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

BEFORE

C.L. SCOVEL **M.J. SUSZAN** **J.L. FALVEY**

UNITED STATES

v.

Troy E. RICE, Jr.
Aviation Support Equipment Technician Airman Recruit (E-1), U.S. Navy

NMCCA 200202357 Decided 15 December 2005

Sentence adjudged 14 September 2001. Military Judge: J.L. Hiller. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, NAS, Key West, FL.

LT JENNIE GOLDSMITH, JAGC, USNR, Appellate Defense Counsel
LT GUILLERMO ROJAS, JAGC, USNR, Appellate Government Counsel

FALVEY, Judge:

The appellant was tried by a special court-martial, before a military judge sitting alone. Pursuant to mixed pleas, the appellant was convicted of attempted distribution of marijuana, two specifications of unauthorized absence, one of which was terminated by apprehension, wrongful use of marijuana, and wrongful possession of marijuana, in violation of Articles 80, 86, and 112a, Uniform Code of Military Justice, 10 U.S.C §§ 880, 886, and 912a. The appellant was sentenced to confinement for 90 days and a bad-conduct discharge. The pretrial agreement had no effect on the sentence and the convening authority approved the sentence as adjudged.

In two assignments of error, the appellant alleges (1) the evidence is factually insufficient to prove knowing and wrongful possession of marijuana in that his possession was inadvertent; and (2) the evidence is factually insufficient to prove attempted distribution in that the appellant could not attempt to distribute what he did not possess.

We have carefully considered the record of trial, the appellant's assignments of error, and the Government's response. We conclude that the appellant's conviction for possession was factually sufficient, but that his conviction for attempted distribution is not supported by the facts. This latter determination requires corrective action on the findings and sentence, which we will take in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

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. *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66(c), UCMJ. In exercising this duty, this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute our judgment for that of the trial court. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). For us to be convinced beyond a reasonable doubt, however, does not require that the evidence be free from conflict. *See United States v. Lips,* 22 M.J. 679, 684 (A.F.C.M.R. 1986).

The appellant challenges the factual sufficiency of his conviction for wrongful possession of marijuana and attempted distribution of marijuana.

1. Wrongful Possession of Marijuana

Regarding the wrongful possession of marijuana conviction, the appellant argues that there is insufficient evidence to establish his knowing, and therefore wrongful, possession of marijuana. We disagree.

The elements of wrongful possession of marijuana are: (1) that the accused possessed a certain amount of a controlled substance; and (2) that the possession by the accused was wrongful. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶ 37b(1). The Manual explains that:

> Possession must be knowing and conscious. . . . An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred by circumstantial evidence.

MCM, Part IV, ¶ 37c(2). *See also, United States v. Seger*, 25 M.J. 420, 421 (C.M.A. 1988).

The essence of the appellant's claim is that there is inadequate evidence to establish that he knowingly and consciously possessed the marijuana. The record of trial, however, provides ample evidence from which the military judge could have concluded that the appellant's possession was knowing and, therefore, wrongful.

The uncontroverted evidence indicates that on the morning of 11 May 2001, as the appellant approached a gate separating base housing from Naval Air Station Key West, he had on his person a baggie containing a small quantity of marijuana. The appellant claims to have discovered the marijuana while reaching in his pocket for a cigarette shortly after noticing that military working dogs were being used at the gate. The appellant then discarded the marijuana in a neighbor's garbage can. The appellant indicated that he "panicked" when he found the marijuana in his pocket and realized that it would be discovered during the gate inspection. It was then that the appellant discarded the marijuana in a neighbor's garbage can.

Originally charged with wrongful introduction of marijuana onto an installation, but found guilty of the lesser included offense of wrongful possession, the appellant argues that the military judge must have accepted his claim of inadvertent discovery. To the contrary, the record reveals that the evidence was inadequate to support a wrongful introduction charge because there was no evidence that the appellant actually introduced the marijuana onto NAS Key West. The evidence did support the military judge's finding that he possessed the marijuana while aboard NAS Key West.

From our review of the record of trial, we too are convinced beyond a reasonable doubt that the appellant knowingly possessed marijuana. Although "a person does not possess a substance unless he is aware of its presence," . . . "the presence of that substance could permit a logical inference under appropriate circumstances that the accused had the requisite knowledge of its presence." *United States v. Mance*, 26 M.J. 244, 253-254 (C.M.A. 1988)(citations omitted). "[T]his permissive inference would be legally sufficient to satisfy the Government's burden of proof as to knowledge." *Id.* at 254 (citations omitted).

As noted above, the appellant had on his person a baggie of marijuana. Review of the record also reveals that the marijuana that the appellant had on his person was in the pocket of the appellant's pants, that the appellant had retrieved the pants from his bedroom floor that morning, and that only a limited number of people could have had access to the pants prior to the appellant wearing them that morning. Importantly, the appellant admitted to having a party at his house the previous evening

where a number of people were smoking marijuana and where the appellant himself smoked marijuana.[1] After discarding the marijuana in his neighbor's garbage can, the appellant did not disclose this to his neighbor when seeing him immediately thereafter. Finally, when confronted several days later about the marijuana found in his neighbor's garbage can, the appellant initially denied knowing anything about the marijuana and only later claimed that he had found it in his pocket.

