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

BEFORE

CHARLES Wm. DORMAN **C.J. VILLEMEZ** **R.C. HARRIS**

UNITED STATES

v.

Patrick D. BROWN
Electronics Technician Second Class (E-5), U.S. Navy

NMCCA 200100881 Decided 23 January 2004

Sentence adjudged 29 September 2000. Military Judge: K.J. Allred. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Japan.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LtCol DWIGHT H. SULLIVAN, USMCR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USNR, Appellate Defense Counsel
LT FRANK L. GATTO, JAGC, USNR, Appellate Government Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel
LCDR R.W. SARDEGNA, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was tried by general court-martial before a military judge sitting alone on a single specification alleging the introduction of methylenedioxymethamphetamine (ecstasy) on board a vessel with the intent to distribute. This is a mixed plea case. The appellant pled guilty to the introduction of ecstasy on board a military installation. The military judge accepted his guilty plea. The Government then went forward in an attempt to prove that the appellant introduced the ecstasy on board a vessel and that he did so with the intent to distribute it. Eventually, the military judge found the appellant guilty of introduction of ecstasy on board a military installation with the intent to distribute. The appellant's crime violated Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The adjudged and approved sentence includes a bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to pay grade E-1.

In this appeal the appellant has raised a single assignment of error. He argues that the evidence is factually insufficient to prove beyond a reasonable doubt that he had the intent to distribute ecstasy. After carefully considering the record of trial, the appellant's assignment of error, and the Government's response, we concur. Following our corrective action, we conclude that the findings and sentence as modified by this decision are correct in law and fact and that no error remains that is materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of Evidence

The appellant's sole assignment of error is that the evidence is factually insufficient to prove that he intended to distribute ecstasy. Appellant's Brief of 12 July 2002 at 3. 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 accused's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). 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, the briefs of counsel, and have given no deference to the factual determinations made at the trial level. Based on that review, we are not convinced beyond a reasonable doubt that the appellant intended to distribute ecstasy.

In order to convict the appellant of the wrongful introduction of ecstasy on board a military installation with the intent to distribute it, the Government was required to prove three elements beyond a reasonable doubt. Those three elements are: (1) that the accused introduced 34 tablets of ecstasy on board a military installation; (2) that the introduction was wrongful; and (3) that the introduction was with the intent to distribute the ecstasy. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), Part IV, ¶37B(6). Since this is a specific intent offense, the Government was required to prove that the appellant intended to distribute the ecstasy he introduced. *United States v. Brown*, 19 M.J. 63, 64 (C.M.A. 1984). The Government was not, however, required to prove that the appellant intended to distribute the ecstasy on board a military installation. It would be sufficient to simply prove that the appellant intended to distribute it at some time and at any location. *United States v. Pitt*, 35 M.J. 478, 480 (C.M.A. 1992); *United States v. Dinzy*, 39 M.J. 604, 605-06 (A.C.M.R. 1994).

The appellant's guilty plea to the wrongful introduction satisfied the Government's burden of proof with respect to the

first two elements. *United States v. Grijalva*, 55 M.J. 223, 227 (C.A.A.F. 2001). With respect to the third element, the Government can normally rely upon a permissive inference based upon circumstantial evidence. The MCM specifically provides:

> *Intent to distribute.* Intent to distribute may be inferred from circumstantial evidence. Examples of evidence which may tend to support an inference to distribute are: possession of a quantity of substance in excess of that which one would be likely to have for personal use; market value of the substance; the manner in which the substance is packaged; and that the accused is not a user of the substance. On the other hand, evidence that the accused is addicted to or is a heavy user of the substance may tend to negate an inference of intent to distribute.

MCM, Part IV, ¶37c(6).

In this case, the Government presented no direct evidence of the appellant's intent to distribute ecstasy. Instead, they relied upon circumstantial evidence and this permissive inference. At trial, however, the Government did not argue the inference to the military judge based on either the quantity of the substance[1] or its market value. Record at 98-100. During its opening statement, the Government commented on the quantity of pills and the street value being about $1,500.00. The primary thrust of the Government's circumstantial case, however, was the fact that the appellant had distributed ecstasy in the past.

To prove the appellant's intent to distribute, the Government introduced two pretrial statements made by the appellant and the testimony of Seaman Caudill. At the time he testified, Seaman Caudill was awaiting an administrative separation for his use of ecstasy. He testified that he had seen the appellant distribute ecstasy a few times in rave clubs in Sinjuku, Japan (a suburb of Tokyo). Seaman Caudill did not know if the individuals who received the ecstasy were in the Navy or if they were civilians. Seaman Caudill received ecstasy from the appellant one time while at a rave club. The appellant had told him that he distributed to "rave people" in Tokyo and Yokosuka, and that he sold ecstasy. Seaman Caudill had only been to two rave clubs with the appellant. He also testified that he had asked the appellant for ecstasy on one occasion and

[1] The only reference the trial counsel made to the quantity of the substance was as follows: "a smart person doesn't walk onto a berthing barge with 34 tablets of ecstasy for personal use unless there's a good reason, and that reason is he intended to distribute at least some of those pills." Record at 99. The obvious suggestion here was that the appellant intended to distribute the ecstasy in the berthing area. There is no evidence in the record, however, suggesting that the appellant ever distributed drugs on board a military installation.

the appellant did not give him any. The one time that the appellant gave him some ecstasy, Seaman Caudill did not pay for it. Seaman Caudill never saw the appellant attempting to sell ecstasy, rather people would come up to the appellant and ask him for it. Seaman Caudill never saw any money change hands. He further testified that the price of an ecstasy pill was $40-50 dollars for one pill. When Seaman Caudill used ecstasy he would normally use one pill a night. The most he had used was two pills, but he had seen an individual take eight pills at one time. Record at 79-93. This is the only evidence in the record concerning the "normal" dosage for individual use.

