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

BEFORE

W.L. RITTER **C.L. SCOVEL** **M.J. SUSZAN**

UNITED STATES

v.

Rigel V. ROUNTREE
Electronics Technician Third Class (E-4), U.S. Navy

NMCCA 200301593 Decided 31 October 2005

Sentence adjudged 20 May 2003. Military Judge: B.W. MacKenzie. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by U.S. Naval Computer and Telecommunications Station, Sigonella, Sicily, Italy.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

SUSZAN, Judge:

The appellant was tried before a special court-martial composed of members. Contrary to his pleas, the appellant was convicted of wrongfully using cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The adjudged sentence included a bad-conduct discharge, hard labor without confinement for 90 days, restriction for 60 days, and reduction to pay grade E-1. There was no pretrial agreement in the case. In an act of clemency, the convening authority disapproved the adjudged hard labor without confinement. Otherwise the convening authority approved the sentence as adjudged.

The appellant claims (1) factual insufficiency of the evidence, and (2) an abuse of discretion by the military judge when he admitted extrinsic evidence of uncharged misconduct in rebuttal. We have carefully reviewed the record of trial, the appellant’s two assignments of error, and the Government’s response. Having done so, we find merit in the appellant's second assignment of error and grant relief in our decretal paragraph.

Sufficiency of Evidence

In his first assignment of error, the appellant asserts that the evidence was factually insufficient to support his finding of guilt for use of cocaine. We disagree.

A military court of criminal appeals has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). In doing so, this court's assessment of both legal and factual sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993).

Legal sufficiency is not at issue in the appellant's case. 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. *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. Reasonable doubt, however, does not mean the evidence must be free from any and all conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *United States v. Reed,* 51 M.J. 559, 562 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. at 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. Further we may believe one part of a witness' testimony yet disbelieve another. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ.

The applicable facts in the appellant's case are that he provided a urine sample in December 2002 as a part of a command unit sweep. At the conclusion of the command unit sweep, the appellant's sample was placed in a cabinet over the weekend. The urinalysis chain of custody, signed Friday, 27 December, indicated the appellant's sample had been mailed that day. However, testimony established that the appellant's sample was not mailed until the following Monday, 30 December.

While failure to exactly follow procedures in collecting, transmitting, and testing urine samples does not require suppression of the test results, those deviations are considered in determining the reliability of the evidence. *United States v. Arguello,* 29 M.J. 198 (C.M.A. 1989); *United States v. Whipple,* 28 M.J. 314 (C.M.A. 1989); *United States v. Pollard,* 27 M.J. 376 (C.M.A. 1989); *United States v. Ouellette*, 16 M.J. 911

(N.M.C.M.R. 1983). Taking this into consideration we are not convinced that this slight procedural deviation rendered the evidence factually insufficient. The command urinalysis observer testified that he witnessed the appellant provide the urine sample in question. The command urinalysis coordinator testified that he correctly labeled the appellant's sample and mailed it to the lab for testing. There was no evidence that the appellant's urine sample was tampered with. A lab expert testified that no discrepancies were noted for the urine sample identified as the appellant's. The appellant's urine sample tested positive for cocaine. We find the evidence factually sufficient to support the permissive inference of knowing, wrongful use of cocaine. *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001).

Uncharged Misconduct

In his second assignment of error, the appellant alleges error by the military judge in admitting extrinsic evidence (over defense objection) of uncharged misconduct in rebuttal to his good character evidence. Simply stated, MILITARY RULE OF EVIDENCE 404(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), provides that evidence offered to prove that an accused is a bad person is not admissible. *United States v. Reynolds* 29 M.J. 105 (C.M.A. 1989). We review the military judge's decision for an abuse of discretion and in the appellant's case we find the probative value of the extrinsic evidence of uncharged misconduct was substantially outweighed by the danger of unfair prejudice. MIL. R. EVID. 403.

The Government has conceded error and in view of the Government's concession, a detailed discussion of our analysis is not warranted. With that in mind, we conclude that the military judge abused his discretion and agree with both the appellant and the Government that the military judge erred in admitting extrinsic evidence of specific instances of misconduct.

Having found error, we must test for prejudice. The test for prejudice is whether the finding of guilt was substantially swayed by the error. The appellant has the initial burden of showing the error is of such a nature that its "natural effect" is to be prejudicial, and the Government then must show that the error was harmless. *United States v. Rhodes*, __ M.J. __, No. 04-0336, slip op. at 21 (C.A.A.F. Sep. 19, 2005).

"We 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); *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A. 1985). Applying this four-prong test, we are not convinced that the error was harmless. First, we find the Government's case against the appellant was not overwhelming. There was no direct evidence that the appellant knowingly used cocaine. The Government was

forced to rely upon the permissive inference, per *Green,* to meet its burden of proof. On the defense side, the record shows that the appellant was an outstanding petty officer with a good record. Prior to the circumstances that gave rise to the appellant's court-martial, he had not been the subject of any disciplinary action. The appellant was an athlete, and numerous witnesses testified that he was unlikely to have used drugs. The appellant also made a sworn statement denying drug use and subjected himself to cross-examination by the Government.

We find that the evidence admitted in error was material and directly contradicted the appellant's evidence of good military character. The crux of the defense's case was the appellant's good character. The military judge allowed the trial counsel to present direct evidence that the appellant stole a uniform from a former roommate and lied about it.[1]

The quality of the evidence was strong. The trial counsel called the appellant's former roommate in rebuttal. The roommate's testimony was credible and damaging to the defense. In closing the trial counsel argued that the appellant was untruthful and that he stole a uniform. He told the members to balance what the appellant told them against the "type of person he was" as related by "the people who knew him the best." Without the extrinsic evidence, the members would have seen a good Sailor with no prior offenses. In the appellant's case we conclude that he has met his burden and that the Government has not. We further conclude that the "natural effect" of the error might have swayed the members in finding the appellant guilty of wrongful cocaine use. We therefore must set aside the finding.

Conclusion

Accordingly, the findings and the sentence are set aside, and the record is returned to the Judge Advocate General. A rehearing may be ordered.

Senior Judge RITTER and Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court

1 The military judge's ruling also denied the appellant's motion to suppress evidence of adultery. As a result of the ruling, the appellant revealed this otherwise inadmissible evidence during his direct testimony. Record at 402, 453.