UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DONALD L. MILLER
United States Air Force

ACM S30395

14 December 2005

Sentence adjudged 1 May 2003 by SPCM convened at Beale Air Force Base, California. Military Judge: R. Scott Howard.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Antony B. Kolenc, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Robert V. Combs, and Major Lane A. Thurgood.

Before

MOODY, JOHNSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

Pursuant to his pleas, the appellant was convicted at a special court-martial of possessing six pills of methylenedioxymethamphetamine (ecstasy), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. He was sentenced by officer members to a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The appellant now asserts that the military judge erred in permitting a nonexpert witness to provide hearsay testimony regarding the medical effects of ecstasy. He requests this Court grant him relief by setting aside the bad-conduct discharge, or in the alternative, by setting aside the sentence and ordering a rehearing on sentence. After a careful review of the facts in this case, the military judge's

ruling and the case law, we concur with the appellant and grant relief. We reassess the sentence and set aside the bad-conduct discharge.

Background

During an Article 39a, UCMJ, 10 U.S.C. § 839a, session, while discussing the admission of exhibits and witnesses, trial counsel indicated they anticipated calling an expert, Major (Maj) Steven Cusack, during sentencing. When asked by the military judge if there was going to be any objection to the witness, trial defense counsel explained that based on her understanding that Maj Cusack would be testifying about ecstasy and its effects on the human body, she had an objection under Mil. R. Evid. 401 and 403. Specifically, her argument was that testimony regarding effects of the use of ecstasy was not relevant and unduly prejudicial in a possession case such as this. For purposes of the proffer of testimony under Mil. R. Evid. 103, Maj Cusack was called during the Article 39a, UCMJ, session. When trial counsel offered the witness as an expert, trial defense counsel stated she would challenge his qualifications as an expert through her cross-examination. The trial counsel then continued with the proffer of testimony.

After hearing the testimony, the military judge entered findings of fact and conclusions of law, ultimately admitting the evidence over the Mil. R. Evid. 401 and 403 objections that were before the court at that time. He concluded that Maj Cusack was going to "testify, generally, as to what the literature he has researched states about ecstasy and its effects on the human body." He concluded that to "disallow this testimony would only serve to let these court members operate in a vacuum and be insulated from what the court views as general information about ecstasy and its effect on individuals."[1] After conducting a balancing test under Mil. R. Evid. 403, the military judge found that the testimony was not unduly prejudicial. Further, he ruled that trial defense counsel is "certainly entitled to take up any voir dire or *further objections* concerning Maj Cusack's qualifications as an expert during the sentencing portion of the trial."

During the presentation of evidence on sentencing before the members, trial counsel offered Maj Cusack as an expert to speak about the effects of ecstasy. Defense counsel conducted voir dire, then objected to his recognition as an expert witness because he "has no specialized knowledge other than what any layperson would have, of ecstasy."

The qualifications of the witness established during the voir dire portion of the direct and cross examination were these:

[1] In the Court's discussion of the relevance of this subject matter under Mil. R. Evid. 401, he referenced this language from *United States v. Needham*, 23 M.J. 383, 384 (C.M.A. 1987).

- He performed his undergraduate work at Union University in Albany, New York;
- He obtained a Doctor of Pharmacy degree from Brown University of Rhode Island;
- He has been a pharmacist for approximately 12 years at five military bases;
- He read "about five" articles over the Internet and on medical literature searches, specifically naming the Journal of the American Medical Association, and searches on MedLine, which is a "medical research site that searches various print--books and articles and compiles them into reports";
- The sources reviewed are technical journals, but available to laypersons.
- Laypersons could go online and read these articles themselves, although they are not easily understandable;
- He has never examined anyone who had used ecstasy;
- He has never observed anyone under the influence of ecstasy.

