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

BEFORE

Charles Wm. DORMAN **C.J. VILLEMEZ** **J.D. HARTY**

UNITED STATES

v.

Stephen C. JOLLY
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200100417 Decided 19 May 2004

Sentence adjudged 7 May 1999. Military Judge: F.A. Delzompo. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 1st Battalion, 4th Marines, 1st Marine Division (Rein), Camp Pendleton, CA.

LCDR E.J. MCDONALD, JAGC, USNR, Appellate Defense Counsel
CAPT BRUCE BOKONY, JAGC, USNR, Appellate Defense Counsel
CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LCDR ROBIN SARDEGNA, 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 wrongful use of lysergic acid diethylamide (LSD), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to 90 days confinement, forfeiture of $639.00 pay per month for three months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

We have carefully reviewed the record of trial, the appellant's five assignments of error, the Government's response, and the appellant’s reply. 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.

Impartiality of Military Judge

For his first assignment of error, the appellant contends for the first time on appeal that he was denied a fair trial, because the military judge abandoned his impartial role and became a partisan advocate for the Government. He argues that the military judge did so by questioning the Government's expert witness in a manner intended solely to elicit the predicate facts necessary to sustain the permissive inference of knowing and wrongful drug use.

The predicate facts necessary for sustaining a permissive inference of knowing and wrongful drug use have been enumerated as: (1) the controlled substance metabolite in question was not naturally produced by the body or some other legal substance ingested by the accused; (2) the permissive inference is appropriate in light of the established Department of Defense (DOD) cutoff level, the reported concentration found in the accused's urine, and other pertinent factors; and, (3) the testing methodology employed was reliable in detecting and quantifying the concentration of the metabolite in the accused's sample. These three enumerated considerations, however, are not exclusive, and the military judge may consider other factors. *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001); *see also United States v. Barnes*, 57 M.J. 626, 630-31 (N.M.Ct.Crim.App. 2002).

The Government introduced evidence at trial consisting in part of a laboratory report and testimony of an expert in the field of "forensic unrinalysis." The expert's testimony and the laboratory results were admitted without defense objection. The expert witness, a certified forensic toxicologist and lab certifying officer for the Navy Drug Screening Lab, San Diego (NDSL) described the laboratory's procedures and explained the results of the urinalysis. The witness testified that there had been three tests of appellant's sample: two immunoassay tests were used to screen the sample, plus a confirming test using gas chromatography/mass spectrometry (GC/MS) technology. The witness characterized the GC/MS as the "method required of all regulated forensic drug testing laboratories to confirm presumptive screening positive results," Record at 241, and that the GC/MS machine is "calibrated with each run." *Id*. at 242. The witness testified that the GC/MS analysis of appellant's sample revealed 2,871 picograms of LSD per milliliter of urine and that the established confirmation cutoff for LSD is 200 picograms per milliliter of urine. *Id*. at 242-44.

Thus, the Government expert covered the second and third predicate requirements for a permissive inference of a knowing and wrongful drug use. That is, the appellant's urine sample contained LSD far above the DOD confirmation cutoff level for a positive report, and the testing methodology used was the same as required in all regulated laboratories for confirming the presence of drugs or their metabolites in human urine.

After both trial and defense counsels' questions, the military judge asked questions of the Government expert that can be summarized as follows:

1. What is LSD?
2. What does LSD do to you?
3. Is 2,871 picograms per milliliter a relatively high result?
4. Are you detecting LSD or its metabolite?
5. Is there any way LSD can get in your system without ingesting it?
6. Are you aware of any other substance that could cause LSD to be detected in the urine?
7. Would the appellant still be experiencing any effect of the LSD at the time he provided his urine sample?

Record at 250-52.

A basic right of military due process is the right to "a judge who appears impartial throughout [an accused's] court-martial." *United States v. Cooper,* 51 M.J. 247, 250 (C.A.A.F. 1999); *United States v. Grandy*, 11 M.J. 270, 277 (C.M.A. 1981); RULE FOR COURTS-MARTIAL 801(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Discussion. It has, however, "long been the law" that the military judge has the power to question witnesses. *United States v. Dock*, 40 M.J. 112, 127 (C.M.A. 1994). The military judge does not lay aside his impartiality by asking appropriate questions "to clarify factual uncertainties." *United States v. Reynolds*, 24 M.J. 261, 264 (C.M.A. 1987).

