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

BEFORE

Charles Wm. DORMAN **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

Jerwin T. MARCIAL
Hospitalman (E-3), U.S. Navy

NMCCA 200001765 Decided 20 August 2004

Sentence adjudged 24 January 2000. Military Judge: C.A. Price. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Region, Mid-Atlantic, Norfolk, VA.

LT MARCUS FULTON, JAGC, USN, Appellate Defense Counsel
LT CHRISTOPHER HAJEC, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by general court-martial composed of officer members. Contrary to the appellant's pleas, he was convicted of the divers use and the divers distribution of methamphetamine, and of making a false official statement. The appellant's crimes violated Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The adjudged and approved sentence includes a dishonorable discharge and confinement for 36 months.

The appellant has raised four assignments of error. First, he alleges that the military judge erred in admitting hearsay testimony concerning statements made by an informant. In his second and third assignments of error, the appellant asserts that the military judge erred in granting motions in limine in favor of the Government, preventing the appellant from exploring the extent of drug involvement by two of the appellant's accusers. Finally, the appellant argues that the evidence of record is factually insufficient to sustain his conviction for having made a false official statement. As relief for the first three assigned errors, the appellant asks that the findings and

sentence be set aside. With respect to the last assignment of error the appellant prays that we set aside his conviction for making a false official statement and authorize a new sentencing hearing.

We have thoroughly examined the record of trial, and have considered the appellant's assignments of error and the Government's response. Following that examination, 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.

Facts

The appellant was convicted of three separate offenses. First, he was convicted of distributing methamphetamine on divers occasions between the summer of 1998 and July 1999. These distributions occurred in the vicinity of both Norfolk and Portsmouth, VA. Second, the appellant was convicted of the divers use of methamphetamine at or near Norfolk, VA, between February and July 1999. Finally, the appellant was convicted of making a false official statement. The specifics of this offense are that the appellant was required to submit a urine sample on 3 May 1999 to be screened for drugs. The appellant provided a urine sample, but that sample was not his. He then signed the urinalysis ledger verifying that the sample was his, when he knew that it was not. The appellant's conviction was secured through the testimony of witnesses, without the benefit of any methamphetamine being seized from the appellant or being detected in his urine.

Four different witnesses testified that they had either purchased methamphetamine from the appellant or had seen the appellant use methamphetamine, or both. All four witnesses testified under some form of immunity. Hospitalman Recruit (HR) Dunbar testified that he had purchased methamphetamine from the appellant 20 to 25 times, and that he had seen the appellant use methamphetamine an equal number of times. HR Dunbar had been prosecuted for distribution of methamphetamine, having sold some to an undercover agent of the Naval Criminal Investigative Service (NCIS). HR Dunbar testified that the methamphetamine he sold to the NCIS agent had been obtained from the appellant. The substance he sold to NCIS tested positive as methamphetamine. Hospitalman Third Class (HM3) Sanson was HR Dunbar's room mate. Upon returning home one day, HM3 Sanson discovered HR Dunbar and the appellant using methamphetamine. HM3 Sanson joined them in using the substance. He testified that he felt the effects of the drug. Machinist Mate First Class (MM1) Kennedy testified that he had used methamphetamine with the appellant 7 to 10 times and that he purchased it from the appellant about 30 times. He also saw the appellant use methamphetamine about 25 times. Finally, Mr. Beckham, who had already been kicked out of the Navy, testified that he had purchased methamphetamine from the appellant more than 10 times, including one time when MM1 Kennedy

was present. The appellant's primary defense was to attack the credibility of these witnesses.

The defense was actually quite effective as each witness admitted to extensive drug usage, as well as to having provided different accounts as to what had happened and when. Additionally, HR Dunbar testified that he hoped that his testimony against the appellant might be helpful in securing a reduction in his sentence. HM3 Sanson and MM1 Kennedy had not been prosecuted and were hopeful their cooperation might result in their being allowed to stay in the Navy. The appellant, however, was prohibited from presenting evidence of some of HR Dunbar's and some of MM1 Kennedy's drug history. This was as a result of the military judge granting motions in limine on behalf of the Government. By granting those motions, the military judge limited the scope of the appellant's examination of those two witnesses.

The Government also called Special Agent (SA) Budd from NCIS concerning background information about the case, as well as his undercover purchase of methamphetamine from HR Dunbar. During cross-examination of SA Budd, the civilian defense counsel asked him how it was that NCIS focused their attention on HR Dunbar. SA Budd testified that an informant had told them that he had purchased methamphetamine from HR Dunbar and that a second informant had implicated HR Dunbar as being involved with drugs. Record at 242. On redirect examination, the trial counsel asked SA Budd whether the informant had identified HR Dunbar's supplier. Over a defense hearsay objection the military judge allowed the witness to testify that the informant said that the appellant was HR Dunbar's supplier. This is the focus of the appellant's first assignment of error.

Testimony of Special Agent Budd

The appellant contends that the military judge erred in admitting testimony of SA Budd that one of the individuals who had focused his attention on HR Dunbar had told him that HR Dunbar obtained his methamphetamine from the appellant. He asserts that this testimony was inadmissible hearsay, and deprived him of the right to confront the individual who made the statement. We find no material prejudice to the appellant's substantial rights that flows from the admission of this evidence over defense objection.

In response to the appellant's hearsay objection the trial counsel responded that the appellant had "open[ed] the door" during cross-examination into the subject. He did not directly respond to the hearsay objection. We cannot determine the purpose for admitting the challenged evidence. The fact that the trial counsel asked such a pointed question, however, highly suggests that she wished to have the evidence considered for the truth of the matter stated. Nevertheless, the testimony was never again mentioned during the course of the trial, except for

a very brief and generalized reference to it by the civilian defense counsel during his argument on findings. Record at 694.

