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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **R.C. HARRIS**

UNITED STATES

v.

Brandon L. SHEASLEY
Dental Technician Third Class (E-4), U.S. Navy

NMCCA 9901396 Decided 12 April 2004

Sentence adjudged 22 February 1999. Military Judge: R.J. Kreichelt. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Naval Base Jacksonville, Jacksonville, FL.

CDR GEORGE F. REILLY, JAGC, USN, Appellate Defense Counsel
LtCol DWIGHT SULLIVAN, USMCR, Appellate Defense Counsel
LT J.R. GOODMAN, JAGC, USNR, Appellate Defense Counsel
LT JASON GROVER, JAGC, USN, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel
LT ROSS W. WEILAND, JAGC, USNR, Appellate Government Counsel

HARRIS, Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of attempting to possess lysergic acid diethylamide (LSD) with intent to distribute and conspiracy to possess LSD with intent to distribute, in violation of Articles 80 and 81, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 881. The members sentenced the appellant to confinement for 6 months, reduction to pay grade E-1, total forfeiture of pay and allowances, and a bad-conduct discharge. The convening authority approved the adjudged sentence and, except for the bad-conduct discharge, ordered it executed.

We have carefully examined the record of trial, the appellant's single assignment of error asserting that the evidence is factually insufficient to support his conviction on

the charges, his brief on two issues[1] specified by this court, the Government's responses, the appellant's replies, and the oral arguments of appellate counsel. Because we have a reasonable doubt as to the factual sufficiency of the evidence, we find the appellant not guilty of Charges I and II and their respective specifications.

Background

On 1 April 1998, Naval Criminal Investigative Service (NCIS) Special Agent (SA) James Lennon set up a "reverse sting" drug transaction through a cooperating witness (CW), involving the appellant's roommate, Fireman (now Fireman Recruit (FR)) Stephen Maloney, U.S. Navy, and an unknown individual, purportedly the appellant. The CW contacted FR Maloney and arranged to take him and another unknown individual to a Mayport Village, FL, boat landing to meet an alleged drug dealer and to buy a large quantity of LSD from the dealer. SA Lennon was operating undercover in the role of the drug distributor. After the drug transaction was set up on the telephone between the CW and FR Maloney, FR Maloney and a man identified by FR Maloney as the appellant went to a local bank ATM and withdrew cash to pay for the LSD. They then purportedly returned to their apartment in Neptune Beach, FL and waited for the CW. A short time after the CW's arrival, the appellant, FR Maloney, and the CW left in the CW's car and drove to the boat landing, in the vicinity of Mayport, FL, where they met SA Lennon.

After brief introductions were made by the CW, a drug deal was struck between FR Maloney and SA Lennon. FR Maloney agreed to purchase 200 hits of LSD from SA Lennon for $340.00. FR Maloney held the money and exchanged it with SA Lennon for what he believed to be LSD. The appellant and FR Maloney were subsequently apprehended at the drug transaction site by local police and special agents from NCIS. SA Lennon videotaped the "reverse sting" operation. The sound portion of the videotape, however, is inaudible. The appellant cannot be seen nor heard on the videotape. At no time before their apprehension did FR Maloney transfer any part of the counterfeit LSD to the appellant.

I. WHETHER CIVILIAN DEFENSE COUNSEL'S REPRESENTATION OF APPELLANT AT TRIAL WAS INEFFECTIVE?

II. WHETHER INCONSISTENT FINDINGS WERE RENDERED BY THE COURT-MARTIAL MEMBERS WHEN THEY FOUND APPELLANT GUILTY OF THE SPECIFICATION OF CHARGE I WHERE THEY ALSO FOUND HIM GUILTY OF THE SPECIFICATION OF CHARGE II BY EXCEPTING THE LANGUAGE FROM THE OVERT ACTS, WHICH WAS THE SAME LANGUAGE INSTRUCTED UPON AS AN ESSENTIAL ELEMENT OF THE SPECIFICATION OF CHARGE I?

Before trial, the appellant was detailed a military defense counsel to represent him. The appellant also hired a civilian defense counsel to act as lead counsel in his defense. The civilian counsel had never before represented a service member at a court-martial. During the trial, the trial counsel prosecuting the appellant's case elicited from a Government witness evidence of uncharged misconduct of unrelated drug distributions by the appellant to the co-accused, FR Maloney. The civilian defense counsel objected and moved the court for a mistrial. The military judge told the civilian defense counsel that he would grant the motion if that was what the defense wanted. After consultation with the appellant, the civilian defense counsel withdrew his motion for a mistrial. A limiting instruction was given to the members by the military judge and the appellant's trial proceeded.

Factual Sufficiency of the Evidence

In his sole assignment of error, the appellant contends that the evidence is factually insufficient to prove beyond a reasonable doubt that he either attempted to possess LSD with intent to distribute or conspired to possess LSD with intent to distribute. We agree.