Under these circumstances, we conclude that the Government has met its burden of proof in this case and the evidence is factually sufficient to establish that the appellant had the requisite knowledge to sustain his wrongful possession conviction.

Attempted Distribution of Marijuana

Regarding the appellant's conviction for attempted distribution of marijuana, the appellant argues that there is insufficient evidence to establish that he delivered or transferred possession of marijuana to another. We agree.

Attempted distribution of marijuana requires proof that the appellant attempted to distribute a certain amount of marijuana and that such distribution was wrongful. MCM, Part IV, ¶ 37b(3). The Manual explains that, "'[d]istribute' means to deliver to the possession of another. 'Deliver' means the actual, constructive, or attempted transfer of an item." MCM, Part IV, ¶ 37c(3).

The essence of the appellant's claim is that that there is insufficient evidence to establish that he possessed or constructively possessed the marijuana allowing him to deliver possession to another. Review of the record of trial reveals that, as noted above, the appellant discarded the marijuana that he possessed into a garbage can on the morning of 11 May 2002. This garbage can belonged to a neighbor who lived around the corner from the appellant and between his residence and the gate. On the evening of 12 May 2002, James S, a former Sailor, asked if the appellant knew where he could get some marijuana. The appellant told him that he had discarded some in his neighbor's garbage can and suggested that it might still be there. James S then went to the home of the appellant's neighbor, PO Kimbrough, and explained to him that the appellant had thrown something in PO Kimbrough's garbage can. PO Kimbrough recalled the security check at the gate and thought that the appellant may have thrown drugs away. PO Kimbrough looked in the garbage can and recovered

[1] The appellant was found guilty, contrary to his pleas, of this use of marijuana. The appellant claimed that his use was inadvertent and resulted from him confusing a marijuana joint with a cigarette. The expert toxicological evidence, however, demonstrated that inadvertent ingestion would not have produced the test results presented. The military judge had the opportunity to listen to the appellant and assess his credibility and, apparently, found the appellant's explanation to be incredible.

the marijuana from the bottom of the empty garbage can. PO Kimbrough turned the marijuana into the command two days later.

The Government claims that the marijuana in the garbage can was within the appellant's constructive possession and was, therefore, capable of being delivered into the possession of another. The Manual explains that,

> "Possess" means to exercise control of something. Possession may be direct physical custody . . . or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. . . . Possession inherently includes the power or authority to preclude control by others. It is possible, however, for more than one person to possess an item simultaneously, as when several people share control of an item.

MCM, Part IV, ¶ 37c(2).

In *United States v. Wilson,* 7 M.J. 290 (C.M.A. 1979), our superior court addressed constructive possession as follows:

> To convict by proof that the accused constructively possessed the contraband, the Government must prove that the accused "'was [knowingly] in a position or had the right to exercise dominion and control over' it, either directly or through others." If the proven circumstances establish the foregoing, possession exists though it is jointly shared. Moreover, possession may be established by circumstantial as well as by direct evidence.

Id. at 293 (citations omitted)(alteration in original).

In our view, there is insufficient evidence to establish that the marijuana, discarded in a garbage can, remained within the appellant's dominion and control. More likely, the appellant abandoned all dominion and control over the marijuana when he put it in his neighbor's garbage can, which was certainly accessible to his neighbor and apparently accessible to passersby. The contents would also be emptied eventually for waste removal. As such, the appellant had no "power or authority to preclude control by others." There is no evidence that the appellant secreted the marijuana in a hidden location with the intent to retrieve it at a later time. To the contrary, the appellant did not return to retrieve the marijuana although he had almost two days to do so. The circumstances of this case are also easily distinguishable from those involving contraband in a desk, locker or car, locations easily secured so as to preclude control by others and to preserve one's own dominion and control. Although possession may be "jointly shared," such was not the case under the circumstances of this case in that the appellant did not share in the dominion and control of the marijuana contained in the garbage can.

Finally, the record is silent as to the description of the garbage can and its lid, if any, the location of the garbage can in relation to the neighbor's home and the security of that location, the schedule for waste removal and the day/time of the last/next trash collection, the contents, if any, of the garbage can when the appellant discarded the marijuana, and the ability of others to access the garbage can. Such detail may have established that the marijuana remained in the defendant's constructive possession; however, such detail is lacking here.

Accordingly, we find the appellant's conviction for attempted distribution to be factually insufficient. We will take corrective action below.

Conclusion

In view of the above, we set aside the findings of guilty and dismiss the Additional Charge and its specification. We find the remaining findings of guilty correct in law and fact and they are affirmed. Arts. 59(a) and 66(c), UCMJ.

Applying the principles of *United States v. Cook*, 48 M.J. 434 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990) and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we reassess and affirm the sentence as adjudged and approved below.

Senior Judge SCOVEL and Judge SUSZAN concur.

For the Court

R.H. TROIDL
Clerk of Court