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

BEFORE

C.A. PRICE **M.J. SUSZAN** **R.C. HARRIS**

UNITED STATES

v.

James D. HARRIS II
Corporal (E-4), U.S. Marine Corps

NMCCA 9900265 Decided 30 April 2004

Sentence adjudged 6 February 1997. Military Judge: R.L. Rodgers. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Quantico, VA.

Maj PHILLIP D. SANCHEZ, USMC, Appellate Defense Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

The appellant stands convicted of disrespect towards, and disobedience of, a noncommissioned officer, and wrongful use of marijuana, in violation of Articles 91 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 891 and 912a. A general court-martial comprised of officer and enlisted members sentenced the appellant to confinement for 30 days, reduction to pay grade E-3, forfeiture of $1,196.70 for one month, and a bad-conduct discharge. Except for the forfeiture of 70 cents, the convening authority approved the sentence as adjudged.

We have considered the record of trial, the assignments of error,[1] and the Government's response. We conclude that the

[1] I. THE URINE SAMPLE RETAINED BY NDSL, AND FROZEN FOR ONE YEAR, SHOULD HAVE BEEN DISCARDED AFTER APPELLANT'S NEGATIVE RESULTS WERE REPORTED TO HIS COMMAND. IT WAS ERROR FOR THE MILITARY JUDGE TO HAVE ADMITTED THE RESULTS FROM A RETESTING CONDUCTED ON THE FORZEN [SIC] SAMPLE.

II. CPL HARRIS'S CONSENT TO HAVE HIS URINE SAMPLE TESTED TERMINATED AFTER THE NDSL INITIALLY REPORTED HIS RESULTS WERE NEGATIVE. IT WAS ERROR FOR THE MILITARY JUDGE TO HAVE ADMITTED THE RESULTS FROM A RETESTING CONDUCTED ON THE FORZEN [SIC] SAMPLE.

findings and the 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.

Appellate History

This case is before us for the second time. In our first review, this court, applying the permissible inference standards set forth in *United States v. Campbell*, 50 M.J. 154, 161 (C.A.A.F. 1999)[*Campbell I*], *supplemented on reconsideration*, 52 M.J. 386, 388 (C.A.A.F. 2000)[*Campbell II*], determined that the military judge committed plain error in instructing the members that they could rely on a permissive inference to conclude that the appellant knowingly used marijuana. Accordingly, in pertinent part, we set aside the findings of guilty of wrongful use of marijuana and authorized a rehearing. *United States v. Harris*, 54 M.J. 749 (N.M.Ct.Crim.App. 2001).

The Judge Advocate General of the Navy certified the following issue to the Court of Appeals for the Armed Forces:

> Whether the lower court erred in finding that, based upon this court's decisions in *United States v. Campbell*, the members could not receive the permissive inference instruction of knowing and wrongful use of marijuana based upon the positive urinalysis, despite the fact that the evidence at trial included eyewitness testimony of knowing use.

CAAF Docketing Notice of 2 Mar 2001. Our superior court answered the certified question in the affirmative, set aside our decision, and remanded the record of trial to this court "for further consideration in light of [*United States v. Green,* 55 M.J. 76 (C.A.A.F. 2001)]." *United States v. Harris*, 55 M.J. 358 (C.A.A.F. 2001)(summary disposition). We will now comply with that remand.

Facts

In this court's previous opinion, we set forth a detailed description of the facts of this court-martial, which we incorporate for purposes of this opinion. *Harris*, 54 M.J. at

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III. THE FINDING OF GUILTY TO CHARGE II, SPECIFICATION 1 WAS LEGALLY AND FACTUALLY INSUFFICIENT.

III. [SIC] WHETHER ARTICLE 112a'S PERMISSIVE INFERENCE OF WRONGFUL USE VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

IV. [SIC] WHERE MEMBERS COULD REASONABLY INTERPET [SIC] THE WRONGFUL USE INSTRUCTION IN AN UNCONSTITUTIONAL MANNER, THIS COURT MUST HOLD THE INSTRUCTION UNCONSTITUTIONAL.

V. [SIC] THE MILITARY JUDGE COMMITTED PLAIN ERROR WHEN HE INSTRUCTED THE MEMBERS THAT THEY COULD RELY ON A SEQUENCE OF PREMISSIVE [SIC] INFERENCES TO FIND THAT APPELLANT HAD WRONGFULLY USED MARIJUANA.

750-52. Additional facts necessary to understand the assignments of error will be discussed below.

Discussion

The first two assignments of error address the admissibility of urinalysis test results for the sample given by the appellant within 24 hours of the time he was reported to have smoked marijuana. Apparently anticipating an objection to these test results, the trial counsel filed a pre-trial motion in limine to obtain a ruling on admissibility. However, the trial defense counsel offered no objection to either the original test result or the retest of the frozen sample, thereby forfeiting the issues raised in the first two assignments of error. Thus, the appellant is entitled to no relief under these assignments of error absent a finding of plain error. *United States v. Tanksley*, 54 M.J. 169, 173 (C.A.A.F. 2001). Based on our review of the record, we conclude that the military judge did not commit plain error. The assignments of error are without merit.

The appellant next contends that the evidence is legally and factually insufficient. We have carefully considered the evidence of record and the appellant's arguments. We conclude that the evidence is legally and factually sufficient.

Finally, the appellant asserts three assignments of error peculiar to prosecutions of wrongful use of drugs based on positive urinalysis test results. These assignments of error have previously been considered and rejected. *United States v. Green,* 55 M.J. 76, 80-81 (C.A.A.F. 2001); *United States v. Hildebrandt*, __ M.J. __, No. 200000911 (N.M.Ct.Crim.App. 22 Mar 2004). Finding no reason to depart from these precedents, we reject these assignments of error in this case.

Conclusion

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

Judge SUSZAN and Judge HARRIS concur.

For the Court

R.H. TROIDL
Clerk of Court