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.

Jeremy D. THOMPSON
Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200101956 Decided 20 January 2004

Sentence adjudged 5 January 2001. Military Judge: L.K. Burnett. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Barracks, 8th and "I" Streets, S.E., Washington, DC.

DAVID P. SHELDON, Civilian Defense Counsel
LT MICHAEL J. NAVARRE, JAGC, USNR, Appellate Defense Counsel
LT C.J. HAJEC, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A special court-martial, composed of both officer and enlisted members, convicted the appellant, contrary to his pleas, of using disrespectful language towards a superior non-commissioned officer in the execution of his office, the wrongful distribution of a controlled substance (ecstasy) on divers occasions, and disorderly conduct, in violation of Articles 91, 112a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 891, 912a, and 934. The members sentenced the appellant to 30 days confinement, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority (CA) approved the adjudged sentence and, except for the bad-conduct discharge, ordered the punishment executed.

In accordance with our statutory obligations under Articles 59(a) and 66(c), UCMJ, we have examined the record of trial, the appellant’s assignments of error, and the Government’s response. We agree with the appellant that both the staff judge advocate’s

recommendation (SJAR) and the court-martial order (CMO) incorrectly report the findings of the court-martial. We shall order corrective action below in our decretal paragraph.

Jurisdiction

In the appellant's first assignment of error, he asserts that the court-martial was without proper jurisdiction to try him because qualified personnel were improperly excluded from panel selection. The appellant avers that this court should set aside the findings and the sentence and order a rehearing. We disagree.

Whether the CA properly selected the members of the appellant's court-martial is a question of law and is reviewed *de novo*. *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). RULE FOR COURTS-MARTIAL 912(b)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.) provides that failure to make a timely motion of improper selection waives that issue, unless the improper selection "constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2)."

Here, the appellant never raised the issue of improper selection of members at trial. Therefore, we find that the appellant waived his right to raise this issue. R.C.M. 912(b)(3). Despite the appellant's claim on appeal that the process allegedly used in his case was in violation of R.C.M. 502(a), Appellant's Brief of 21 Jan 2003 at 7, he does not assert that the CA failed to make his selections based on the qualifications of R.C.M. 502(a)(1), which are "age, education, training, experience, length of service, and judicial temperament." Rather, the appellant claims that the CA selected members from a pool of names that was improperly generated, based, in part, on rank, and, in one instance, on gender. Appellant's Brief of 21 Jan 2003 at 6-7. It is this court's opinion that even if the *venire* pool had been so restricted, such a restriction would not automatically constitute a failure by the CA to apply the proper criteria in his independent selection of members.

Nonetheless, even if this court were not to apply waiver, the burden is still on the appellant to establish that qualified personnel were improperly excluded from the selection process. *Kirkland*, 53 M.J. at 24. This, we find, the appellant has failed to do.

Finally, with regard to the appellant's jurisdictional assignment of error, he offers no evidence to show from what

pool or list of names the CA actually selected the members that he specifically detailed. The appellant claims that the *venire* pool was improperly restricted. He, however, fails to provide any evidence of how the CA selected potential members, or that the CA did select members from the pool in question.

In the absence of any evidence of improper member selection, we find that the appellant's claim is based on speculation. Speculation, without actual evidence, is not enough to "establish" a violation of Article 25, UCMJ, pursuant to *Kirkland*, 53 M.J. at 24. *See United States v. Townsend*, 12 M.J. 861 (A.C.M.R. 1981)(concluding that the mere absence of lower-ranking enlisted members from the panel is not enough to show improper exclusion). Furthermore, "it is proper to assume that a [CA] is aware of his duties, powers, and responsibilities and that he performs them satisfactorily." *United States v. Townsend*, 12 M.J. 861, 862 (A.F.C.M.R. 1981)(citing, *inter alia*, *United States v. Baker*, 42 C.M.R. 370, 373 (A.C.M.R. 1970), *rev. denied*, 42 C.M.R. 355 (1970)). The appellant provides no evidence to overcome that presumption here. For all of these reasons, the appellant fails to meet his burden of establishing the improper exclusion of qualified personnel from the selection process. Accordingly, we decline to grant relief.

Sufficiency of Evidence

In the appellant's second assignment of error, he asserts that the evidence is both factually and legally insufficient to sustain his conviction for distributing ecstasy on divers occasions. The appellant avers that this court should set aside the findings of guilty to Specification 2 of the Additional Charge, dismiss the Additional Charge, and order a rehearing on the sentence. We disagree.

Military courts of criminal appeals must determine both the factual and legal sufficiency of the evidence presented at trial. *United States v. Turner,* 25 M.J. 324, 325 (C.M.A. 1987); *see* Art. 66, UCMJ. The test for factual sufficiency is whether, after weighing all of the evidence in the record of trial and making allowances for the lack of personal observation, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. The test for legal sufficiency is whether, considering the evidence in light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt. *Id.* The term reasonable doubt does not mean the evidence must be free from conflict. *United States v. Reed,* 51 M.J. 559, 562 (N.M.Ct.

