

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

BEFORE

C.A. PRICE

D.A. WAGNER

J.F. FELTHAM

UNITED STATES

v.

**Stephan R. COKER
Lance Corporal (E-3), U.S. Marine Corps**

NMCCA 200301097

Decided 29 September 2005

Sentence adjudged 27 March 2002. Military Judge: E.W. Loughran. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Education Command, Marine Corps Base, Quantico, VA.

LT JANELLE LOKEY, JAGC, USNR, Appellate Defense Counsel
LT ROSS WEILAND, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Judge:

Contrary to his pleas, the appellant was convicted by a general court-martial, composed of officer and enlisted members, of use of marijuana on four occasions and possession of marijuana on two occasions, all in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. Following announcement of findings, the military judge, sua sponte, dismissed one of the possession specifications as a lesser included offense. The members sentenced the appellant to a bad-conduct discharge, confinement for 6 months, total forfeiture of pay and allowances, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

In his first assignment of error, the appellant claims that the evidence is legally and factually insufficient to support the findings of guilty to use and possession of marijuana. In his second allegation of error, the appellant claims that the

staff judge advocate's recommendation and the convening authority's action incorrectly reflect the findings.

After considering the record of trial, the appellant's assignments of error, and the Government's response, we agree, in part, with the appellant. We will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Facts

In all, three Marines testified as Government witnesses regarding the appellant's use and possession of marijuana. All were accomplices, either by their admitted use or possession of marijuana. The Government presented no other evidence on the merits. The military judge provided an accomplice instruction to the members, properly warning them to treat accomplice testimony with caution and to seek corroborating evidence outside of the testimony of other accomplices.

Legal Sufficiency of the Evidence

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. In applying the foregoing principles of law, we are mindful of our superior court's cautionary stance toward accomplice testimony lacking corroboration. *United States v. Gillette*, 35 M.J. 468, 470 (C.M.A. 1992).

Relative to Specification 4, the appellant was found guilty of using marijuana with Private (Pvt) Clevenger and Pvt Armendariz on board Camp Barrett. Both Pvt Clevenger and Pvt Armendariz were called as Government witnesses and testified that they left the barracks with the appellant after dark and went to a hidden location to smoke marijuana. Both testified that they smoked from the marijuana cigarette, but neither could recall the appellant possessing or using the marijuana. All they could testify to was that the appellant was with them when they used the marijuana. The Government impeached them with their prior sworn statements to Naval Criminal Investigative Service (NCIS) wherein they stated that they smoked marijuana with each other and the appellant on that occasion, but both insisted at trial that they did not actually witness the

appellant use or possess the marijuana. Pvt Clevenger was also impeached with the Stipulation of Fact offered in support of his guilty pleas during his court-martial.

Relative to Specification 5, the appellant was found guilty of using marijuana with Pvt Clevenger and another Marine, Redd, while riding together in a vehicle and parked at a reservoir. Pvt Clevenger was the only witness to testify for the Government. Pvt Clevenger testified that he drove the vehicle and Redd rode in the front passenger's seat. The appellant sat alone in the rear seat. Pvt Clevenger testified that he and Redd smoked marijuana in the vehicle, but that he could not recall if he or Redd ever passed the marijuana cigarette to the appellant. Again, the Government impeached its own witness with his prior sworn statement to NCIS and with the Stipulation of Fact from his court-martial.

Specifications 4 and 5 were supported only by the testimony of accomplices who, at trial, denied witnessing any drug use by the appellant. Under such circumstances, we find that no rational trier of fact, even when viewing the evidence in the light most favorable to the Government, could have found the appellant guilty of the foregoing two offenses.

Factual Sufficiency of the Evidence

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). Again, in applying the foregoing principles of law, we are mindful of our superior court's cautionary stance toward accomplice testimony. *Gillette*, 35 M.J. at 470.

Relative to Specification 1, the appellant was found guilty of using marijuana with a group of Marines at a demolitions range. The key Government witness was Lance Corporal (LCpl) Brewer, who testified that he smoked marijuana with a group of Marines, including the appellant, on the date in question. He testified that he saw the appellant "take a hit" off of the marijuana cigarette. He also testified that Pvt Clevenger was not at the range during this incident.

On cross-examination, LCpl Brewer acknowledged that he had not mentioned the appellant in his first sworn statement to NCIS, despite the interrogator asking him about the

appellant approximately twenty times. LCpl Brewer was called back in for a second interview, informed by NCIS that the appellant had confessed and named LCpl Brewer in his statement to NCIS (both of which were fabrications), and asked to give another statement. In the second sworn statement, LCpl Brewer included the appellant in the illegal activity. Pvt Clevenger and Pvt Armendariz both testified that they were also present at the range. Pvt Clevenger did not testify that the appellant used marijuana on that occasion and Pvt Armendariz denied that there was ever an occasion when the appellant used marijuana at the range.

The defense called Corporal (Cpl) Brewer, who testified that he had previously pled guilty and was found guilty of drug-related charges, including one specification involving the incident at the range. He testified that the appellant was in the demolition shed approximately 150 to 200 meters away when the other Marines were smoking marijuana at the range.

Relative to Specification 2, LCpl Brewer was the sole Government witness, testifying that he and the appellant were driving around on base when they parked and smoked a marijuana cigarette. There were no other witnesses.

We note that a gunnery sergeant who had supervised LCpl Brewer for about two years testified that LCpl Brewer was untruthful. He also testified that he had supervised the appellant for the same period and opined that he displayed good military character and had never lied to him.

Relative to Specification 6, Pvt Clevenger testified that he and an unknown civilian left a nightclub to smoke marijuana at the civilian's invitation. The appellant followed them out to the civilian's truck. All three sat in the bench seat of the truck, with Pvt Clevenger between the civilian and the appellant. Pvt Clevenger testified that he passed the marijuana cigarette to the appellant and the appellant passed it back, but that he did not see the appellant use marijuana. Pvt Clevenger was impeached by his Stipulation of Fact and providence inquiry from his court-martial, where he agreed that he had smoked marijuana with the appellant. Pvt Clevenger explained that he meant only that the appellant was with him when Pvt Clevenger was smoking marijuana, not that the appellant had also used marijuana. It is noted that Pvt Clevenger, a Government witness, was impeached by the Government with his prior inconsistent statements as to other

portions of his testimony, raising substantial question as to the reliability of his testimony at trial.

The Government's evidence on these three specifications consisted only of accomplice testimony that is either exculpatory or unreliable. We are not, ourselves, convinced beyond a reasonable doubt of the appellant's guilt of Specifications 1, 2, and 6 of the Charge.

Conclusion

Accordingly, the findings of guilty are set aside and the charges and specifications are dismissed. All rights, privileges, and property of which the appellant was deprived by virtue of the execution of any portion of the sentence will be restored. The remaining assignment of error is moot.

Senior Judge PRICE and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court