Based on the testimony elicited from Maj Cusack during voir dire, the military judge ruled that he *would not* recognize Maj Cusack as an expert on ecstasy and its effects, but nevertheless allowed him to continue his testimony. Trial counsel then attempted three times to elicit testimony from him about how ecstasy affects the human body, each time with a question that was similar, if not identical to the previous questions asked during the proffer of testimony under Mil. R. Evid. 103. Defense counsel objected after each question on the basis that the witness was not an expert, had no specialized knowledge, and thus was not competent to testify as requested. The military judge sustained the objection each time, and after sustaining the third objection, told trial counsel that he would have to limit the testimony to the research the witness had done.[2] On the fourth attempt, trial counsel asked: "Major Cusack, based on the research that you have done, are you aware of what effects ecstasy has on the human brain?" The military judge overruled the defense counsel's objection this time, stating, "he has done some research into this and I'll let him testify based on his research." At no time did the military judge reverse his finding that the witness was not an expert.

By this time a court member asked how the determination of whether the witness was an expert should affect the members' interpretation of his testimony. The military judge deferred answering the question at that time.

Thereafter, the witness testified to what his research revealed, which is that ecstasy impacts certain portions of the brain, such as the neocortex and hippocampus which control things like conscious thought, memory, and cognitive thought. The witness testified that ecstasy causes hallucinations "by interfering with the process of

[2] After sustaining each objection, the military judge told trial counsel he could "rephrase" the question if he wanted to do so. By the third time, he directed trial counsel to limit the testimony of the witness to the research conducted.

interpretation of both visual and auditory sights and sounds," and irrational thinking. The witness testified that brain damage would be a long-term result with chronic use, but in the short term, ecstasy causes hallucinations and impacts the body's thermostat, causing it to overheat, which is "generally what kills people with the ecstasy." The witness described a type of brain damage effecting motor control, testifying it will "get fried out quite easily and you'll have what is called a Parkinsonism symptom, you know, mimicking Parkinson's disease."

On cross-examination, trial defense counsel focused the witness on distinguishing a possession offense from a use offense, asking whether any of the effects to which he had just testified would matter when someone merely possesses ecstasy in one's hand. The witness testified they would not.

After the close of the evidence, the military judge invited the member's question about the debate with respect to Maj Cusack's status as an expert. The following dialogue ensued:

> MBR [2Lt Stefanovic]: Sir, my question in particular was there was some debate before as to whether or not Major Cusack was an expert witness.
>
> MJ: Uh-huh.
>
> MBR [2Lt Stefanovic]: And you determined that he was not an expert witness, and I was curious as to how that affects how we view his testimony.
>
> MJ: Very well. Okay, members of the court, I think probably I'll cover a little bit of that in the instructions, but let me just state that you are to give Major Cusack's testimony the weight that each court member feels it deserves in determining an appropriate sentence in this case. Does each court member understand that?

There was an affirmative response from the members. No further instruction on consideration of the testimony of witnesses, expert or otherwise, was provided.[3]

[3] When there is expert witness testimony, the military judge is to instruct substantially as follows:

> You have heard testimony of (Major Cusack). He is known as an "expert witness" because his knowledge, skill, experience, training, or education may assist you in understanding the evidence or in determining a fact in issue. You are not required to accept the testimony of an expert witness or give it more weight than the testimony of an ordinary witness. You should, however, consider his qualifications as an expert.

Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 7-9-1 (15 Sept 2002).

Discussion

We review a military judge's ruling regarding admissibility of evidence under an abuse of discretion standard. *United States v. Bailey*, 55 M.J. 38, 40 (C.A.A.F. 2001). We hold that it was error under these circumstances to allow the witness to testify as to the research he conducted on the effects of ecstasy on the human body. On the record before us, this witness was permitted to offer hearsay evidence.

