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

BEFORE

C.L. SCOVEL **J.F. FELTHAM** **J.D. HARTY**

UNITED STATES

v.

Lincoln BROWN, Jr.
Aviation Electrician's Mate Third Class (E-4), U.S. Navy

NMCCA 200400122 Decided 29 December 2005

Sentence adjudged 17 January 2003. Military Judge: C.E. Schaff. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Patrol Squadron FIVE, NAS Jacksonville, FL.

Col KATHERINE GUNTHER, USMCR, Appellate Defense Counsel
LT DONALD PALMER, JAGC, USNR, Appellate Government Counsel

HARTY, Judge:

A special court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of unlawful use of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant's sentence was limited to a bad-conduct discharge (BCD). The convening authority (CA) approved the sentence as adjudged.

The appellant presents four assignments of error, arguing that: (1) he was denied effective assistance of post-trial counsel; (2) his BCD should be disapproved because the record of trial is incomplete; (3) the evidence presented at trial is legally and factually insufficient to support his conviction for marijuana use; and, (4) this court should set aside his BCD in order to accord him the court-ordered confinement credit for illegal pretrial punishment.

We have carefully examined the entire record of trial, the appellant's four assignments of error, the appellant’s motion to

attach, the Government's motion to attach, and the Government's answer. We find 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.

Effective Assistance of Post-Trial Counsel

For his first assignment of error, the appellant asserts he was denied effective assistance of counsel during the post-trial review stage of his case. Appellant's Brief of 29 Jun 2004 at 2; Appellant's Motion to Attach of 29 Jun 2004. The Government counters the appellant's allegations with trial defense counsel's affidavit. Government's Motion to Attach of 12 Jan 2005.

The Sixth Amendment to the United States Constitution and Article 27, UCMJ, guarantee an accused the right to the effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n.14 (1970); *United States v. Ingham,* 42 M.J. 218, 223 (C.A.A.F. 1995). To prevail on a claim of ineffective assistance, however, the appellant must overcome the strong presumption his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington,* 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial. *Id.*; *United States v. Scott,* 24 M.J. 186, 188 (C.M.A. 1987). The appellant "'must surmount a very high hurdle.'" *United States v. Smith,* 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton,* 47 M.J. 227, 229 (C.A.A.F. 1997)).

By declaration under penalty of perjury, the appellant asserts that after trial his detailed trial counsel told him that:

> 6. [I]f I submitted any matters in clemency to the convening authority, then I would lose my right to appeal my case. He executed a statement and told me to sign it to cover himself, as he put it. I signed it, thinking that this was the only way that I could have a higher court look at my case.
>
> . . . .

> 8. [T]he waiver of my right to submit clemency matters would speed up my appeal process and soon I would be back in the Navy finishing off my commitment.

Appellant's Declaration of 22 Jun 2004. The appellant did not submit any matters in clemency, but he has described what he would have submitted to the convening authority had he been advised correctly. *Id*. at ¶ 7.

Trial defense counsel asserts, by his affidavit, that the appellant was advised in part that if the convening authority disapproved the BCD based on a clemency request, the appellant would lose his automatic appellate review and the Navy could still administratively separate him from active duty. The appellant made clear to his TDC that he wanted to shoot for having his guilty finding disapproved by the appellate court. TDC's Affidavit of 23 Dec 2004. The factual basis for the appellant's assigned issue, therefore, is subject to competing affidavits.

We are not free to resolve collateral post-trial factual issues based solely on affidavits. In *United States V. Ginn*, 47 M.J. 236 (C.A.A.F. 1997), our superior court announced six principles courts of criminal appeals must apply in disposing of post-trial, collateral, affidavit-based claims, such as ineffective assistance of counsel. We believe this issue can be resolved under the fourth principle which states:

> Fourth, if the affidavit is factually adequate on its face but the appellate filings and the record as a whole "compellingly demonstrate" the improbability of those facts, the Court may discount those factual assertions and decide the legal issue.

Id. at 248.

The appellant alleges that had he understood his post-trial rights, he would have submitted clemency information to the convening authority that would have shown he was not a drug user. Appellant's Declaration of 22 Jun 2004 at ¶ 7. The appellate filings and the record as a whole, however, compellingly demonstrate the improbability of the appellant's allegations.

