UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DAVID F. MORAN
United States Air Force

ACM 35755

20 October 2005

Sentence adjudged 29 July 2003 by GCM convened at Keesler Air Force Base, Mississippi. Military Judge: Kirk R. Granier.

Approved sentence: Bad-conduct discharge, confinement for 20 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

OPINION OF THE COURT

FINCHER, Judge:

The appellant was tried by a general court-martial composed of officer members at Keesler Air Force Base, Mississippi. Contrary to his pleas, the court found him guilty of driving under the influence of alcohol, wrongful use of ecstasy, cocaine, and lysergic acid diethylamide (LSD) on divers occasions, wrongful distribution of cocaine on divers occasions, and obstruction of justice, in violation of Articles 111, 112a, and 134, UCMJ, 10 U.S.C. §§ 911, 912a, 934. The court found him not guilty of wrongful use and possession of marijuana, wrongful possession of ecstasy with the intent to distribute, larceny, housebreaking, and disorderly conduct, in violation of Articles 112a, 121, 130,

and 134, UCMJ, 10 U.S.C. §§ 912a, 921, 930, 934. The members sentenced the appellant to a dishonorable discharge, confinement for 2 years, and reduction to E-1. The convening authority later dismissed the cocaine distribution specification and reassessed the sentence. The approved sentence was a bad-conduct discharge, confinement for 20 months, and reduction to E-1.

The appellant has submitted six assignments of error: (1) Whether the military judge abused his discretion by improperly limiting recross-examination of the prosecution's witnesses and improperly refusing to allow trial defense counsel to impeach a witness who was pending prosecution for manslaughter; (2) Whether the appellant was materially prejudiced when both a prosecution witness and the trial counsel commented on the appellant's request for an attorney and his refusal to give consent to a search of his hair and blood; (3) Whether the military judge committed plain error by admitting the prior consistent statement of a prosecution witness without a proper limiting instruction; (4) Whether the evidence is insufficient to support a conviction for wrongful use of LSD on "divers occasions"; (5) Whether the appellant's rights were prejudiced because the staff judge advocate did not provide the convening authority with guidelines on how to reassess the sentence after he disapproved a finding of guilt; and (6) Whether the appellant was deprived of due process because the court-martial panel consisted of less than six members. Finding merit with regards to the appellant's assertions (3) and (4), we grant relief.

Cross-examination and Impeachment

At his trial, several of the appellant's former friends and associates testified for the prosecution. Most of them were immunized and had previously been convicted and sentenced for a variety of drug offenses.

The appellant complains that the military judge deprived him of his Sixth Amendment right to confront witnesses by arbitrarily denying him the opportunity to conduct recross-examination of prosecution witnesses. The appellant bases the crux of his argument on the following courtroom exchange, which took place in the presence of court members at the conclusion of trial counsel's direct examination of a witness:

DC: Just a couple of follow-up.

MJ: No. I'm not going to allow any more recross, all right, by anybody.

DC: There's been direct, redirect, I don't think recross---

MJ: No. Member[s'] of the Court, so we've got this straight, the party calling the witness gets two chances to question him. They get what is called direct examination. Then the opposite side cross. Then they get a redirect, right. And that's generally all I'm going to allow, all right; so, I'm not going to let you do it, all right. I didn't see anything new that came up that wasn't covered. So, it's ---

DC: I'm just not familiar with that practice in my two years in court. I apologize.

MJ: All right, counsel. I'm a reserve military judge. Do the military rules allow for recross or is it at my discretion?

TC: It['s] your discretion, Your Honor.

MJ: That's - that's what I thought, all right. And I'm not going to allow it because this is going to go on forever. Unless you can convince me that there's something absolutely earth shattering or new that was brought up that you perhaps forgot to object to, I'm not going to allow recross.

The appellant contends this inflexible attitude by the military judge effectively deprived him of the ability to confront the witnesses against him. We disagree.

We review a military judge's application of the rules of evidence for an abuse of discretion. *United States v. Strong*, 17 M.J. 263, 266 (C.M.A. 1984). Taken out of context, these comments from the military judge could be cause for concern. However, in examining his actions for an abuse of discretion, context is key. In this case, what the military judge did is much more important than what he said. We have examined the testimony of each of the prosecution witnesses in context and have determined that the military judge did not abuse his discretion:

Witness 1—Defense counsel conducted cross and recross-examination.

Witness 2—Defense counsel conducted extensive cross-examination, but did not request recross. He did, however, remind the military judge to ask the members if they had questions. They had none.

Witness 3—Defense counsel conducted cross-examination, but because there was no redirect, there was no recross. The members asked questions, and the trial counsel asked questions based on those questions. The military judge offered defense counsel the opportunity to ask additional questions, but defense counsel had none.

> Witness 4—Defense counsel cross-examined the witness, but did not request recross. He reminded the military judge to ask the members if they had questions. They did not.
>
> Witness 5—Defense counsel cross-examined the witness. The prosecution then conducted a cursory redirect. The military judge denied defense counsel's request for recross in the exchange quoted above. The court members then asked one question, and there were no further questions from either counsel.

