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

BEFORE

C.A. PRICE **E.B. HEALEY** **R.C. HARRIS**

UNITED STATES

v.

James E. FORTUNE, Jr.
Corporal (E-4), U.S. Marine Corps

NMCCA 200300779 Decided 13 April 2005

Sentence adjudged 12 February 2002. Military Judge: A.W. Keller, Jr. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Assault Amphibian Battalion, 2d Marine Division, Camp Lejeune, NC.

Capt E.V. TIPON, USMC, Appellate Defense Counsel
LT KATHLEEN HELMANN, JAGC, USNR, Appellate Government Counsel
CAPT FREDERIC MATTHEWS, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of two specifications of wrongful use of cocaine, in violation of Article 112a, Uniform Code Of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to confinement for 90 days, forfeiture of $737.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged, and, except for the bad-conduct discharge, ordered it executed.

We have carefully considered the record of trial, the appellant's two assignments of error, 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.

Illegal Pretrial Punishment and Unlawful Command Influence

In the appellant's first assignment of error, he contends that the military judge erred in denying his motion for credit against confinement alleging illegal pretrial punishment in violation of Article 13, UCMJ. As a result, the appellant avers that we should disapprove his adjudged bad-conduct discharge and forfeitures. We disagree.

At trial, the appellant moved for credit against confinement for unlawful pretrial punishment on the grounds that his pretrial restriction, which began on 24 August 2001, constituted illegal pretrial punishment in violation of Article 13, UCMJ. The appellant also moved to dismiss the charges on the grounds that remarks made by his company commander, Captain (Capt) Harris, at a company formation and remarks made by Chief Warrant Officer 2 (CWO2) Gossett a week later at a guided discussion amounted to unlawful command influence. The military judge denied both motions. On appeal, the appellant contends that his initial pretrial confinement from 14 August 2001 to 17 August 2001 and the remarks made by Capt Harris at the company formation both constituted illegal pretrial punishment in violation of Article 13, UCMJ.

"Article 13, UCMJ, prohibits both the purposeful imposition of punishment on a military accused prior to court-martial and pretrial confinement conditions which are more rigorous than the circumstances required to ensure an accused's presence." *United States v. Fricke*, 53 M.J. 149, 154 (C.A.A.F. 2000)(citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). The test for illegal pretrial punishment is whether there was intent to punish or stigmatize the person being held for trial, and if not, were the conditions in furtherance of a legitimate, non-punitive government objective. *United States v. Starr*, 53 M.J. 380, 382 (C.A.A.F. 2000). Pretrial punishment also includes public denunciation and degradation. *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001)(citing *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987)). The burden of proof is on the appellant to show a violation of Article 13, UCMJ. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Once an appellant successfully does that, the burden then shifts to the Government to present evidence to rebut the allegation "beyond the point of . . . inconclusiveness." *United States v. Scalarone*, 52 M.J. 539, 543-44 (N.M.Ct.Crim.App. 1999)(quoting *United States v. Cordova*, 42 C.M.R 466 (A.C.M.R. 1970)), *aff'd*, 54 M.J. 114 (C.A.A.F 2000).

The appellant's claim of pretrial punishment presents a "'mixed question of law and fact' qualifying for independent review." *McCarthy*, 47 M.J. at 165 (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). We review the findings of the military judge that there was no intent to punish to determine whether those findings were clearly erroneous. *United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000)(citing *United States v. Phillips*, 42 M.J. 346 (C.A.A.F. 1995)). In the absence of

factual findings on the intent to punish, however, we review the issue de novo.[1] *Id*.

We conclude that the appellant has not established that his pretrial confinement was motivated by an intent to punish. Capt Harris testified that he believed that the appellant was ordered into confinement after testing positive for cocaine the first time because the "battalion commander was under the opinion that [the appellant] needed a wake up call for the positive urinalysis." Record at 169. Capt Harris did not make the decision to place the appellant in pretrial confinement, however. *Id.* at 179. Further, he admitted that this information came from Major (Maj) Coon, the operations officer, not from the battalion commander himself. *Id.* at 175. Contrary to Capt Harris' testimony, the appellant's battalion commander, Lieutenant Colonel (LtCol) Harris, testified that he ordered confinement because he was concerned that, as a mechanic working on amphibious vehicles during an exercise, the appellant's drug use presented a safety hazard to the other Marines in the field.[2] *Id.* at 81. LtCol Harris also specifically stated that he took the appellant's prior record into account before ordering confinement, which we note included a summary court-martial for unauthorized absence and a summary court-martial for larceny. *Id.*; Prosecution Exhibit 10 at 4 and 6.