Appellate Exhibit XXV is the appellant's appellate and post-trial rights statement. The military judge made sure the appellant had read and fully understood his post-trial rights as contained in that document. The appellant stated that he signed the document after reading it and that he did understand his

post-trial rights. Record at 536-37. That document clearly states that the appellant has the right to submit clemency matters to the convening authority and that his case will be automatically reviewed by this court. If that is not compelling enough, the appellant's Appellate Rights Statement addressed to the Judge Advocate General, executed 17 January 2003 and appended to the record, states the appellant's trial defense counsel had advised the appellant of his appellate rights and the review process including the following:

> My defense counsel has advised me it is his/her responsibility to represent me during the convening authority's action stage of my court-martial conviction. In this regard, my defense counsel has advised me . . . of counsel's obligation to advise and assist me in preparing matters for submission to the convening authority for consideration prior to his taking action. . . . I also understand that the failure to submit matters within the times proscribed waives the right to submit matters. I also may expressly waive, in writing, my right to submit matters, and any such waiver may not be revoked.

Appellate Rights Statement of 17 Jan 2003.

We reject the appellant's assertion that he chose not to submit matters in clemency because his trial defense counsel told him it would waive his automatic review by this court. He clearly understood his options and now does not like the option he chose. The appellant has failed in his burden to establish the first prong of the *Strickland* test - deficient performance by his trial defense counsel. This assignment of error has no merit.

Incomplete Record of Trial

For his second assignment of error, the appellant asserts that his bad-conduct discharge cannot be approved because Appellate Exhibit XXIV is missing from the record of trial. The missing exhibit was presented by the trial defense counsel to the military judge and described in the record as "sentencing information to be read with the instructions." Record at 510. There was no defense objection to the sentencing instructions as read by the military judge.

A complete record of the proceedings and testimony must be prepared for each special court-martial resulting in an adjudged

sentence that includes a bad-conduct discharge. Art. 54(c)(1)(B), UCMJ. Our superior court has consistently interpreted Article 54, UCMJ, to require such proceedings to be substantially verbatim. *United States v. Santoro*, 46 M.J. 344 (C.A.A.F. 1997); *United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). It is noted, however, that "[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript." *Gray*, 7 M.J. at 297 (quoting *United States v. Donati*, 34 C.M.R. 15 (C.M.A. 1963).

Whether a record of trial is incomplete is a question of law, which we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). As a threshold question, a reviewing court must first determine whether an omission from the record of trial is "substantial." *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981). Whether an omission is substantial can be a question of quality as well as quantity. *United States v. Lashley,* 14 M.J. 7, 9 (C.M.A. 1982). The question of what constitutes a substantial omission is analyzed on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999). A substantial omission from the record of trial raises a presumption of prejudice that the Government must rebut. *McCullah*, 11 M.J. at 237. Missing portions of transcripts can be reconstructed or summarized sufficiently to permit the Government to overcome the presumption of prejudice. *United States v. Peck*, 10 M.J. 779, 781 (A.F.C.M.R. 1981).

In this case, the record is missing a single document containing defense-proposed sentencing information about the appellant. This information was to be read to the members as part of the military judge's sentencing instructions. During the discussion of this appellate exhibit, the military judge stated he was amending the proposed language of item number 3 to "let the members know that [the appellant] has been awarded the equivalent of 15 days' confinement, to consider that." Record at 511. The military judge instructed the members, in part as follows:

> Among the other matters you should consider are: The accused's age, that the accused is entitled to wear the following medals and awards: . . . ; the nature of the offense of which the accused has been convicted; and the fact the accused has been awarded the equivalent of 15 days' pretrial confinement credit.

Id. at 527-28. There was no defense objection to this portion of the sentencing instructions.

We are convinced that the missing appellate exhibit does not constitute a substantial omission in the record of trial according to case law. There is, therefore, no rebuttable presumption of prejudice. The content of the missing appellate exhibit can be reasonably determined from the military judge's instructions. Finally, the absence of a defense objection to the military judge's sentencing instructions is compelling. The appellant would clearly be in the best position and have the greatest motive to challenge the sentencing instructions if they did not contain the information requested in the missing appellate exhibit.