Crim.App. 1999). The fact-finder may "believe one part of a witness' testimony and disbelieve another." *United States v. Harris,* 8 M.J. 52, 59 (C.M.A. 1979).

During the appellant's contested trial, two former Lance Corporals (LCpl), now Privates (Pvt), Nathan Vick and Adam Hartman, both U.S. Marine Corps, gave uncontradicted testimony, albeit contested, that the appellant sold each of them ecstasy on separate occasions from his barracks room. The appellant asserts that Pvts Vick and Hartman should not be believed, because they testified at the appellant's court-martial in return for limitations on punishment at their own disciplinary proceedings for violations of controlled-substance offenses. Appellant's Brief of 21 Jan 2003 at 11, 13. The appellant further claims that Pvts Vick and Hartman are not credible, because their pretrial statements differed from their trial testimony. Id. at 12-13.

We, however, find that a reasonable fact-finder, nonetheless, could find the appellant guilty of distributing ecstasy on divers occasions based on the evidence presented at trial. Further, we are convinced beyond a reasonable doubt that the appellant wrongfully distributed ecstasy on divers occasions, and find that the evidence of his guilt was, therefore, both factually and legally sufficient. Accordingly, we decline to grant relief.

In the appellant's third assignment of error, he asserts that the evidence is both factually and legally insufficient to sustain his conviction for disorderly conduct. The appellant avers that this court should set aside the findings of guilty to Charge II and its Specification, dismiss Charge II, and order a rehearing on the sentence. We disagree.

On Saturday, 3 June 2000, the appellant, assigned to the Marine Barracks, U.S. Naval Academy, Annapolis, Maryland, was part of a ceremonial detail for the funeral of a recently deceased Lieutenant Colonel (LtCol), U.S. Marine Corps (Retired). One of the section leaders on the funeral detail was Sergeant (Sgt) Joshua Gobin, U.S. Marine Corps. According to Sgt Gobin, after the funeral detail arrived at the funeral site, the funeral took significantly longer to start than expected. Record at 67. Sgt Gobin testified that the members of the detail, all in uniform, were standing in a corridor waiting for the funeral to begin, when "an elderly woman escorted by another woman" passed, heading toward the funeral. *Id.* When the women were 4 to 5 feet behind the appellant, the appellant, his voice

raised to what Sgt Gobin described as a "conversational" level of volume, said: "I hope this fucking guy died a slow and painful death." *Id.* at 67-68. According to Sgt Gobin, one of the civilian women turned and looked at him, and he described the woman's expression as one of "awe." *Id.* at 68.

The appellant's argument for his innocence stems from the testimony of LCpl Jacob Mowrey, U.S. Marine Corps. Appellant's Brief of 21 Jan 2003 at 16. While LCpl Mowrey's testimony does somewhat minimize the appellant's misconduct, it does not specifically contradict that of Sgt Gobin. Sgt Gobin's testimony that the two civilian women were 4 to 5 feet behind the appellant when the appellant spoke is consistent with their being 10 to 15 feet away by the time the group of Marines "dispersed" and "turned around," as testified to by LCpl Mowrey. Record at 171. Further, the woman whose expression Sgt Gobin described as one of "awe," might have no longer been wearing this expression by the time LCpl Mowrey observed her. Because of this, LCpl Mowrey's testimony provides no reason to disbelieve the clear and unequivocal testimony of Sgt Gobin. Nor is there any evidence of any other reason to disbelieve Sgt Gobin. It is this court's opinion that it was shown at trial that the appellant, by making his statement under the circumstances in which he made it--namely, as a member of a funeral detail in a church and in the presence of civilian guests of the funeral--was guilty of disorderly conduct of a nature to bring discredit on the armed forces.

We, therefore, find that a reasonable fact-finder could find the appellant guilty of disorderly conduct based on the evidence presented at trial. Further, we are convinced beyond a reasonable doubt that the appellant committed the offense of disorderly conduct, and find that the evidence of his guilt was, therefore, both factually and legally sufficient. Accordingly, we decline to grant relief.

Convening Authority's Action

In the appellant's fourth assignment of error, he asserts that he is entitled to a new post-trial proceeding because the CA was erroneously told that the appellant was convicted of using ecstasy, when the Government actually withdrew and dismissed Specification 1 of Charge II, and where the CA did not consider the appellant's clemency submission prior to taking action on the appellant's record. The appellant avers that this court should set aside the sentence and order new post-trial processing. We only agree that the SJAR and the CMO reported an

erroneous finding. We shall order the issuance of a supplemental action below in our decretal paragraph.

In Specification 1 of the Additional Charge, the appellant was charged with wrongfully using ecstasy on divers occasions. Add'l Charge Sheet. At the conclusion of the Government's case, the Government having not put on any evidence of wrongful use of ecstasy on any occasion by the appellant, the military judge, without objection, granted the trial counsel's request to withdraw and dismiss Specification 1 of the Additional Charge. Record at 154-55.

