UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CARL L. KEY
United States Air Force

ACM 34965

29 October 2003

Sentence adjudged 24 October 2001 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Rodger A. Drew Jr.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Major Terry L. McElyea and Captain Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, Lieutenant Colonel Lance B. Sigmon, Major Shannon J. Kennedy, and Captain Steven R. Kaufman.

Before

BRESLIN, STONE, and MOODY
Appellate Military Judges

STONE, Senior Judge:

At a general court-martial convened at Shaw Air Force Base (AFB), South Carolina, from 17 to 24 October 2001, a panel of officer and enlisted members convicted the appellant, contrary to his pleas, of a single use of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge and reduction to E-1.

After filing a single assignment of error claiming the military judge erred in admitting uncharged misconduct, the appellant filed a supplemental assignment of error asking this Court to order post-trial discovery. In support of this supplemental error, the appellant asked this Court to consider a declaration from his trial defense counsel. For the reasons below, we affirm.

I. Background

The appellant was assigned to the 15th Air Support Operations Squadron at Fort Stewart, Georgia. On 26 April 2001, the entire squadron was assembled and ordered to provide urine samples for drug testing. Soon thereafter, the appellant's urine was forensically tested at Brooks AFB, Texas. These tests indicated the presence of 3,4-methylenedioxymethamphetamine (MDMA), the metabolite of ecstasy, in the amount of 8322 nanograms per milliliter. The Department of Defense cutoff for reporting a urine sample as positive for MDMA is 500 nanograms per milliliter.

The primary evidence against the appellant included the testimony of an expert in toxicology, pharmacology, and urine drug testing, as well as several witnesses who verified the chain of custody procedures followed in the collection, shipping, and testing of the appellant's urine specimen. In addition, three witnesses testified to their observation of the appellant's nervous and agitated demeanor at the collection site on 26 April 2001.

One of these demeanor witnesses was Staff Sergeant (SSgt) Langley, who was present at the collection site and testified about a nervous comment the appellant made that morning. She further testified about the uncharged misconduct the appellant complains of in his first assignment of error. Moreover, the appellant's pursuit of post-trial discovery relates to evidence that he anticipates would have impeached this same witness. Thus, a review of her role in the case is necessary for a full understanding of both issues raised on appeal.

SSgt Langley was an information specialist assigned to the appellant's squadron and was assisting the Air Force Office of Special Investigations (AFOSI) in undercover drug investigations. These investigations targeted several members of the squadron, but not specifically the appellant. On 31 March 2001, SSgt Langley went to a club in Savannah, Georgia, with an AFOSI undercover agent known as "Amy." The women purchased ecstasy from Airman McKenzie, another airman from the squadron. SSgt Langley described these pills as smaller than aspirin and bearing the imprint of the letter "E."

Upon completing the transaction, SSgt Langley and "Amy" left the club and met with other AFOSI agents to process the evidence and write statements. SSgt Langley then returned to her home. In the early morning hours, she received a call from Airman McKenzie, who was calling to see if she was okay. At trial, she testified that Airman McKenzie told her the appellant had nine additional pills of ecstasy, and that a short while later the appellant got on the telephone. According to SSgt Langley, she asked him, "So you have pills?" and the appellant responded "Yeah." SSgt Langley told the men she would come over to Airman McKenzie's apartment.

Immediately after hanging up, however, she contacted her AFOSI handlers to advise them of this conversation and to see if they wanted to set up an undercover operation. The AFOSI agent apparently indicated it was too problematic under such short notice and elected not to pursue it. Because SSgt Langley did not want to raise any suspicion about not going to Airman McKenzie's apartment, she decided to move her vehicle in the event someone checked on her. Upon returning from moving her vehicle, she had a voice mail message stating, "Langley, this is Key. I was just calling to see what was taking you so long."

The appellant's defense counsel vigorously challenged the testimony of SSgt Langley. He cross-examined SSgt Langley at some length, and at one point in time asked her about any compensation she may have received from the AFOSI:

> Q: Did OSI ever just give you money so you could go out and club hop?
>
> A: Well, when you say give me money, you sound like as if they were paying me. They gave me money because I had to pay a babysitter, and also if I had to buy drinks for whoever was around, yes, I did get money for those things.
>
> Q: Okay, on more than one occasion?
>
> A: To assist with the investigation.

Trial defense counsel also submitted documents indicating that AFOSI expended $206.25 on SSgt Langley.

The appellant's overall defense strategy was two-fold: (1) challenge the reliability of the drug collection and testing process and (2) raise the affirmative defense of innocent ingestion. The latter defense was raised through the testimony of the appellant's long-time girlfriend. She testified that on the night prior to the squadron inspection, she and the appellant went to Hurricanes, a bar they regularly frequented. During the course of the night, she said, the appellant drank most of the contents of a 750-milliliter bottle of Canadian whiskey. She testified he became ill and complained of a headache. She said she obtained what she thought were two aspirins from an unknown bar patron and gave them to the appellant. The appellant argued these aspirin may have actually contained MDMA and would account for the MDMA metabolites in his urine the next day.