Even if the missing appellate exhibit is considered substantial, thereby creating a rebuttable presumption of prejudice, we find the record of trial rebuts that presumption. In addition, the appellant does not assert and we do not find prejudice resulting from the failure to attach the missing appellate exhibit. This assignment of error is without merit.

Sufficiency of the Evidence

For his third assignment of error the appellant contends that the evidence is legally and factually insufficient to sustain his conviction of using marijuana. Specifically, the appellant alleges the evidence is insufficient due to the irregular collection procedures and irregular lab procedures in his case. We disagree.

A military Court of Criminal Appeals has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency. Art. 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). 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 particular witness' testimony yet disbelieve another part. *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979); *see* Art. 66(c), UCMJ. 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).

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); *Turner*, 25 M.J. at 324-25; *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Ct.Crim.App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ.

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. Reasonable doubt does not mean, however, that the evidence contained in the record must be free from any and all conflict. *Reed*, 51 M.J. at 562.

The wrongful use of a controlled substance has but two elements:

1. That the accused used a controlled substance; and,
2. That the use by the accused was wrongful.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37b(2). The use of a controlled substance is wrongful only if the accused has knowledge the controlled substance is present. That knowledge, however, "may be inferred from the presence of the controlled substance in the accused's body or from other circumstantial evidence." *Id*. at Part IV, ¶ 37c(10).

When urinalysis evidence is the sole basis used to establish the knowledge requirement, expert testimony interpreting the test results or some other lawful substitute is required in order to provide the rational basis upon which the permissive inference of knowledge and therefore wrongfulness may be drawn. *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001). "The admissibility of such evidence is subject to applicable rules governing opinions and expert testimony." *Id*. (citations omitted)

In *Green*, our superior court found that the admissibility of urinalysis evidence is determined in part by considering "whether: (1) the metabolite is naturally produced by the body or any substance other than the drug in question; (2) the permissive inference of knowing use is appropriate in light of the cutoff level, the reported concentration, and other appropriate factors; and (3) the testing methodology is reliable in terms of detecting the presence and quantifying the concentration of the drug or metabolite in the sample." *Green*, 55 M.J. at 80. Other admissibility factors can be

considered "so long as they meet applicable standards for determining the admissibility of scientific evidence." *Id*.

When evidence of novel scientific evidence testing is involved, "the military judge must ensure a careful and thorough Daubert-type analysis[1] in such cases." *Id*. (citing *United States v. Bush*, 44 M.J. 646, 649-52 (A.F.Ct.Crim.App. 1996), *aff'd*, 47 M.J. 305 (1997)). When the military judge is considering evidence of a test that does not involve a novel scientific procedure, a *Daubert*-type analysis may not be required. Urinalysis evidence properly admitted and accompanied by expert testimony interpreting that evidence provides a legally sufficient basis upon which to draw the permissive inference of a knowing, wrongful use. *Id*. (citations omitted).

The Government's evidence of wrongful use of marijuana consisted of testimony from command members assigned to perform the standard urinalysis duties including the urinalysis coordinators and observers, supporting documents, and expert testimony of a chemist from the Navy Drug Screening Laboratory (NDSL), Jacksonville, explaining laboratory documents, procedures, test results, and passive inhalation studies. The appellant challenges the facts in his case as they pertain to the collection process and the lab testing process. We will discuss each individually.

Collection Procedures

The appellant provided a partial urine sample in the presence of an observer, that was retained by the urinalysis coordinator. A strip of tape was placed over the cap and the sample was kept with the appellant's military identification card at the urinalysis coordinator's table. The bottle did not have a label on it, however, it did not leave the urinalysis coordinator's immediate presence. The appellant returned two hours later and was given a bottle containing liquid. The urinalysis coordinator described how he protected the appellant's partial sample and that it was the appellant's partial sample that he handed to the appellant when the appellant returned. The appellant filled the bottle the rest of the way in the presence of a different observer. All information on the label, including the appellant's social security number, was then confirmed and initialed before the label was placed on the bottle. All information in the

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

urinalysis ledger was confirmed before the appellant signed the ledger. At the conclusion of the command unit sweep, all urine samples collected that day were hand-carried directly to NDSL Jacksonville for testing.

