UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant TERRY A. FLETCHER
United States Air Force

ACM 34945 (f rev)

23 May 2007

Sentence adjudged 17 May 2006 by GCM convened at Patrick Air Force Base, Florida. Military Judge: Gary M. Jackson and Harvey A. Kornstein.

Approved sentence: Reduction to E-4 and a reprimand.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Colonel Niki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Terry L. McElyea, Major John N. Page III, and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Colonel Gerald R. Bruce, Lieutenant Colonel Lance B. Sigmon, Lieutenant Colonel David N. Cooper, Major Matthew W. Ward, and Captain Jamie L. Mendelson.

Before

BROWN, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

This case is before us for the second time. In *United States v. Fletcher*, ACM 34945 (A.F. Ct. Crim. App. 27 Feb 2004) (unpub. op.), this Court affirmed the appellant's conviction and sentence. On appeal, our superior court set aside our decision and returned the case for a new hearing. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). At the rehearing the appellant was tried by a general court-martial comprised of officer and enlisted members. Contrary to his pleas, the appellant was convicted of one

specification of use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court-martial sentenced the appellant to a reprimand and reduction to the grade of E-4. The convening authority approved the findings and sentence as adjudged.

The appellant contends: (1) the military judge erred when he denied trial defense counsel's motion to dismiss the positive urinalysis test result and evidence derived therefrom; and (2) his conviction should be set aside because the urinalysis bottles that contained his samples were lost or destroyed.[1] We find the appellant's contentions without merit and affirm.

Motion to Suppress

At trial, the appellant moved to suppress evidence obtained from his urinalysis, namely, a laboratory report indicating that he had ingested cocaine. He argued that the search was unlawful and thus the report was inadmissible. The military judge denied the motion, and the appellant now alleges the military judge erred. We find no basis for the appellant's contentions.

The appellant was assigned to Patrick Air Force Base (AFB), Florida. On 9 April 2001, he was randomly selected for urinalysis pursuant to the base drug testing program. The appellant contends that because his commander did not personally order the urinalysis, and did not delegate the authority to do so, the order he received to submit his sample was not valid.

The Patrick AFB drug testing program implements the provisions of Air Force Instruction (AFI) 44-120, *Drug Abuse Testing Program*, (1 July 2000). This AFI lays out the responsibilities of the various persons and agencies involved in the program. It requires installation commanders to establish a testing program that reaches all military personnel assigned to the installation, is administered in accordance with applicable regulations, and is commensurate with the drug threat in the area. AFI 44-120, ¶ 4.7.1.

The AFI establishes a minimum number of inspections per month and expresses a preference for random selection of the persons to be inspected, but gives installation commanders discretion to conduct additional tests if local conditions warrant. *Id.* at ¶ 4.7.1.2. The instruction provides for a Demand Reduction Program Manager (DRPM) at each installation, responsible for coordinating the drug testing program. *Id.* at ¶ 4.7.4. The DRPM generates lists of persons selected randomly for inspection and notifies so-called "trusted agents" within each unit on the installation when a person assigned to that unit is selected for inspection. *Id.* at ¶ 4.7.4.7.[2] Unit commanders are responsible for

[1] The appellant raised both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[2] Examples of persons who may serve as "trusted agents" are unit commanders, first sergeants, or other designated individuals. AFI 44-120, ¶ 4.7.4.7.

ensuring that persons randomly selected for inspection are ordered to report for testing. *Id.* at ¶¶ 4.7.6.1-4.7.6.3.

The appellant argues that there was a fatal variance in the way he was directed to provide his sample: the letter he received ordering him to report for testing was prepared by a Senior Master Sergeant (SMSgt) F, the trusted agent for the unit, and appellant's unit commander did not delegate any authority to SMSgt F to so order the appellant. The unit commander never ordered the appellant to provide the sample and was unaware that the appellant had been selected that day to provide a sample.

