on the case. R.C.M. 1102(d). Such post-trial sessions may be a proceeding in revision "to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused." R.C.M. 1102(b)(1). They may also include Article 39(a), UCMJ, sessions "called for the purpose of inquiring into, and, when appropriate, resolving any matter which arises after trial and which substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). Any post-trial session must be conducted in open court and the proceedings made part of the authenticated record of trial. R.C.M. 1102(e)(3).

In this case, the military judge, recognizing his evidentiary error, desired to conduct a proceeding in revision. He did not, however, reopen the court-martial in order to accomplish this task. Instead, he attached an appellate exhibit to the record of trial entitled "Proceeding in Revision," purporting to correct his legal error and change the findings he

entered during the trial. Appellate Exhibit XXVI. The record of trial does not contain any open session of court where the appellant and counsel were present. This action is, therefore, a nullity. Consequently, the finding of guilty to wrongful possession of ecstasy contained in the record of trial stands pending our review of the case.[1]

We note that Appellate Exhibit XXVI also would not have been effective as a certificate of correction under R.C.M. 1104. First, a certificate of correction may be used only to make the record of trial correspond to the actual proceeding, not to correct legal error. R.C.M. 1104(d)(1). Additionally, a certificate of correction must be served on the accused and all parties must be given the opportunity to respond prior to authentication of the certificate of correction. R.C.M. 1104(d)(2) and (3).

Prejudice

Having established the error by the military judge, we must test that error for prejudice. We are tasked to "evaluate prejudice from an erroneous evidentiary ruling by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F. 1999). We must be convinced that the error was harmless. In this case, we are not.

The Government's case against the appellant relied almost exclusively on the testimony of Pvt Shelnut. There were no other witnesses to either the alleged drug distribution or the drug use, except that Pvt Shelnut claimed that LCpl McKinney was the one who sold the drugs to the appellant. LCpl McKinney testified that he had previously provided false information to NCIS when he identified the appellant as being involved with drugs and that the appellant had never used, possessed, or distributed drugs, to his knowledge. Pvt Shelnut's character for truthfulness was attacked and the veracity of his testimony challenged by the fact that none of the other cooperating witnesses or undercover agents were able to identify the appellant as being involved in a drug transaction on the night in question.

Under the circumstances, LCpl McKinney's out-of-court sworn statement was not only critical evidence on the specification involving wrongful possession of ecstasy, but could not help but corroborate for the military judge the veracity and credibility of Pvt Shelnut's testimony as to both specifications. There is also little doubt that the extensive drug involvement of the appellant detailed in that statement would have had a significant impact on sentencing in this case.

[1] We note that the convening authority's action is also, therefore, incorrect, but this issue is made moot by our corrective action.

The Supreme Court has said:

> But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). In the present case, we are left in grave doubt that the erroneous admission did not sway the verdicts on both specifications and the findings, therefore, cannot stand.

Role of the Military Judge

Although not raised as error, we note with concern the practice of the military judge in failing to elicit objections or responses to objections from the trial counsel prior to ruling on evidentiary matters. For example, the trial defense counsel offered a sworn statement of a witness into evidence when the witness invoked his Fifth Amendment right against self-incrimination. Without Government objection, the military judge asked the defense what the basis was to admit the hearsay statement. The trial defense counsel failed to articulate a specific exception to the hearsay rule when asked for one and the military judge then asked the trial counsel if there is an objection. The trial counsel said simply, "Yes, sir." The military judge then sustained the objection. Record at 257.

At another juncture, during the testimony on redirect of a Government witness, the trial counsel asked whether LCpl McKinney had told the witness that he had sold drugs to the appellant. The trial defense counsel objected to the question as eliciting hearsay testimony. Without asking for a Government response or any further basis from the defense, the military judge overruled the objection and allowed the witness to testify extensively regarding what he was told by LCpl McKinney. Record at 214.

R.C.M. 913(c)(4) states that the military judge may exclude evidence in the absence of an objection, but the Discussion section to that rule cautions that this should be done only in extraordinary circumstances. In the normal course of events, military judges should allow counsel to lodge their own objections unless gate-keeping responsibilities require the military judge to act to avoid reversible error. Additionally, counsel should be expected to argue the contrary sides of an evidentiary issue and present theories of admissibility or inadmissibility of their own volition prior to the judge's ruling.

Conclusion

As a result of our corrective action, we need not address the remaining assignments of error. The findings of guilty and the sentence are set aside. The record of trial is returned to the Judge Advocate General. A rehearing may be ordered.

Senior Judge CARVER and Judge VINCENT concur.

For the Court

R.H. TROIDL
Clerk of Court