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the urine in the bottle submitted to NDSL Jacksonville under the appellant's social security number was the appellant's urine. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt that the urine in the bottle submitted to NDSL Jacksonville under the appellant's social security number was the appellant's urine. The evidence is, therefore, factually sufficient as well.

Laboratory Testing Procedures

The Government's expert witness testified that the appellant's urine sample screened positive for the THC metabolite. A confirmation test was conducted by gas chromatography mass spectrometry (GC/MS). The results from that confirmation test were invalidated because of background interference on the qualifying ion although the two quantifying ions were clean. The expert opined that the interference was caused by the organic solvent used by the lab to dissolve the film extracted from the urine prior to the GC/MS analysis. This confirmation test identified and quantified 16 nanograms of 11-nor-delta-9-THC-9-carboxylic acid (single THC metabolite) per milliliter of urine. The lab tested the same extracted material again and received the same interference. For administrative reasons, the NDSL chose not to report the positive result.

The expert stated that the NDSL ran a second GC/MS confirmation test by pouring a new test sample from the appellant's urine and then diluting that urine with an equal amount of a certified negative urine. This time there was no background interference and the single THC metabolite was detected and quantified at eight nanograms per milliliter of urine. The NDSL then multiplied the results by a factor of two and reported the results as 16 nanograms of the single THC metabolite per milliliter of urine. The Department of Defense confirmation cutoff for THC is 15 nanograms per milliliter of urine.

We will not assume that the practice of diluting a person's urine sample and extrapolating test results is accepted within the scientific community or that it has a scientific basis without something in the record supporting that finding. Even if the practice was shown to be accepted within the scientific community, we would not assume that a certified negative urine was added to the appellant's urine or in equal amounts. We look for a *Daubert*-type inquiry by the military judge and review all testimony and exhibits to resolve this issue.

The military judge conducted a *Daubert*-type inquiry into the lab's difficulty in testing the appellant's urine and the process of diluting the urine sample with a certified negative urine. During this inquiry, the lab expert stated the dilution procedure "sometimes helps us get better chromatography, which is necessary to have good mass spectral information." Record at 291. Later, the NDSL expert described the testing procedure in greater detail stating:

> [I]n GC/MS, we don't test the urine sample. It has to go through an extraction procedure. We take 3 milliliters of urine, and we get it down to a film on the bottom of a glass tube and then add an organic solvent to dissolve it, so it can be analyzed. While that extraction procedure will extract out the metabolite, but there would be other extraneous material. That gets further purified by running it through a gas chromatograph that separates components in a mixture. But, we may not be always totally successful in removing all extraneous material for one of the ions. . . . So, we decided to repeat it with a dilution, which is helpful in cleaning up extraneous material in our analysis.

Id. at 326-27.

We find that the expert witness' testimony, combined with the NDSL lab documents, support a finding that the practice of diluting a person's urine sample and extrapolating test results is an accepted practice. The lab accession number assigned to the appellant's social security number was "J0207163045." Record at 303. Prosecution Exhibit 7 at 30[2] is

[2] The NDSL expert refers to this document as Prosecution Exhibit 7, Enclosure 7 at page 2. Prosecution Exhibit 7 is also numbered as pages 1 through 48 encompassing all enclosures. We will refer to a document with Prosecution Exhibit 7 by its page number rather than its enclosure and page number.

the NDSL Jacksonville Intralaboratory Chain of Custody form for the appellant's first GC/MS confirmation test and the appellant's sample is specimen number 4. Record at 332. The fourth column from the left on this document is labeled "DIL" and there are no entries in that column. Prosecution Exhibit 7 at 37 is a Dilution Worksheet showing that 1.5 milliliters of the appellant's urine was mixed with 1.5 milliliters of a certified negative urine.[3] Prosecution Exhibit 7 at 34 is the Intralaboratory Chain of Custody form for the appellant's final GC/MS confirmation test and the appellant's sample is specimen number 1. Under the column titled "DIL" and across from the appellant's accession number is the entry "1:2." The lab expert referred to the appellant's dilution rate as a "1 to 2 dilution" explaining that "means that we have one part of the urine sample mixed with an equal part of a certified negative urine sample." Record at 291.

We do not see why an NDSL would have standard forms designed specifically to account for the urine dilution process unless that process is routine. We accept the lab expert's explanation that any quantity of the single THC metabolite found in a urine sample diluted with an equal amount of certified negative urine has to be multiplied by a factor of 2 to get the correct reportable result.