Evidence regarding the effects of ecstasy may be relevant in a drug case, even when there is no evidence of use. *United States v. Needham*, 23 M.J. 383 (C.M.A. 1987).[4] This Court in *United States v. Eads*, 24 M.J. 919 (A.F.C.M.R. 1987), noting that admission of DEA extracts was commonplace in military courts-martial, advised that the practice had been called into question in *Needham*. Acknowledging that this evidence may be admitted provided the appropriate Mil. R. Evid. 403 balancing test is conducted, the court observed that case law at that point had not defined the precise form and manner for getting this information before the court, stating "the message is valid, the medium is doubtful." *Id.* at 920. This Court found prejudicial error and reassessed the sentence. The rationale was not because the military judge took improper judicial notice, an issue that was not before the court, but because the military judge permitted the evidence for aggravation purposes under relaxed rules for sentencing proceedings, over the defense counsel's hearsay objection. *Id.* at 921; *see* Mil. R. Evid. 1101(c). This Court found nothing in Mil. R. Evid. 1101(c) nor Rule for Courts-Martial (R.C.M.) 1001 that provided a proper means for admitting the extract over a hearsay objection, and found the military judge had erred. *Id.*

Turning to the question of prejudice, this Court observed that *Needham* set forth several factors a reviewing court may examine to determine whether the appellant has been prejudiced by improperly admitted extracts. Among them is a limiting instruction as to how the members should consider the extracts, apprising them that the extract is intended to provide information, but not necessarily describe the abuse engaged in by the appellant. *Id*. at 922. This Court went on to suggest that redactions from the extract would also be beneficial, particularly those instances of use not fairly related to the appellant's uses as described in the stipulation of fact. Finding that the military judge in

[4] In *Needham*, the court ruled that no error occurred when the military judge took judicial notice of extracts from a Drug Enforcement Administration (DEA), Department of Justice publication, *Drug Enforcement* magazine. The extract addressed lysergic acid diethylamide (LSD) use when the appellant in that case was only charged with distribution of LSD. The court specifically addressed the Mil. R. Evid. 401 and 403 objections, noting that it was "evidence which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." *Id*. at 384 (quoting *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982)). The court went on to add that it had "some doubt whether a Drug-Enforcement-Administration publication, *as compared to a learned treatise*, meets the source requirement of Mil. R. Evid. 201(b)(2) in the context of a drug prosecution." *Id*. at 385 (emphasis added). However, this issue was not adequately developed at trial and it was not directly pursued on appeal.

Eads failed to take these mitigating measures, this Court concluded that the appellant was prejudiced and reassessed the sentence. *Id.*

Eads is significant in our analysis for another important reason besides mitigating prejudicial impact under Mil. R. Evid. 403. Concurring with *Needham* that judicial notice of extracts may be fraught with peril, this Court suggested using personnel about the base to provide background information on the same matters. The Court said:

> We offer the thought that most Air Force installations have a number of personnel assigned who have acquired *a certain amount of expertise* on the nature and effect of a variety of controlled substances. Many of these personnel could provide members with useful background information if called as witnesses. A few, unquestionably, might well be capable of relating inaccurate or misleading information. Astute trial counsel in most instances will readily identify those in the latter category well prior to trial.

Id. at 922 (emphasis added).

Taking a historical step forward, this Court again had the opportunity to consider the impact of testimony regarding the effects of drug use in *United States v. Kuhnel*, 30 M.J. 510 (A.F.C.M.R. 1990). But in this case a live witness, the Chief of Flight Medicine, testified "concerning the characteristics and general effects of methamphetamine use" and the only issue before this Court was whether the military judge had a sua sponte duty to either limit the testimony or provide a limiting instruction. *Id.* at 511. Counsel took their cues from this Court's *dicta* in *Eads,* offering the evidence through a witness rather than the extracts. But appellant defense counsel was attempting to argue that the guidance in *Eads* and *Needham*, with respect to minimization of the prejudicial effects with the use of extracts, one method being a liming instruction, placed a burden on the judge to provide a limiting instruction sua sponte. This court properly recounted that limiting instructions are but one factor in determining whether the appellant suffered prejudice with the erroneous admission *of an extract*, and that the absence of a limiting instruction does not necessarily constitute plain error. *Id*. at 512.