We need not decide the issue of whether the evidence was properly admitted because, even if error, we find that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). We reach this finding because HR Dunbar later took the stand and testified that he purchased methamphetamine from the appellant. Thus, HR Dunbar himself confirmed that the appellant was his supplier. We also reach this finding because no other use of the evidence was made by the Government during the course of this lengthy trial.

Motions in Limine

In the appellant's next two assignments of error he alleges that the military judge erred in granting the Government's motions in limine, thereby restricting his ability to question HR Dunbar and MM1 Kennedy concerning their use of drugs, unrelated to the appellant. In granting the motion, the military judge prohibited the appellant from introducing other evidence concerning those issues. Particularly with MM1 Kennedy, the appellant had hoped to develop the issue further through the testimony of MM1 Kennedy's wife and daughter. The appellant alleges that by granting these motions, the military judge violated the appellant's constitutional right under the Sixth Amendment to confront the witnesses against him. Appellant's Brief of 31 Jan 2003 at 9-14.

Specifically, the appellant had wanted to introduce evidence concerning HR Dunbar's involvement with marijuana and lysergic acid diethylamide (LSD). Record at 327. The appellant also argued that this evidence was admissible under MILITARY RULE OF EVIDENCE 608(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), to show HR Dunbar's motivation to misrepresent the truth. Record at 327. In response the Government relied on *United States v. Weeks*, 17 M.J. 613 (N.M.C.M.R. 1983), as well as Mil. R. Evid. 403. Record at 328; Appellate Exhibit XIII. No evidence was presented suggesting that the Government was aware of HR Dunbar's involvement with marijuana or LSD. The military judge excluded this evidence by granting the Government's motion in limine. Record at 329. In so doing, it is not clear that he conducted a balancing test, though his last statement on page 329 of the record is certainly suggestive of that thought process. Earlier, however, the military judge had stated that the evidence was not relevant. *Id*. at 59.

With respect to MM1 Kennedy, the appellant wanted to introduce evidence of MM1 Kennedy's involvement with methamphetamine in circumstances unrelated to the appellant. The defense was in fact successful in doing that, revealing MM1 Kennedy's use of the drug as early as 1987, as well as testimony from MM1 Kennedy's daughter concerning his sources to obtain methamphetamine, and her seeing him sending methamphetamine to

his parents. Again, the appellant argued that he should be allowed to introduce this evidence to show MM1 Kennedy's motive to fabricate, specifically citing MIL. R. EVID. 608(c). *Id*. at 449. No evidence was presented that the Government was aware of MM1 Kennedy's other involvement with methamphetamine. In granting the Government's motion in limine concerning MM1 Kennedy, the military judge clearly employed a balancing test. *Id*. at 452.

Our superior court has recently addressed the type of evidence the appellant unsuccessfully attempted to introduce at his court-martial:

> Evidence of bias can be powerful impeachment. Davis v. Alaska, 415 U.S. 308 (1974). The Supreme Court has observed that "[p]roof of bias is almost always relevant." United States v. Abel, 469 U.S. 45, 52 (1984). Although extrinsic evidence of specific acts of misconduct may not be used to prove a witness's general character for truthfulness, it may be used to impeach a witness by showing bias. United States v. Hunter, 21 M.J. 240, 242 (C.M.A. 1986).

United States v. Saferite, 59 M.J. 270, 273-74 (C.A.A.F. 2004). Although relevant, such evidence may still be excluded under Mil. R. Evid. 403. *Id*. at 274.

The standard of review for a trial judge's ruling excluding evidence is abuse of discretion. *Id*. Furthermore, "[w]hen the military judge conducts a proper balancing test, we will not overturn the ruling to admit the evidence unless there is a 'clear abuse of discretion.'" *Id*. (citing *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)).

In this case, we find that the military judge did not abuse his discretion in granting the Government's motions in limine concerning HR Dunbar and MM1 Kennedy. His decision was also consistent with *Weeks.* 17 M.J. at 613. Furthermore, given the extensive impeachment of these witnesses by the appellant, we are convinced beyond a reasonable doubt that even if the military judge erred in excluding this evidence, the error was harmless. Accordingly, we conclude that the appellant is not entitled to relief based upon his second and third assignments of error.

Sufficiency of Evidence

In his last assignment of error, the appellant argues that the evidence is factually insufficient to sustain his conviction for making a false official statement. He argues that his conviction cannot stand solely upon the testimony of MM1 Kennedy. In essence, the appellant argues that MM1 Kennedy is not worthy of belief, and certainly not to the point of establishing the appellant's guilt beyond a reasonable doubt.

Although not specifically raised by the appellant, we must examine the findings for legal as well as factual sufficiency. The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). With regard to legal sufficiency, that test is easily met in this case.

The test for factual sufficiency is more favorable to the appellant. It requires this court to be convinced of an appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. 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.

In order to establish the appellant's guilt of having made a false official statement, the Government was required to prove the following four elements: (1) The appellant signed a certain official document or made a certain official statement; (2) The document the appellant signed or the statement he made was false in certain particulars; (3) The appellant knew that at the time he signed the document or made that statement that it was false; and (4) the appellant had the intent to deceive at the time he made the false statement or signed the false document. MCM, Part IV, ¶ 31b.

In spite of the evidence presented by the appellant that served to impeach the credibility of MM1 Kennedy, based upon our review of the record we are convinced beyond a reasonable doubt that the appellant substituted another person's urine sample for testing and that he signed Prosecution Exhibit 7, knowing that the urine sample he submitted was not his. We are also convinced beyond a reasonable doubt that the appellant did this because he had recently used methamphetamine and feared that if he submitted a sample of his own urine for testing that it would have tested positive for methamphetamine.

Conclusion

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

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court