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

BEFORE

C.L. CARVER **D.A. WAGNER** **E.B. STONE**

UNITED STATES

v.

Justin A. HOVIS
Sergeant (E-5), U.S. Marine Corps

NMCCA 200401500 Decided 25 July 2005

Sentence adjudged 8 May 2003. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Corps Communication-Electronic School, Marine Corps Air Ground Task Force Training Command, Twentynine Palms, CA.

Capt JEFFREY STEPHENS, USMC, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
LT IAN THORNHILL, JAGC, USNR, Appellate Government Counsel

CARVER, Senior Judge:

The appellant was convicted, contrary to his pleas, by officer court members at a special court-martial 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 a bad-conduct discharge, confinement for 60 days, forfeiture of $767.00 pay per month for 2 months, and reduction to pay grade E-1. There was no pretrial agreement. The convening authority approved the sentence as adjudged.

After carefully considering the record of trial, the appellant's assignment of error that the evidence was factually insufficient, 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. *See* Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant gave a urine specimen during a random urinalysis test after a three-day holiday weekend. The specimen tested positive for the metabolite of cocaine. The drug lab expert testified that the amount of metabolite in the sample would indicate that, for a casual user, the individual had used cocaine during a window from three or four days to a few hours before he provided the urine specimen. The expert also testified that alcohol and cocaine together would have a synergistic effect in which the effects of the cocaine would be increased. The appellant did not contest the chain of custody or the laboratory test and the results.

The appellant testified that he did not knowingly use cocaine. He said that he, Corporal (Cpl) Daniels, and two other Marine sergeants went to Mexico to drink alcohol on the Sunday afternoon before he gave the urine specimen on Tuesday morning. He did not know the last names of the two Marine sergeants, but all of them were students in the Marine Corps Communication-Electronic School at Marine Air Ground Task Force Training Command, Twentynine Palms, California. Later that Sunday evening, the two sergeants drove to San Diego where they lived, but said that they would return on Monday to pick up the appellant and Cpl Daniels.

The appellant and Cpl Daniels continued drinking alcohol. At about 0200, Monday morning, the appellant carried Cpl Daniels to a local hotel and rented a room. He left Cpl Daniels in the room, but took a taxicab to another bar and continued drinking. He does not remember what happened from the time he went to that bar until the same taxicab driver awakened him in the taxicab sometime between 0700 and 0800 Monday morning. The taxicab was parked in front of the hotel where he had rented a room. His wallet and credit cards had been stolen, but he still had his military identification card and driver's license that he keeps in his sock. He had no money, so he woke up Cpl Daniels to borrow money to pay the taxicab driver. He had a bad hangover from the alcohol, but did not feel any effects of any other substance.

Later that day, the two sergeants picked them up in Mexico and drove them back to Twentynine Palms where they arrived about 1900 to 1930. During the drive, the appellant studied material for his coursework. After arriving at Twentynine Palms, the appellant participated in a study group and then went to bed about 2200 to 2300. He awoke at the normal time of 0530 to 0600

the next morning and went to class where he learned that he had been selected for a random urinalysis. The urinalysis observer said that the appellant appeared nervous and jittery and that he was not able to provide a urine sample until his third try. The appellant said that he was always nervous before a urinalysis and that he had trouble giving a urine specimen because he was dehydrated from all the alcohol.

The appellant presented evidence from several military supervisors, including a major, lieutenant, sergeant major, and two gunnery sergeants, of his previous good military character and character for truthfulness. Cpl Daniels and the other two Marine sergeants did not testify.

Factual Insufficiency

In his assignment of error, the appellant contends that the Government failed to prove the appellant guilty beyond a reasonable doubt. We disagree and decline to grant relief.

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 also* Art. 66(c). Further, this court may believe one part of a witness' testimony and disbelieve other aspects of his or her testimony. *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

Evidence of a properly conducted urinalysis test, the results of that test, and expert testimony explaining those results are sufficient to permit a factfinder to find beyond a reasonable doubt that the appellant violated Article 112a, UCMJ. *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986); *see also United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001). Based on the evidence as a whole, the factfinder is free to draw the permissive inference that the appellant knowingly and wrongfully ingested cocaine. *United States v. Hildebrandt,* 60 M.J. 642, 645 (N.M.Ct.Crim.App. 2004); MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.), Part IV, ¶ 37c(10).

The appellant claims that his testimony raises the possible defenses of innocent ingestion and voluntary intoxication and that the Government has failed to disprove them. If the appellant was ignorant of the use of cocaine, then he cannot be found guilty of wrongful use of cocaine. MCM, Part IV, ¶

37c(5); RULE FOR COURTS-MARTIAL 916(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). If the evidence is raised, the burden of proof is on the prosecution to establish the appellant's guilt. Voluntary intoxication is not a defense, but it may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge. R.C.M. 916(l)(2).

Upon review of all the evidence, we do not believe that the appellant has raised the defense of innocent ingestion. He merely speculates that he used cocaine during a six-hour window while he was drinking alcohol, but during which he does not recall what happened. He provides no evidence that he ingested cocaine during that timeframe or that, if he did, his use was unknowing. His own testimony that he did not feel the effects of any substance other than alcohol, coupled with the testimony of the lab expert that the use of cocaine and alcohol would increase the effect of cocaine, belie that argument.

On the whole, we are convinced beyond a reasonable doubt that he knowingly used cocaine.

Conclusion

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

Judge WAGNER and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court