Again noting that the problem with this type of evidence has been with the medium, not the message, this Court went on to observe the "important distinction" between extracts and live testimony. Extracts may be given undue weight because "of their published format or perceived government sponsorship, [whereas] a live witness is subject to much closer examination . . . reducing the possibility that inaccurate or misleading information will pass to the members unchallenged." *Id.*

While witness testimony is preferred, we did not mean to say that *any* witness will do. *Kuhnel* cannot be read in a vacuum, but rather must be considered in light of its history. The theme running throughout the case law is that while the evidence may

indeed be relevant, there must be a theory of admissibility that properly brings this evidence before the fact finder. A careful reading of *Eads* suggests using a witness "who have acquired a certain amount of expertise." *Eads*, 24 M.J. at 922. Clearly, the witness in *Kuhnel* was either accepted as an expert witness or the trial defense counsel waived the issue.

In this case, we have a witness who was not recognized by the military judge as an expert witness, but was permitted to testify over defense objection. The military judge's ruling is clear to this Court, and nowhere do we see evidence that the military judge reversed his ruling. As such, we reject the government's offer to analyze this issue backwards—the evidence was admitted, therefore, the military judge must have found the witness to be an expert after all.

Accordingly, the next step in our analysis is to determine whether another "medium" exists for admissibility of this evidence. Mil. R. Evid. 701 provides the groundwork for admissibility of opinion testimony by lay witnesses. This medium is not available, however, because one criterion is clearly absent in this scenario: Opinions must be "rationally based on the perception of the witness." Mil. R. Evid. 701(a). Another criterion is even questionable: the testimony may not be based on "scientific, technical or other specialized knowledge within the scope of Mil. R. 702." Mil. R. Evid. 701(c). It is important to note a somewhat fine distinction: The witness was challenged and ruled to be not qualified as an expert witness, because *he had no specialized knowledge* after reading only five articles over the internet. We do not know and cannot say whether his discussion of the articles was based on or demonstrated "scientific, technical, or other specialized knowledge," because there is very little on the record about these five articles.[5] More importantly, Mil. R. Evid 701(c) added to and amending Mil. R. Evid. 701 in 2002,[6] prohibits us from relying on Rule 701. With this amendment, the drafters of the federal rules intended to eliminate "the risk that expert witnesses might evade Rule 702's foundational and reliability obligations by simply testifying as lay witnesses." *See* Steven A. Saltzburg, et al., *Military Rules of Evidence Manual* § 701.02[3] (5th ed. 2003). In other words, the intention was to stop the practice of offering "expert" opinion evidence without qualifying the witness under Mil. R. Evid. 702.

Under Mil. R. Evid. 803(18), experts are permitted to discuss scientific literature and the like if relied upon as a basis for their opinions in direct testimony, or called to the

[5] One article is reportedly from the American Journal of American Medicine. But while the journal may be reliable, it is important to establish the authoritativeness of the literature itself. 2 MCCORMICK ON EVIDENCE § 321 n.14 (John W. Strong ed., 1999). The other online source the witness referenced is MedLine, which is reportedly a research gathering cite. There is no evidence on the record about its reliability or the reliability of the articles it relies upon in its summaries.

[6] Mil. R. Evid. 701 was amended by application of Mil. R. Evid. 1102, which provides that the Mil. R. Evid. will be automatically amended after 18 months from the effective date of the new Federal Rule, which was December 1, 2000.

attention of the witness in cross-examination, *if the authority is established as reliable* by the witness, another expert, or by judicial notice. Mil. R. Evid. 803(18). This rule specifically provides an exception to Mil. R. Evid 802's bar against admission of hearsay evidence. When this rule is relied upon, the literature is read to the members, but not made an exhibit or published to the members.

R.C.M. 1001(c)(3) and Mil. R. Evid. 1101 provide that the Mil. R. Evid. *are* applicable to sentencing, but may be relaxed for defense extenuation and mitigation evidence, and to the same degree for prosecution rebuttal evidence. R.C.M. 1001(d). However, the relaxation of the rules of evidence does not extend to admission of testimony which does not meet "generally accepted standards of relevance, materiality, and reliability." *United States v. Boone*, 49 M.J. 187, 198 n.14 (C.A.A.F. 1998) (quoting *United States v. Gudel*, 17 M.J. 1075, 1077 (A.F.C.M.R. 1984)); *see also United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004).

