UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SHAZAD A. MOHAMMED
United States Air Force

ACM S30838

30 October 2006

Sentence adjudged 12 January 2005 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Daryl E. Trawick.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Captain Daniel J. Breen.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

Charged, inter alia, with one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, the appellant entered pleas of not guilty and elected to be tried by a panel of officer and enlisted members. Prior to his arraignment, the appellant made a timely motion to suppress the prosecution's key piece of evidence: a urinalysis report indicating that he had ingested cocaine. The appellant argued that his urine was unlawfully obtained, and the was report therefore inadmissible. He renews that argument on appeal. Finding no basis for the appellant's contentions, we affirm.

Background

The appellant was assigned to Moody Air Force Base (AFB), Georgia. On 24 February 2004, he and other Moody AFB personnel were randomly selected for urinalysis under the auspices of the base's drug testing program. As a result of the appellant's leave and duty schedule, he did not provide a urine sample until 9 March 2004. That sample tested positive for benzoylecognine (BE), a metabolite of cocaine, at a level well above the Department of Defense (DoD) standard.[1]

The appellant's claim before us is unusual in that he does not allege that he was unlawfully singled out for testing, or that the inspection of his unit for which he submitted a urine sample was a subterfuge for some other purpose. Instead, he contends that because his unit commander did not personally review and approve the list of persons randomly selected for testing, the order he received to submit his sample "cannot be considered a lawful, enforceable order." As a consequence, the appellant asserts, the "urinalysis and all of its fruits must be suppressed."

The Moody 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,[2] 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.* ¶ 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. ¶ 4.7.4. The DRPM generates lists of persons selected randomly for inspection[3] and notifies so-called "trusted agents" within each unit on the installation when a person assigned to that unit is selected for inspection. *Id.* ¶ 4.7.4.7.[4] Unit commanders are responsible for ensuring that persons randomly selected for inspection are ordered to report for testing. *Id.* ¶¶ 4.7.6.1-.6.3.

[1] The DoD standard is 100 nanograms (ng) of BE per millileter (mL) of urine. The appellant's urine tested positive for BE at 1340 ng/mL.

[2] Personnel present on temporary duty may also be subject to testing, if the installation commander deems it appropriate. AFI 44-120, ¶ 4.7.1.4.4.1.

[3] The AFI identifies a preference for using computer software provided by the Air Force for this task, but stipulates that random selection by other methods will not affect the "validity" of the results. *Id.* ¶ 4.7.4.6.

[4] Examples of persons who may serve as "trusted agents" are unit commanders, first sergeants, or other designated individuals. *Id.* ¶ 4.7.4.7.

The government contends that the procedures described in the AFI were fully followed in the appellant's case. The appellant disagrees, arguing that there was a fatal variance in the process: the letter he received ordering him to report for testing was signed by his unit commander *prior* to the date the appellant's name was randomly selected for testing. The unit commander never approved, or even knew of, the appellant's selection. Thus, the appellant claims, the order requiring him to provide a urine sample "cannot be considered . . . lawful."

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.

We begin our examination of this issue with the proposition that the collection and testing of urine samples from military personnel randomly selected for inspection is permissible under Mil. R. Evid. 313. *United States v. Gardner*, 41 M.J. 189, 190 (C.M.A. 1994). AFI 44-120, sets forth a comprehensive regulatory framework for conducting such inspections. In the context of an installation-wide inspection like the one in the case sub judice, this framework 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.[5] 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 unit commander did so was not expressly prohibited, by AFI 44-120 or otherwise.[6]

The military judge's key finding - that the appellant was properly required to submit to inspection pursuant to AFI 44-120 - was well-founded and 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's conclusion that "[w]hile it may be the better practice" for the unit commander to have personal knowledge of the identity of

[5] *See generally* AFI 44-120, ¶ 4.7.6 *et. seq.; see also United States v. Bickel*, 30 M.J. 277, 286 (C.M.A. 1990) ("neither Mil. R. Evid. 313 nor the Fourth Amendment permits a military commander to pick and choose the members of his unit who will be tested for drugs. . . . the testing must be performed on a nondiscriminatory basis pursuant to an established policy or guideline . . .").

[6] The appellant submitted along with his brief a declaration from Major Shawn E. Vandenberg, opining that had the appellant disobeyed the pre-signed order issued by the unit commander, the appellant might not have been successfully prosecuted for disobedience under the UCMJ. We need not decide the merit of this opinion, because the appellant was not charged with a disobedience offense. We note, however, that even if the order could not be enforced, it was not *ipso facto* unlawful. *Compare Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 14c(2)(a) (2005 ed.) *with MCM,* Part IV, ¶14c(2)(b)-(2)(g).

each member selected for inspection under the installation drug testing program, such knowledge is not required by the AFI, is likewise correct. The appellant's urinalysis results were admissible pursuant to Mil. R. Evid. 313.

Other Issues

We have also reviewed the appellant's remaining assignment of error, which challenges the sufficiency of the evidence offered to prove his alleged dishonorable failure to pay a just debt, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant used his government credit card for non travel-related purchases, in violation of applicable regulations; falsely challenged at least some of his purchases; and allowed his debt to remain unpaid over the course of several months. We find this evidence both legally and factually sufficient to sustain his conviction. Article 66(c), UCMJ, 10 U.S.C. 866(c); *United States v. Polk*, 47 M.J. 116, 120 (C.A.A.F. 1997); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Conclusion

The 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court