We find this evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt that the urine in the bottle submitted to NDSL Jacksonville under the appellant's social security number contained 16 nanograms of the single THC metabolite. After weighing all the evidence in the record of trial on this issue, and recognizing that we did not see or hear the witnesses, as did the trial court, we ourselves are convinced beyond a reasonable doubt that the urine in the bottle submitted to NDSL Jacksonville under the appellant's social security number contained 16 nanograms of the single THC metabolite. The evidence is, therefore factually sufficient as well.

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[3] Prosecution Exhibit 7 at 33 appears to be an instruction sheet for retests on the appellant's batch. The only reference to diluting a urine sample is for accession number J0207206047 which is not the appellant's number. This accession number also appears on the Intralaboratory Chain of Custody form for the appellant's final GC/MS confirmation test and is specimen number 7. However, there is no reference to diluting this sample as there is for the appellant's sample. We do not consider this discrepancy to be serious enough to diminish our faith in the lab results.

We further find the evidence admitted in this case is both factually and legally sufficient to create the permissive inference of wrongful use of marijuana. We find that the evidence is legally sufficient to convince a rational trier of fact beyond a reasonable doubt of the appellant's guilt of wrongful use, and that that we ourselves are convinced beyond a reasonable doubt of the appellant's wrongful use of marijuana. This assignment of error is without merit.

Application of Pretrial Confinement Credit to BCD

For his fourth assignment of error the appellant asks this court to set aside his BCD as a way of granting him his 15 days of court-ordered confinement credit. Here, the military judge awarded the appellant 15 days of confinement credit for illegal pretrial punishment. The members were informed of this credit prior to deliberating on sentence. The members did not award confinement as a punishment in this case. The appellant correctly notes, and the Government agrees, that current law does not allow the remedy the appellant seeks under these facts.

The proper application of credit for illegal pretrial punishment is a question of law, reviewed *de novo*. *United States v. Spaustat*, 57 M.J. 256, 260 (C.A.A.F. 2002); *United States v. Rock*, 52 M.J. 154, 156-57 (C.A.A.F. 1999). The Manual for Courts-Martial has adopted certain equivalencies to provide meaningful credit for improper pretrial confinement. RULE FOR COURTS-MARTIAL 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed). Where the credit for improper confinement exceeds the amount of confinement that had been adjudged, credits awarded under R.C.M. 305(k) "shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, . . ." This provision, however, does not authorize application of the credit against reduction or a punitive separation. "This is because [reduction and punitive separation] are so qualitatively different from confinement that the fact that an accused has served confinement which was technically illegal should not automatically affect these forms of punishment." R.C.M. 305(k), Drafter's Analysis, A21-20. *See United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003); *United States v. Rosendahl*, 53 M.J. 344, 347 (C.A.A.F. 2000).

Because there was no confinement awarded, we concur with the parties that a credit against confinement cannot provide any relief to the appellant. The appellant has not requested

that we grant relief as to the automatic reduction in rate and we agree that such a remedy would be incorrect. *See* Art. 58a, UCMJ; *United States v. Kinzer*, 56 M.J. 741, 744 (N.M.Ct.Crim.App. 2002), *aff'd*, 58 M.J. 287 (C.A.A.F. 2003); R.C.M. 305(k). That leaves us with the bad-conduct discharge. We are convinced that application of the credit against the bad-conduct discharge would provide the appellant with an unjustified windfall. *See Spaustat*, 57 M.J. at 263 (bad-conduct discharge would not be set aside as relief for 17 days of illegal post-trial confinement); *United States v. Valead*, 32 M.J. 122, 128 (C.M.A. 1991)(Everett, S.J., concurring in the result)("To set Valead's discharge aside . . . would provide relief that is totally disproportionate to the harm he suffered because of the improper punishment of 3-or-4-days of confinement on bread and water."). We are reminded here that every wrong does not have a remedy. Under the facts and circumstances of this case, we are unable to provide the appellant with meaningful relief.

Conclusion

Accordingly, we affirm the findings and sentence, as approved by the convening authority.

SENIOR Judge Scovel and Judge Feltham concur.

For the Court

R.H. TROIDL
Clerk of Court