In *United States v. Acosta*, 49 M.J. 14 (C.A.A.F. 1998), our superior court held that "Article 46, UCMJ, 10 U.S.C. § 846, and [Military Rule of Evidence] 614, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), provide wide latitude to a military judge to ask questions of witnesses called by the parties." *Acosta,* 49 M.J. at 17. Furthermore, "[n]either Article 46 nor [Military Rule of Evidence] 614 precludes a military judge from asking questions to which he may know the witness' answer; *nor do they restrict him from asking questions which might adversely affect one party or another*." *Id.* at 17-18 (emphasis added).[1]

But, the court also recognized that the military judge walks a "tightrope" in examining a witness. *United States v. Ramos,* 42 M.J. 392, 396 (C.A.A.F. 1995). He may elicit or clarify relevant information to assist the court-martial members in their deliberations, but must do so in a way that

[1] *See United States v. Martin*, 189 F.3d 547, 554 (7th Cir. 1999)(stating that "the rule concerning judicial interrogation is designed to prevent judges from conveying prejudicial messages to the jury. It is not concerned with the damaging truth that the questions might uncover.")

"scrupulously avoid[s] even the slightest appearance of partiality." *Id.* (quoting *United States v. Shackelford*, 2 M.J. 17, 19 (C.M.A. 1976)). The court noted long ago that the members expect counsel to be partisan advocates and will view the presentation of evidence and arguments by counsel in that light. *Grandy*, 11 M.J. at 277. On the other hand, members' "expectation of impartiality on the part of the judge is so great that, when he does take sides, the members can hardly avoid being influenced substantially by *his* advocacy." *Id*. (emphasis in original).

In this case, the military judge's questioning established: (1) that LSD use causes an altered state of perception of reality; (2) LSD can only appear in urine if ingested or placed directly into the urine sample; (3) there are no other substances that can cause a positive result for LSD; and, (4) the user would not experience the drug's effects three hours after usage. Of the three predicate factors, the military judge's questions only established the first predicate; the LSD found in the urine sample admitted into evidence was not naturally produced by the body or by the ingestion of a substance other than LSD.

We examine the military judge's questions in the context of the entire record to determine if they have placed in doubt the "legality, fairness, and impartiality" of the court-martial proceedings under an objective "reasonable person" standard. *Ramos*, 42 M.J. at 396 (quoting *United States v. Reynolds*, 24 M.J. 261, 265 (C.M.A. 1987)); *see also Acosta,* 49 M.J. at 18 (holding that the standard is whether a reasonable person viewing questions of the military judge in proper context would have doubts about judge's impartiality). We answer this question in the negative for the following reasons: (1) the military judge did not intrude upon the members' fact-finding function; (2) the military judge's questions did not go to the appellant's credibility; (3) the military judge did not express a substantive opinion on the state of the evidence; and, (4) the military judge gave the standard instruction concerning comments of the judge.

In summary, we find that the military judge did not demonstrate partiality before the members when he questioned the Government's expert witness. His questions did not create a reasonable doubt as to the legality, fairness, and impartiality of this court-martial proceeding. Accordingly, we resolve this issue against the appellant.

Permissive Inference

For his next three assignments of error, the appellant challenges the permissive inference instruction, because: (1) it conflicted with the appellant's overriding presumption of innocence; (2) the instruction was constitutionally defective, because it put the factual inference on the same level as the appellant's overriding presumption of innocence; and, (3) there

was no rational basis in the record to establish the appellant knew he had used LSD. We will address these issues together and resolve them consistent with our decision in *United States v. Hildebrandt*, ___ M.J. ___ , No. 200000911 (N.M.Ct.Crim.App. March 22, 2004).

In *Green*, a decision handed down after the appellant's court-martial, our superior court revisited the question of whether the Article 112a, UCMJ, elements can be satisfied with a positive urinalysis test alone. Answering that question in the affirmative, the court placed considerable faith in the military judge as the "gatekeeper" for the admission of such evidence. *Id*. at 80. The admission of urinalysis results combined with expert scientific testimony permits an inference of knowing and wrongful use. *Id*.

Our superior court follows the permissive inference standard laid down in *Ulster County Court*; *see United States v. Pasha,* 24 M.J. 87, 90 (C.M.A. 1987). Under the *Ulster County Court* test, a permissive inference will violate due process "'only if . . . there is no rational way' that the triers of fact could reach the conclusion suggested by the inference [beyond a reasonable doubt] under the facts of the case." *Pasha*, 24 M.J. at 90 (citing *Ulster County Court*, 442 U.S. at 157).

Since the military judge may admit scientific urinalysis evidence only in those cases where the three criteria outlined in the *Green* decision, or other assurances of reliability, are present, *see Green,* 55 M.J. at 80, we are convinced that, in general, the drawing of a permissive inference of knowing and wrongful use, based upon such scientific evidence, is not irrational and is, thus, not unconstitutional. Although the case at bar was tried before the *Green* decision, the scientific evidence presented was more than sufficient to meet that test.