Finding no alternate theory of admissibility, we find the military judge erred in admitting the testimony of Maj Cusack. We now must test for prejudice. We use a four-prong analysis, evaluating: (1) the strength of the government's case; (2) the defense theory; (3) the materiality of the evidence; and (4) the quality of the evidence. *United States v. Latorre*, 53 M.J. 179, 182 (C.A.A.F. 2000) (citing *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985)). In reviewing the record in its entirety and evaluating it under the four-pronged analysis, we find prejudice.

The government's case consisted mainly of the testimony of Maj Cusack, although there was evidence of other minor infractions from the appellant's military record. The appellant's sentencing case was a reasonably strong one of rehabilitation potential. He made a plea to be spared a punitive discharge. His trial defense counsel argued against the punitive discharge. His exhibits demonstrated positive rehabilitation potential. Further, the record reflects that the members may have been considering a sentence without a punitive discharge. Forty minutes after the members entered their closed deliberations on sentencing, the court was called upon to answer a two-part question from one of the members: "May we recommend a discharge other than a bad-conduct discharge?" and "If we don't elect to recommend a bad-conduct discharge, what, if any, type of discharge may the accused's commander recommend after sentencing?"[7]

Finally, we also find it compelling that another court member asked during the same break in deliberations whether the appellant was under suspicion of drug *use* prior to this event. While the judge admonished that there was no evidence of that before them, he did not further instruct *how* Maj Cusack's testimony on the dangers of use of ecstasy should be considered in this possession case, when it is apparent the member was

[7] The military judge did give an appropriate instruction in response to these questions.

concerned about the appellant's *use* of ecstasy.[8] An instruction as to how to consider the testimony in response to the member's question would have diminished, if not extinguished altogether, the inference that there *had* been prior use, but it was just *not before them.*

We conclude that the members were confused, at best as to how to weigh the testimony on the effects of using ecstasy in this possession case. At a minimum, a limiting instruction to the members for the reasons noted above, *Kuhnel,* 30 M.J. at 512, as well as a "culling out" of the extreme examples to more tailor the evidence to the facts of this case, *Eads,* 24 M.J. at 922, may have mitigated the impact. But this is speculative on our part, and rely as we must on the record, we have reason to doubt that the punitive discharge would have been part of the sentence in this possession case but for the error.

The quality of the evidence is the subject of this opinion--inadmissible hearsay is not reliable evidence, even if the subject matter is highly relevant. Accordingly, we hold that in this case, testimony regarding the effects of use of ecstasy, through the medium employed, was improper and prejudicial[9].

Conclusion

Finding prejudicial error, we must now determine whether we can reassess the sentence in accordance with the criteria set forth in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986). We are convinced that, absent any error, the court members would have sentenced the appellant to at least confinement for 3 months and reduction to E-1. We find this sentence appropriate under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

Accordingly, we affirm only so much of the sentence as provides for confinement for 3 months and reduction to E-1. The findings and the sentence, as reassessed, are correct in law and fact and no other error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence, as reassessed, are

AFFIRMED.

[8] Trial counsel referenced the hallucinations, poor judgment and brain damage, and then asked the members to speculate what the appellant was going to do with the six tablets of ecstasy before drawing an objection. There is no evidence in the record at all regarding use of ecstasy. The member's concern with respect to use clearly comes from the inadmissible testimony.

[9] There is no argument before us, and we make no opinion on whether this type of evidence is *always* admissible. We rely on military judges to conduct the appropriate balancing under Mil. R. Evid. 403.

JOHNSON, Judge (concurring in part and dissenting in part):

I concur with the majority that it was prejudicial error for the military judge to have permitted the lay witness to provide testimony concerning the effects of ecstasy. However, I do not agree with the majority's remedy. I would not have set aside the punitive discharge. I therefore dissent.

OFFICIAL

ANGELA M. BRICE
Clerk of Court