We agree with the appellant that the SJAR incorrectly reported that the members found the appellant guilty of Specification 1 of the Additional Charge. SJAR of 19 Jul 2001. This error was subsequently repeated in the CMO. CA's Action and CMO of 19 Sep 2001.

On 23 July 2001, the trial defense counsel was served a copy of the SJAR. Receipt for SJAR of 23 Jul 2001. On 27 August 2001, pursuant to R.C.M. 1105, the trial defense counsel submitted clemency matters for the CA's consideration. In light of the fact that the appellant did not submit any comments regarding the accuracy of the SJAR, we find any error in the SJAR to be forfeited because the incorrect recitation of findings, in and of itself, does not rise to the level of a plain error that prejudiced the appellant's substantial rights. R.C.M. 1106(f)(6). *United States v. Lowry*, 33 M.J. 1035, 1038 (N.M.C.M.R. 1991)(holding that appellate intervention is necessary only "to prevent a miscarriage of justice, protect the reputation and integrity of the court, or to protect a fundamental right of the accused")(*quoting United States v. Frady*, 456 U.S. 152, 163 (1982)).

On the other hand, the error in the CMO should be corrected. Although such errors are harmless, the appellant is entitled to have his official military records correctly reflect the results of his court-martial. *United States v. Crumpley,* 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998). Moreover, the CMO is the means by which the CA's action is promulgated to the public at large. R.C.M. 1114(a)(2). Accordingly, both the appellant and the public have a vested interest in the accuracy of the CMO.

The appellant also asserts that the CA failed to consider his post-trial matters. On 27 July 2001, after having signed a receipt for a copy of the SJAR, the trial defense counsel requested an extension of time to submit matters pursuant to

R.C.M. 1105 and 1106. On 31 July 2001, the trial defense counsel's 20-day extension request was granted. Extension Request Approval Endorsement of 31 Jul 2001.

The appellant, nonetheless, claims that the CA did not consider the appellant's clemency petition before taking action. Appellant's Brief of 21 Jan 2003 at 17. The appellant points out that the CA did not state in his action that he had considered the clemency petition. *Id.* at 16. As this court has previously held, however, "R.C.M. 1107(b)(3)(A)(iii) requires the [CA] to consider an accused's clemency petition but does not require him to 'highlight his consideration of the petition.'" *United States v. Zaptin*, 41 M.J. 877, 880-81 (N.M.Ct.Crim.App. 1995)(quoting *United States v. Barnette*, 21 M.J. 749, 751 (N.M.C.M.R. 1985)). "In the absence of evidence to the contrary, we will presume the CA has read the clemency matters submitted by the appellant prior to taking his action." *Zaptin*, 41 M.J. at 881 (citing *Barnette*, 21 M.J. at 751). This court has further held that where, as in this case, the clemency petition is attached to the record of trial and predates the CA's action, there is "more than a mere presumption that the [CA] considered the appellant's petition." *United States v. Doughman*, 57 M.J. 653, 655 (N.M.Ct.Crim.App. 2002)(quoting *Zaptin*, 41 M.J. at 751). The appellant adduces no evidence that the CA failed to consider his petition. Therefore, pursuant to *Zaptin* and *Doughman*, it is presumed that the successor CA considered the appellant's clemency petition, and that the error asserted by the appellant did not occur. Accordingly, we decline to grant relief.

Sentence Appropriateness

In the appellant's fifth assignment of error, he asserts that his sentence to a bad-conduct discharge is inappropriately severe. The appellant avers that this court should set aside the bad-conduct discharge. We disagree.

A court-martial is free to impose any legal sentence that it determines is fair and just. *United States v. Turner*, 14 C.M.A. 435, 437, 34 C.M.R. 215, 217 (1964); R.C.M. 1002. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). This requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States*

v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 10 C.M.A. 102, 106-07, 27 C.M.R. 176, 180-81 (1959)).

The wrongful distribution of ecstasy on divers occasions offense committed by the appellant was serious and deserving of serious punishment. Aggravating the offense was the fact that, on each occasion, the appellant distributed the controlled substance from his barracks room for money. It is well-established that misconduct involving illegal substances "has special military significance." *United States v. Parrish*, 20 M.J. 665, 667 (N.M.C.M.R. 1985).

We have carefully considered the mitigating factors raised by the appellant during trial, during post-trial review, and on appeal. We do not believe the sentence, as adjudged and approved by the CA, was inappropriately severe. Granting sentence relief at this point would be to engage in clemency, a prerogative reserved for the CA. *Healy*, 26 M.J. at 395-96. Apart from clemency, the appellant has articulated no basis to disturb his sentence. The appellant received individualized consideration based on his character and the seriousness of his offenses, which is all the law requires. *United States v. Rojas*, 15 M.J. 902, 919 (N.M.C.M.R. 1983). As such, we decline to grant relief.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the convening authority. We direct that the supplemental court-martial order accurately reflect that Specification 1 of the Additional Charge was withdrawn and dismissed.

Chief Judge DORMAN and Judge VILLEMEZ concur.

For the Court

R.H. TROIDL
Clerk of Court