II. Uncharged Misconduct

The appellant argues that the military judge erred in admitting, over defense objection, the testimony concerning the appellant's possession of MDMA three weeks

before the alleged use. The appellant contends this evidence was inadmissible as uncharged misconduct because it was unreliable, irrelevant, and unduly prejudicial.

We review a military judge's decision to admit evidence for an abuse of discretion. *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Judges abuse their discretion if their findings of fact are clearly erroneous or their conclusions of law are incorrect. *Id.*

"[E]vidence which is offered simply to prove than an accused is a bad person is not admissible" under Mil. R. Evid. 404(b). *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989). "Mil. R. Evid. 404(b), however, is a rule of inclusion not exclusion." *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002). "The sole test under Mil. R. Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime . . . ." *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000) (quoting *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989)), *overruled in part on other grounds, United States v. Inong*, 58 M.J. 460 (C.A.A.F. 2003). "In addition to having a proper purpose, the proffered evidence must meet the standards of Mil. R. Evid. 104(b), 402, and 403." *Humpherys*, 57 M.J. at 90.

In *Reynolds*, our superior court adopted a three-pronged test incorporating the combined requirements of these rules. Under this test, we ask ourselves:

> (1) whether the evidence reasonably supports a finding by the court members that the appellant committed prior crimes, wrongs, or acts; (2) what fact of consequence is made more or less probable by the existence of this evidence; and (3) whether the probative value is substantially outweighed by the danger of unfair prejudice.

Reynolds, 29 M.J. at 109. "If the evidence fails to meet any one of the three tests, it is inadmissible." *Id*. Testing SSgt Langley's testimony against these standards, we conclude that the military judge did not err.

The standard for meeting the first test is quite low. *United States v. Dorsey*, 38 M.J. 244, 246 (C.M.A. 1993). The appellant called several witnesses who were present at Airman McKenzie's apartment to contradict SSgt Langley's recollection of the phone call, but their own ability to observe the appellant throughout the evening was drawn into serious question. On the other hand, SSgt Langley immediately reported the conversation to her AFOSI handling agent, a prior consistent statement of considerable merit. Thus, we hold SSgt Langley's testimony adequately and reasonably supported a finding that the appellant admitted he had ecstasy pills prior to his urine test.

As to the second test, we must determine how this admission made it more or less likely the appellant used the same drug three weeks later. The military judge instructed the court members they could consider the telephone call

> for the limited purpose of its tendency, if any, to show the accused may have had access to MDMA a few weeks later at the time of the alleged offense, or to show that the accused would have had sufficient knowledge of MDMA such that he would not have mistaken that an MDMA pill was aspirin.

The appellant invites our attention to *United States v. Graham*, 50 M.J. 56 (C.A.A.F. 1999), in support of his contention that the military judge erred. In *Graham*, the appellant raised a "general denial" to knowing use of marijuana when his urine tested positive for the metabolites of marijuana. *Id.* at 59. The government attempted to rebut this general denial by showing the appellant's urine had tested positive for marijuana four years earlier. Our superior court held this was improper because the results of the prior urinalysis, without more, failed to prove or disapprove the likelihood the accused in *Graham* would test positive four years later. *Id*. at 58. Moreover, our superior court found it significant that the accused in *Graham* did not raise specific circumstances indicating he might have unknowingly ingested marijuana.

Unlike a stand-alone urinalysis test result, the uncharged misconduct in this case provides a clear factual predicate upon which this Court can determine its probative value to the facts at issue. Thus, this testimony could permissibly be used to establish the appellant's familiarity with the very drug he is charged with using such that it would be less likely he would mistake an aspirin for an ecstasy pill. Moreover, the appellant's possession of ecstasy pills three weeks prior to his urine test suggests that the pills may have been the source of the metabolites in the appellant's urine. To be guilty of wrongful use of ecstasy would have required access to ecstasy, and SSgt Langley's testimony not only provides evidence of where he may have obtained the drug he used, but also negates the possibility the source was from some unknown bar patron.

Finally, with respect to the danger of unfair prejudice under Mil. R. Evid. 403, we note that the military judge has "wide discretion" in applying this rule. This Court exercises "great restraint" in reviewing a military judge's Mil. R. Evid. 403 ruling if his or her reasoning is articulated on the record. *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997). Indeed, the military judge concluded the amount of time involved in presenting this information would not be unnecessarily long or become a distraction for the court members. He further determined the testimony was highly probative of the issues before the court and concluded it was not "the type of evidence that is just simply going to cause the court members to discount all other evidence they receive. In other words, it's not explosive type evidence." Further, in light of the military judge's "clear, cogent, correct, and complete instructions to the court members regarding the use of

[SSgt Langley's] testimony," the appellant has not demonstrated unfair prejudice. *See Tanksley*, 54 M.J. at 177. Thus, we conclude the military judge did not abuse his discretion in admitting SSgt Langley's testimony concerning the telephone call.