The appellant's pretrial statements contain the following relevant information:

> I have provided ecstasy to friends in the past. I first provided ecstasy to Japanese nationals in Shibuya, Tokyo, Japan as well as members of the Armed Forces. I can only partially identify some sailors . . . but I am unable to remember their names. Some of the ways I facilitated sailors in obtaining ecstasy is while at a night club (Rave) when someone would ask me for ecstasy I would give them some or show then (sic) where to obtain the drug. I would only provide ecstasy to people on rare occasions.
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> . . .
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> I have facilitated some U.S. Naval personnel in obtaining ecstasy, a narcotic drug. When I returned from deployment on 21 Apr 00, I provided TM3 Scott Cassell, USN, NFI and STG3 Hill, USN, NFI with two (2) pills each of ecstasy for 4,500 yen. During the time frame of mid-Jun 00, I provided SN Caudill, USN and Kenny, USN, NFI with one(1) and two (2) pills respectively for 4,500 yen. I provided the ecstasy in Roppongi, Tokyo, Japan. At no time have I sold and/or provided ecstasy on board the USS John S. McCain.

Prosecution Exhibit 1. Following introduction of the Government's evidence, the defense rested without presenting any evidence on the merits. During argument on findings, the trial defense counsel argued that the appellant is a heavy user of ecstasy, using as many as 8 pills on a weekend spree.[2]

[2] This information was not admitted into evidence on findings, but was contained in the appellant's sworn statements to the military judge during the providence inquiry into his guilty plea to introduction of ecstasy onto a military installation. Since this information was not relevant to the providence of the plea, it was not evidence before the military judge concerning the issue of intent to distribute. Accordingly, we have not considered this information in our deliberations. *Grijalva*, 55 M.J. at 227-28.

Before the Government can rely upon a permissible inference there must be either "expert testimony or other evidence in the record providing a rational basis for [the] infer[ence] . . . ." *United States v. Graham*, 50 M.J. 56, 58-59 (C.A.A.F. 1999). *See also United States v. Campbell*, 52 M.J. 386, 388 (C.A.A.F. 2000). Since there is no direct evidence of the appellant's intent to distribute, the Government seeks to rely upon the inference that the quantity of ecstasy the appellant possessed and its market value, indicate that he possessed more than was needed for personal use, and thus the appellant had the intent to distribute the ecstasy he introduced onto the base. We find the evidence wanting to support that inference.

First, there is no expert testimony in this record concerning the normal dosage for ecstasy. Although Seaman Caudill testified that *he* normally only used one pill a night, he also testified that he sometimes would take two, and that he had seen as many as eight taken at one time. Second, there is no testimony or evidence concerning the appellant's level of usage of ecstasy, or even if he used it at all.[3] Third, although the appellant had distributed ecstasy in the past, the evidence is that he did so on rare occasions. Fourth, there is no evidence concerning the quantity of ecstasy the appellant possessed on those rare occasions that he had distributed it in the past. Fifth, while true that the appellant had distributed ecstasy in the past, this record provides little information about those distributions and no information about the appellant's own appetite for the drug. Without such additional information we cannot rely upon the inference.[4] Sixth, in light of our experience in reviewing countless drug cases, the 34 tablets of ecstasy the appellant possessed is not, in and of itself, a sufficient quantity to allow for reliance on the inference. Accordingly, we find that the Government has failed to meet its burden of proof to provide a rational basis for the inference. Thus, we also find that the evidence of record is insufficient to sustain the appellant's conviction of the aggravating element of intent to distribute in this case.

Conclusion

We affirm the appellant conviction, consistent with his plea of introduction of 34 tablets of ecstasy on board U.S. Fleet Activities Yokosuka. As a result of our action on the findings,

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[3] While the appellant did testify during the providence inquiry that he had used 6-8 tablets of ecstasy on a weekend, Record at 68, that information is not "evidence." *Grijalva*, 55 M.J. at 227-28.

[4] We note the well-crafted argument of the trial defense counsel concerning the appellant's prior distribution. "It's akin to having two quarters in my pocket and somebody asking me for 50 cents so they can buy a coke. Yeah. I might give it to him, but does that mean with every quarter that I carry in my pocket that I specifically intend to give that money to someone who might ask me for a coke?" Record at 101-02.

we have reassessed the sentence in accordance with the principles of *United States v. Cook*, 48 M.J. 434, 438 (C.A.A.F. 1998), *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986).

Upon reassessment of the sentence, we approve only so much of the sentence as extends to confinement for 6 months, forfeiture of all pay and allowances for six months, reduction

to pay-grade E-1, and a bad-conduct discharge. The supplemental promulgating order will reflect the findings and sentence, as modified by this decision.

Judge VILLEMEZ and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court