

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

BEFORE

C.L. CARVER

D.A. WAGNER

R.W. REDCLIFF

UNITED STATES

v.

**Shawn D. KING
Sergeant (E-5), U.S. Marine Corps**

NMCCA 200202267

Decided 10 March 2005

Sentence adjudged 22 February 2002. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 3d Battalion, 7th Marines, 1st Marine Division, (REIN), FMF, MCAGCC, Twentynine Palms, CA.

LT ROBERT SALYER, JAGC, USNR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

CARVER, Senior Judge:

Pursuant to mixed pleas, the appellant was convicted by a special court-martial, composed of officer and enlisted court members, of two specifications 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 bad-conduct discharge, confinement for 2 months, forfeiture of \$737.00 pay per month for 2 months, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have carefully reviewed the record of trial, the appellant's assignment of error contending that, with respect to the offense to which he pled not guilty, the evidence was factually and legally insufficient to prove that the appellant wrongfully used marijuana, 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.

**Legal and Factual Sufficiency
Wrongful Use of Marijuana**

The appellant avers that the evidence against him was not legally or factually sufficient to sustain his conviction for the second specification of the wrongful use of marijuana charge. We disagree.

**Standard of Review
Legal 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 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.Crim.Ct.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. After reviewing all of the evidence, we are convinced that the evidence was legally sufficient to support the conviction.

**Standard of Review
Factual Sufficiency**

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.

In order to establish the appellant's guilt for wrongful use of a controlled substance, the Government was required to prove the following two elements: (1) that the accused used marijuana; and (2) that the use by the accused was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 37b(2).

Background and Facts

The appellant pled guilty to Specification 1 of the Charge, alleging wrongful use of marijuana on or before 14 November 2001. On that date, he gave a urine specimen that was positive for the metabolite tetrahydrocannabinol (THC), the active ingredient in marijuana, at a level of 94 nanograms per milliliter (ng/ml). During the providence inquiry, the appellant admitted that he and his wife smoked a marijuana cigarette between 31 October 2001 and 14 November 2001:

Me and my wife was out at a local bar, and we had been out there drinking. I just got to talking -- we just got to talking to a local gentleman, and the conversation came up over marijuana. He gave me a marijuana cigarette; and [my wife and I] ended up smoking it, sir.

Record at 43.

The appellant was convicted, contrary to his pleas, of Specification 2 of the Charge that alleged wrongful use of marijuana arising from another urine specimen that he gave a week later on 21 November 2001 that was also positive for THC, but at a lower level of 61 ng/ml. The appellant did not testify on his own behalf.

As to the contested Specification 2, we find that the evidence is sufficient to convince us beyond a reasonable doubt that the appellant gave a urine specimen on 21 November 2001, that the specimen was obtained and stored in a proper manner, that it was sealed and transported to the drug testing laboratory without adulteration or tampering, that it was properly tested, and that the lab test results were positive at the THC level of 61 ng/ml. The only remaining factual issue is whether the Government sufficiently proved that the second test resulted from an intervening wrongful use of marijuana.

Mr. Robert Czarny testified for the Government as its expert witness. Mr. Czarny works at the Navy Drug Screening Laboratory (NDSL) at the Naval Hospital, San Diego, and has worked at the NDSL since 1972. Currently, Mr. Czarny is the technical director of the lab.

Mr. Czarny testified that the ultimate issue is the detection window. The level of THC in the urine peaks within 4 to 12 hours of use and then drops quickly to the level of 10 ng/ml or so before the drop off slows down. Once the level of THC is below the Department of Defense cutoff level of 15 ng/ml, the laboratory reports a negative result. The detection window is dependent on the half-life of THC. Half-life is the amount of time it takes the body to eliminate half of the drug. Determining and applying the half-life of marijuana is somewhat complicated. The half-life of THC depends primarily upon the dosage of marijuana and how often the drug was used. The half-life could also be longer if the subject were dehydrated or had too much liquid in his system when he gave the sample.

Mr. Czarny further testified that an infrequent user, i.e., one who uses marijuana 3 to 4 times per month, probably would not remain positive above the cutoff level for more than 2 or 3 days. By the 4th or 5th day, the user would be well below the cutoff of 15 ng/ml. Mr. Czarny opined that test results of 94 ng/ml on day 1 and 61 ng/ml 7 days later are not probable without an intervening use of marijuana. He further testified, however, that a very heavy user of marijuana who used every day for a number of years and used heavy doses could have a positive THC in his urine for two weeks after the last use.

Mr. John Woodward testified as a defense expert. Mr. Woodward explained that he is the owner and chief toxicologist of

a clinical and forensic toxicology consulting service under the business name Utica Toxicology Service in Chula Vista, CA. Although Mr. Woodward has no college degree, he graduated from the U.S. Navy School for Laboratory Technicians in 1944, a 1,200-hour course in California (CA). He passed the CA board examination in March 1945 and has been licensed by the CA Department of Health Services as a clinical laboratory scientist since 1946. Mr. Woodward said that he testified as an expert in various courts over 4,000 times, often two or three times in a single day.

Mr. Woodward opined that if the appellant had used marijuana between the two test dates, the appellant's second test would have had a THC level higher than 61 ng/ml. He explained that the average half-life for THC is anywhere from 3 to 13 days, with a mean of 8 days. Mr. Woodward testified that he is 95 percent confident about his opinion. He agreed with Mr. Czarny that hydration and dehydration could affect the test results. He also testified that a 13-day detection window would be on the high end of a half-life for an infrequent user, e.g., someone who uses a drug once a week. A long detection window implies a long half-life. A first-time user, depending on the strength of the marijuana, would have a three-day or less detection window.

Mr. Czarny testified in rebuttal that studies have shown that the average detection window is about one day for an infrequent user, with most test subjects falling below the cutoff level after a few days, even starting with levels as high as 200 to 400 ng/ml. The test subjects all dropped off very rapidly. However, the detection window is much longer for habitual users.

Discussion

The two experts agreed that the level of THC in the urine would drop off with the half-life of marijuana. Mr. Czarny testified that in his opinion a one-time user would only have a positive result above 15 ng/ml for a day or so after the last use. He further opined that an infrequent user would probably only have a positive result above 15 ng/ml for 2 or 3 days after last use, but, in any event, no more than 4 or 5 days after last use. Mr. Woodward agreed with Mr. Czarny that a first time user would only have a positive result for a short time after last use, no more than 3 days, but he opined that the half-life of marijuana was 3 to 13 days, with an average of 8 days. Both agreed that there was a longer half-life for heavy users of marijuana. The appellant pled guilty to a single use of marijuana on or before 14 November, the date his first positive urine specimen was given. He provided a urine specimen a week later which was also positive for marijuana, but at a lower level. Mr. Czarny was of the opinion that the second positive result was not probable without an intervening use of marijuana. After reviewing their testimony and qualifications, we find Mr. Czarny's testimony to be more credible. After a careful review of all the evidence in the trial, we find that the evidence is

sufficient to convince us beyond a reasonable doubt as to the appellant's guilt.

Conclusion

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

Judge WAGNER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court