We review the military judge's decision to admit the appellant's urinalysis results for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). An abuse of discretion occurs when the military judge's ruling is based on: (1) an incorrect understanding of the law; or (2) clearly erroneous findings of fact. *United States v. Hollis*, 57 M.J. 74, 79 (C.A.A.F. 2002). We find no abuse here.

AFI 44-120 sets forth a comprehensive regulatory framework for conducting urinalysis inspections. The appellant was selected to provide his sample as part of an installation-wide inspection. In such a case, AFI 44-120 does not vest the unit commander with any role in the random selection process and does not grant them discretion to either concur or decline to order a member so selected to report for testing.[3] In this instance, the unit commander's responsibility was merely to notify the appellant that he had a duty to report for inspection and require him to comply. The means by which the appellant's unit commander did so was not expressly prohibited by AFI 44-120.

The military judge made findings of fact that are fully supported by the evidence and not clearly erroneous. His key finding was that the appellant was properly required to submit to a random inspection ordered by the installation commander. This finding was well-founded and also not clearly erroneous. *See United States v. McCollum*, 58 M.J. 323, 332 (C.A.A.F. 2003) (findings not clearly erroneous when sufficient evidence to support them exists in the record). The military judge also concluded that SMSgt F's actions in directing the appellant to provide a urine sample were simply a means to ensure the appellant complied with the installation commander's order to submit to a random urinalysis. This conclusion is likewise fully supported by the evidence and not clearly erroneous. The appellant's urinalysis results were admissible pursuant to Mil. R. Evid. 313.

[3] *See generally* AFI 44-120, ¶ 4.7.6.

Lost or Destroyed Evidence

At the appellant's first trial, conducted 24-28 September 2001, the specimen bottles from his two urinalysis tests were introduced into evidence. After the trial, color photographs of the bottles were taken, and the bottles were stored within the legal office. During the summer of 2004, the legal office had to evacuate twice for hurricanes. On those occasions, in preparation for the hurricanes, legal office personnel moved furniture and other items to prevent possible flood damage. In November 2004, the legal office evacuated for asbestos abatement. When they were able to return in February 2005, they noticed furniture and other items were misplaced. By the time of appellant's rehearing, conducted 15 May 2006, the specimen bottles from his previous court-martial could not be located.

The trial defense counsel moved to suppress the results of both urinalysis tests, asserting the bottles contained chain of custody information and that the bottles may provide indications of tampering or adulteration. The military judge denied the motion, but indicated that his ruling did not prohibit the defense counsel from highlighting for the members the missing evidence. The appellant now asserts that his due process rights were violated by the government's failure to preserve the specimen bottles. He contends that the lost bottles impaired his ability to inspect the bottles for any signs of irregularities or chain of custody issues, and that they "could have contained exculpatory evidence."

Our standard of review on this issue is de novo; however, we review the military judge's findings of fact on a clearly erroneous basis. *United States v. Blaney*, 50 M.J. 533, 543 (A.F. Ct. Crim. App. 1999) (citing *United States v. Burris*, 21 M.J. 140, 145 (C.M.A. 1985)). We have examined the record and conclude that the military judge's findings of fact are fully supported by the evidence and not clearly erroneous. We adopt them as our own for purposes of ruling on the assignment of error.

Failure to preserve evidence does not entitle an appellant to relief unless three conditions are present: (1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the appellant would be unable to obtain comparable evidence by other reasonable means; and (3) the government destroyed the evidence in bad faith. *California v. Trombetta*, 467 U.S. 479, 488-89 (1984); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). Based on the facts in the record, we conclude the appellant has failed to meet this test. We also conclude that the specimen bottles were not of such central importance that they were essential to the appellant receiving a fair trial. *See* Rule for Courts-Martial 703(f)(2); *United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). On the basis of the entire record, the approved findings and sentence are

AFFIRMED.

Senior Judge MATHEWS participated prior to his retirement.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Chief Court Administrator