The appellant insists that more evidence must be shown to satisfy the reasonable doubt standard or to overcome the appellant's overriding presumption of innocence. We disagree. Contrary to the appellant's position, the reasonable doubt standard does not require the prosecution to exclude every possible explanation for the presence of LSD in the appellant's system. *See United States v. Gray,* 51 M.J. 1, 56 (C.A.A.F. 1999), *cert. denied*, 532 U.S. 919 (2001)(approving an instruction issued to the members that the proof need not "exclude . . . every hypothesis or possibility of innocence but every fair and rational hypothesis except that of guilt").

The military judge instructed the members regarding the possibility of drawing the permissive inferences of knowing and wrongful drug use. Despite having multiple opportunities to voice any complaints, the appellant permitted this instruction to reach the members without objection. The absence of an objection forfeits any subsequently claimed error in the absence of plain error. "Plain error" as a legal term requires that an error in

fact exists, that it be plain or obvious, and that it materially prejudices the substantial rights of the appellant. *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999); *United States v. Fuson*, 54 M.J. 523, 526 (N.M.Ct.Crim.App. 2000).

The military judge instructed the members, in part, as follows:

> Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary; however, the drawing of this inference is not required.
>
> . . . [K]nowledge by the accused of the presence of the substance and knowledge of its contraband nature may be inferred from the surrounding circumstances. You may infer from the presence of the LSD metabolite [sic] in the accused's urine that the accused knew he used LSD; however, the drawing of any inference is not required.
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> . . . [T]he accused may not be convicted of the use of a controlled substance if the accused did not know he was actually using the substance. The accused's use of the controlled substance must be knowing and conscious. For example, if a person places a controlled substance into the accused's drink or food without the accused becoming aware of the substance's presence, then the accused's use was not knowing and conscious.

Record at 410. The military judge also instructed the members on voluntary intoxication, reasonable doubt, the presumption of innocence, and that the Government's burden never shifts to the appellant. Record at 411-16; Appellate Exhibit XXXVIII.

The military judge correctly instructed the members that the prosecution bore the burden of proving the appellant's guilt beyond a reasonable doubt. He also correctly instructed the members that they may draw the two permissive inferences of knowledge and wrongfulness. The military judge made it very clear that the members need not draw either inference. We see no error in these instructions, plain or otherwise. The appellant's assignments of error, therefore, are denied.

Post-Trial Delay

For his last assignment of error, the appellant asserts there has been unexplained and excessive post-trial delay in his case. The appellant does not allege any prejudice from this delay, and asks this court for unspecified relief.

For unexplained reasons, it took the Government more than 11 months to serve the trial defense counsel with the record of trial. It then took more than 6 months for the staff judge advocate to prepare his recommendation. This court received the record almost 2 years after the trial.

An "appellant has a right to a speedy post-trial review of his case." *United States v. Williams*, 55 M.J. 302, 305 (C.A.A.F. 2001). In reviewing a case where there is an alleged excessive delay in its post-trial processing, this court must determine whether the excessive delay materially prejudiced the appellant, thus requiring a remedy under Article 59(a), UCMJ. *United States v. Tardif*, 57 M.J. 219, 223-24 (C.A.A.F. 2002). If there is no material prejudice to the appellant, then this court is "required to determine what findings and sentence should be approved, based on all the facts and circumstances reflected in the record, including the unexplained and unreasonable post-trial delay." *Tardif*, 57 M.J. at 224; *see* Art. 66(c), UCMJ. However, "[a]ppellate relief under Article 66(c) should be viewed as the last recourse to vindicate, where appropriate, an appellant's right to timely post-trial processing and appellate review." *Tardif*, 57 M.J. at 225.

The appellant bears the burden of proving that the post-trial delay was unreasonable. However, should this court find there was unreasonable post-trial delay in this case, unreasonable delay alone does not entitle the appellant to relief under Articles 59(a) or 66(c), UCMJ. First, the appellant does not claim he has suffered any actual prejudice, and thus is not entitled to any relief under Article 59(a), UCMJ. Second, the appellant fails to indicate what, if anything, in the record entitles him to relief under Article 66(c), UCMJ. *Tardif*, 57 M.J. at 224.

In this case, the appellant can only cite unreasonable delay as a basis for relief. While we agree that the post-trial processing of this case is not a model of efficiency, and that it should not take almost 2 years for this court to receive a record of trial for review, the appellant fails to establish any other facts or circumstances in the record as a basis for relief. We find, therefore, that this is an inappropriate case for this court to exercise its broad powers under Article 66(c), UCMJ.

Conclusion

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

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court