We also conclude that the appellant has not demonstrated that Capt Harris' remarks at the company formation were intended to humiliate or ridicule him. *Cruz*, 25 M.J. at 330 (apprehending individuals in front of unit formation and then ridiculing them was punishment under Article 13). The company formation was held to advise the company about a company-wide urinalysis test that was going to be conducted that morning. During the formation, Capt Harris reminded the unit of the Marine Corps policy on drugs and stated that an E-4 in the company had tested positive for drugs and was still wearing his rank but would be held accountable. Record at 172. The appellant was not paraded in front of his unit, however, and his name was never mentioned. *Id*. at 171. Further, Capt Harris' remarks were cautionary and clearly designed to warn members of the unit of the consequences of illegal drug activity which was an ongoing problem for the command. *Id.* at 176-77.

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[1] Although not specifically raised in the defense counsel's motion for illegal pretrial punishment credit, the defense counsel did elicit testimony regarding the appellant's pretrial confinement and also raised the issue in his oral argument. The military judge failed to address this issue in his findings of fact and conclusions of law. Further, since Capt Harris' remarks at the company formation were raised in a motion for unlawful command influence, the military judge's analysis focuses on this issue, not on the issue of illegal pretrial punishment.

[2] Pretrial confinement may be lawfully imposed to prevent misconduct "which poses a serious threat to the effectiveness, morale, discipline, readiness or safety of the command." RULE FOR COURTS-MARTIAL 305(h)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.).

As both the appellant's initial confinement and Capt Harris' comments at the formation served a legitimate, non-punitive purpose, we hold that the circumstances of this case do not rise to the level of a violation of Article 13, UCMJ, and decline to grant relief.

Factual and Legal Sufficiency

In the appellant's second assignment of error, he contends that the evidence is not factually and legally sufficient to prove he is guilty of wrongfully using cocaine between 9 August 2001 and 14 August 2001 under the Additional Charge. The appellant avers that we should set aside the finding for the Additional Charge and dismiss it. We disagree.

The test for legal sufficiency is whether, considering the evidence admitted at trial in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Spann*, 48 M.J. 586, 588 (N.M.Ct.Crim.App. 1998), *aff'd,* 51 M.J. 89 (C.A.A.F. 1999). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner,* 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt does not mean that the evidence contained in the record must be free from any and all conflict. *United States v. Reed*, 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). In exercising the duty imposed by this "awesome, plenary, de novo power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

In order to convict the appellant of violating Article 112a, UCMJ, wrongful use of a controlled substance, the prosecution must prove, beyond a reasonable doubt:

(1) That the appellant used cocaine; and

(2) That his use was wrongful.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37b(2). With respect to the first element, the Government must prove that the accused knowingly used the controlled substance. In that regard, the Manual states:

> Knowledge of the presence of the controlled substance may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence. This permissive inference may

be legally sufficient to satisfy the government's burden of proof as to knowledge.

MCM, Part IV, ¶ 37c(10). The Manual further provides that the wrongful nature of the use of a controlled substance may be inferred in the absence of evidence to the contrary. MCM, Part IV, ¶ 37c(5). The two inferences outlined in Paragraphs 37c(5) and (10) are commonly referred to as the "'permissive inference of knowing and wrongful use.'" *United States v. Hildebrandt*, 60 M.J. 642, 645 (N.M.Ct.Crim.App. 2004)(quoting *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987)).

In this case, we find the evidence legally and factually sufficient to sustain the appellant's conviction of wrongful use of cocaine under the Additional Charge beyond a reasonable doubt. The testimony of the Government's expert, Albert Marinari, provided a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use of cocaine. *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F. 2001); *Murphy*, 23 M.J. at 312. Further, we are not convinced that the testimony of the appellant's witnesses rebutting this inference was "uncontroverted" as the appellant contends. Consequently, the members could have reasonably concluded that the appellant's whereabouts seven days prior to the urinalysis test was not "completely accounted for." *See United States v. Bond*, 46 M.J. 86, 89 (C.A.A.F. 1997)(holding that urinalysis evidence is legally sufficient as long as the defense's evidence could be reasonably disbelieved by the fact-finders).

After careful consideration of the record, we conclude that the evidence adduced at trial is both legally and factually sufficient for the charged offense of wrongful use of cocaine. We also have no doubt that a reasonable fact-finder could have found all the essential elements of the charge beyond a reasonable doubt. In addition, we are convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we decline to grant relief.

Conclusion

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

Judge HEALEY concurs.

Senior Judge PRICE (concurring):

I concur with the excellent opinion of my colleague. I write separately to address a troubling trend in the hope that judge advocates might be alerted and exercise appropriate preventive action.

Recently, several cases have been decided by this court that included substantiated allegations of commanders making

statements during unit formations and similar gatherings that raised issues of unlawful command influence. It is beyond cavil that unlawful command influence is the mortal enemy of military justice. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

Whether we serve as appellate judges, trial judges, staff judge advocates, trial counsel, or defense counsel, each of us as judge advocates in the Department of the Navy should endeavor to prevent, deter, and eliminate unlawful command influence. In doing so, we serve the best interests of Sailors and Marines and the officers who lead them.

For the Court

R.H. TROIDL
Clerk of Court