III. Post-trial Discovery

In support of his request for court-ordered post-trial discovery, the appellant provided an affidavit from his trial defense counsel. The affidavit relies entirely on hearsay statements attributed to AFOSI Special Agent Walb, a colleague of the trial defense counsel at his most recent assignment. Trial defense counsel states he was talking with AFOSI Special Agent Walb about a variety of professional matters when the subject of SSgt Langley came up. In his declaration to this Court, trial defense counsel states:

> SA Walb indicated to me that Langley had made out pretty good for her work with OSI. Surprised, I inquired what he meant by that, and Walb indicated that Langley was paid a significant amount of incentive money after the cases she worked were resolved. He could not recollect the amount of money that Langley was paid, but thought it could have been from a couple hundred to a thousand or more dollars, over and above the pocket and expense money Langley admitted to at trial. Walb definitely left me with the impression that it was a significant amount of money. Walb said he knew that Langley was paid some money, because he coordinated on those actions in his role as the primary criminal investigator at the [AFOSI detachment] during the relevant time frame.

The appellant asks this Court to order post-trial discovery in the form of more affidavits or an evidentiary hearing "to determine if SSgt Langley was paid for her testimony at . . . trial." If this inquiry reveals SSgt Langley was paid, the appellant asks for "post-trial discovery to find out how much she was paid and when she learned that she was going to get paid for her testimony." Although the appellant makes it clear he is not petitioning for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873; Rule for Courts-Martial (R.C.M.) 1210, he notes that if court-ordered discovery reveals "SSgt Langley knew she was going to get paid for her testimony, Appellant requests a new trial."

It is within the authority of this Court to compel discovery upon a proper showing of need. *United States v. Lewis*, 42 M.J. 1, 5 (C.A.A.F. 1995); *United States v. Parker*, 36 M.J. 269, 271 (C.M.A. 1993). *See also* R.C.M. 1210(g)(1) (the authority considering a petition for a new trial may cause such additional investigation to be made as that authority believes appropriate). However, determining whether to order post-trial discovery, requires a "delicate balancing of interests." *United States v. Ginn*, 47 M.J. 236, 251 (C.A.A.F. 1997) (Crawford, J. concurring). The appellant believes he is entitled

to this discovery based upon *United States v. Campbell*, 57 M.J. 134 (C.A.A.F. 2002). In *Campbell*, our superior court provided the following guidance:

> When faced with a post-trial dispute over discovery relevant to an appeal, an appellate court . . . must determine whether the appellant met his threshold burden of demonstrating that some measure of appellate inquiry is warranted. In addressing this question, the court should consider, among other things:
>
> (1) whether the defense has made a colorable showing that the evidence or information exists;
> (2) whether or not the evidence or information sought was previously discoverable with due diligence;
> (3) whether the putative information is relevant to appellant's asserted claim or defense; and
> (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

Id. at 138.

Before beginning our analysis of these factors, it is important to highlight a critical distinction--the relevant factual question is not so much whether SSgt Langley received an incentive payment, but *when* she may have known she would receive such a payment. If she was unaware that she might receive an incentive payment until after trial, then the putative information is not relevant because it could not have established a bias or motive to lie at the time of trial.

We conclude the appellant has not made a "colorable showing" that SSgt Langley was aware at or before trial she would receive an incentive payment. Trial defense counsel's affidavit merely speculates that SSgt Langley knew of the existence of an incentive payment before or at trial and, in effect, asks this Court for permission to engage in little more than a fishing expedition.

Moreover, even if one assumed SSgt Langley knew of the possibility that she would receive an incentive payment, it is clear this information would have been discovered at trial with due diligence. First, trial defense counsel interviewed SSgt Langley prior to trial and then cross-examined her regarding the payments she received as reimbursement for her out-of-pocket expenses. Additionally, the military judge made extensive efforts to ensure the appellant had any impeachment evidence relating to SSgt Langley's undercover duties. Some of the documents the appellant was provided reflected the reimbursements SSgt Langley received for out-of-pocket costs; these documents were ultimately admitted into evidence. In sum, the military judge gave the

defense ample opportunity to seek out any impeachment evidence relating to SSgt Langley, and after numerous inquiries from the military judge as to whether he needed additional discovery on more specific grounds, the trial defense counsel declined to pursue the matter further.

Finally, we must consider whether there is a reasonable probability that the result of the proceeding would have been different if the information about the incentive payment had been disclosed. In making this determination, we have not considered that portion of the affidavit that summarizes a discussion trial defense counsel had with an unidentified court member after trial. Such evidence is incompetent. Mil. R. Evid. 606(b) precludes our consideration of testimony concerning court members' deliberative process except in very limited circumstances, none of which apply in this case.

After carefully reviewing the record of trial, we are convinced that the result of the proceeding would not have been different even if SSgt Langley was aware at trial she might receive an incentive payment. Given the corroboration of her demeanor testimony by two other witnesses and the prior consistent statement she made to AFOSI agents about the telephone call, we find that her credibility would not have been substantially impaired such that a different result was reasonably probable. We therefore conclude the appellant has failed to meet his threshold burden of demonstrating that appellate discovery is required.

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

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court