This court has an independent statutory obligation to review each case *de novo* for legal and factual sufficiency, and may substitute its own judgment for that of the trial court. *See* Art. 66, UCMJ; *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). The test for legal sufficiency is whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found that all the essential elements were proven beyond a reasonable doubt. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). 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 appellant's guilt beyond a reasonable doubt. *Reed*, 54 M.J. at 41; *Turner*, 25 M.J. at 325; *see* Art. 66(c), UCMJ. In exercising the duty imposed by this "awesome, plenary . . . power," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), this court may judge the credibility of witnesses, determine controverted questions of fact, and substitute its judgment for that of the military judge or court-martial members. Art. 66(c), UCMJ.

To support a conviction for attempting to possess LSD with intent to distribute, the Government must establish the following four elements beyond a reasonable doubt:

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 4.b. The elements of the intended offense under Article 112a, UCMJ, are:

(1) That the accused possessed a certain amount of a controlled substance;

(2) That the possession was wrongful; and

(3) That the possession was with the intent to distribute.

Id. at ¶ 37.b.(6). To support a conviction for conspiracy to possess LSD with intent to distribute, the Government must prove the following two elements beyond a reasonable doubt:

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

Id. at ¶ 5.b.

We have carefully examined all of the evidence admitted on the merits. While we conclude that the evidence is legally sufficient, we find that it was factually deficient with respect to the two contested offenses because there is insufficient evidence of *mens rea*. We are therefore not convinced, beyond a reasonable doubt, that the appellant is guilty of these two offenses.

First, there is no evidence contained in the record of an agreement between the appellant and FR Maloney, or anyone else for that matter, of any specific intent on the appellant's part to distribute any procured LSD. While the agreement at the boat landing between FR Maloney and SA Lennon was for the sale of 200 hits of LSD to FR Maloney from SA Lennon, no credible evidence is presented on the issue of the appellant's entering into an agreement with the specific intent to distribute any procured LSD. Second, other than FR Maloney's testimony, there is no

evidence contained in the record that the appellant even intended to personally possess any LSD or have FR Maloney possess any LSD on the appellant's behalf, much less distribute any LSD. Third, while there is evidence in the record that the appellant was present at his Neptune Beach apartment when FR Maloney and the CW were having conversations about procuring LSD later that night, there is no persuasive evidence that the appellant was a participant in those same conversations or that the participants discussed the appellant's participation in procuring LSD or having FR Maloney procure LSD on his behalf. Fourth, while there is evidence in the record that the appellant was present in the backseat of the CW's car during the drive from Neptune Beach to the boat landing, there is no evidence that the appellant was involved in any conversations between the CW or FR Maloney in the car as it pertains to any procurement of LSD that night for the appellant's possession or for FR Maloney to possess LSD on behalf of the appellant. Fifth, while the appellant was present at the boat landing during the transaction between FR Maloney and SA Lennon, there is no evidence of the appellant's participation in that transaction.

The crux of the Government's case hinges on FR Maloney's testimony. While we have only the cold record to go on, we have no trouble concluding that FR Maloney was not the most reliable or credible witness. We surmise that there were conscious or unconscious attempts by FR Maloney to embellish his somewhat inconsistent testimony to the appellant's detriment. Also, the witness stated that he may have been technically drunk the evening in question because he had been drinking beer before the transaction. The witness stated that he felt like he was a ".08." Record at 449. As a result, the witness could not remember the specifics of any of the conversations in question.

In conclusion, the Government established only that the purportedly incriminating conversations between the appellant and FR Maloney could have occurred--not that they did, in fact, occur. The record is completely devoid of any real evidence substantiating any ATM transactions by the appellant and/or FR Maloney, other than the testimony of FR Maloney himself, and of the CW stating that FR Maloney told him that "they" had to go to an ATM machine to get money. Additionally, there is no evidence in the record that the appellant's fingerprints were found on the money.

Furthermore, two days before the occurrence of the charges in question, FR Maloney wrongfully used a controlled substance (ecstasy). One day later, FR Maloney was the operator of an elevator on board an aircraft carrier when a civilian was killed, which placed FR Maloney under investigation, thereby resulting in a urinalysis that subsequently exposed his illegal substance abuse. As a result, FR Maloney agreed to cooperate with the Government in establishing cases against other service members, including the appellant. This agreement with the Government

permitted the appellant to enter pleas of guilty to 5 of 8 charges against him in exchange for a pretrial agreement to suspend 12 months of the 24 months ultimately adjudged at his court-martial. Finally, the defense, in its case on the merits, put on two witnesses who each testified as to FR Maloney's reputation on board ship for untruthfulness. Therefore, there is simply not enough evidence to convince us, beyond a reasonable doubt, that the appellant committed these two offenses as charged. We will take appropriate corrective action in our decretal paragraph.

Conclusion

The findings and the sentence are set aside. The Charges are dismissed.[2] "[A]ll rights, privileges, and property affected by an executed part of a court-martial sentence which has been set aside or disapproved, except for an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered. . . ." Art. 75(a), UCMJ. A new trial or rehearing is not authorized in this case.

Chief Judge DORMAN and Senior Judge PRICE concur.

For the Court

R.H. TROIDL
Clerk of Court

[2] Concerning the specified issues, we find the civilian defense counsel's representation to not have been ineffective. In light of our findings above, we do not reach the remaining issue specified to appellate counsel.