Eleven more witnesses testified during the government's case. The prosecution did not conduct redirect examination for five of them. Four others were questioned by the court members, and the trial defense counsel posed derivative questions to three of them. The prosecution conducted redirect of the two remaining witnesses, but defense counsel did not ask to recross.

Examined in context, the only time the military judge denied trial defense counsel's request to recross a prosecution witness was in the case of witness number five. Even then, the military judge qualified his denial. He said that *generally* he did not allow recross and that he did not see anything new that had not already been covered. Mil. R. Evid. 611(b) limits cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness." Military judges have "broad discretion to impose reasonable limitations on cross-examination." *United States v. McElhaney*, 54 M.J. 120, 129 (C.A.A.F. 2000). After reviewing the testimony, we find the military judge exercised his broad discretion in imposing reasonable limitations in this case.

Likewise, we find no abuse of discretion resulting from limiting the scope of the defense cross-examination of the fourth prosecution witness, Airman First Class (A1C) Michelle Kraft. Prior to trial, civilian authorities had arrested A1C Kraft for driving under the influence (DUI) of alcohol and causing someone's death in the process. Trial defense counsel sought to bring these facts out on cross-examination to demonstrate bias. He argued that, although there was no evidence of a connection between the appellant's prosecution and the civilian charges pending against A1C Kraft, she had a motive to please the prosecution in hopes of receiving a better disposition of her pending charges. The military judge considered the matter under Mil. R. Evid. 403 and determined he would allow the defense to ask what she had been charged with and whether she had entered into any plea agreements. He did not allow the defense to elicit that a person had died in the incident. On cross-examination, A1C Kraft admitted she had been charged with felony DUI and that she had not entered into any plea agreements. We conclude that the military judge did not abuse his discretion by limiting cross-examination in this manner. *See Id.*

Comments Regarding Right to Counsel and Refusal of Consent to Search

The appellant claims the military judge committed plain error by allowing comments from witnesses and the trial counsel regarding the appellant's assertion of his right to counsel and refusal of consent to a search. We disagree. Most of the statements the appellant complains about are related to the facts and circumstances surrounding his decision to shave off all of the hair on his body. As a result, investigators could not obtain a hair sample for drug testing. The statements elicited were reasonably necessary to describe these events. Taken in context, we are convinced that allusions to the appellant's request for counsel were not used as substantive evidence of his guilt. *See United States v. Gilley*, 56 M.J. 113, 121-22 (C.A.A.F. 2001); *United States v. Powell*, 49 M.J. 460, 462-64 (C.A.A.F. 1998). Similarly, the testimony of a prosecution witness about the circumstances surrounding his apprehension for DUI did not amount to plain error. *See* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Legal and Factual Sufficiency of Divers Uses of LSD

The appellant contends it was plain error to admit the entire prior written statement of Airman Basic (AB) Jocelyn Gamble as a prior consistent statement. We agree. AB Gamble testified on direct examination that she had only seen the appellant use LSD one time at a block party in Biloxi, Mississippi in October 2000. Three other prosecution witnesses corroborated AB Gamble's account. After a vigorous cross-examination by the defense, the prosecution offered a prior statement by AB Gamble into evidence as a prior consistent statement. The defense did not object. The statement contained information regarding the LSD incident described on direct examination, plus two more instances of LSD use. A review of the direct examination of AB Gamble shows what really happened:

> Q. All right. Were there any other times other than that October night that you recall seeing Airman Moran use LSD?
>
> A. No.
>
> ATC: May I have a moment, Your Honor?
>
> [Trial Counsel and Assistant Trial Counsel conferred.]
>
> ATC: The last thing you mentioned was marijuana. When did that occur?

This witness testified to a litany of drug offenses committed by the appellant. However, when she came to the LSD category she remembered one use but apparently forgot about the others. After conferring about her negative answer to the multiple-use question, the prosecution team decided to move on rather that trying to refresh her

recollection. They then attempted to meet their burden of proof by offering her written statement as a prior consistent statement.

Mil. R. Evid. Rule 801(d)(1)(B) says that prior consistent statements are not hearsay under certain circumstances. The problem is, AB Gamble's statement of additional LSD uses is not a prior consistent statement. Nor is it admissible under any other theory. Moreover, this statement was the only evidence of multiple uses of LSD, and the court members must have relied on it to convict the appellant. Accordingly, we find it was plain error to admit this portion of her statement. *See Powell*, 49 M.J. at 462; Article 59(a), UCMJ.

Consistent with our findings regarding admissibility of the additional LSD uses in AB Gamble's statement, we agree with the appellant's contention that the evidence only supports a single use of LSD rather than multiple uses.

Post-trial Processing and Due Process

We have examined the appellant's remaining assignments of error and find they have no merit. *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987).

Conclusion

Regarding Specification 3 of Charge III, we except the language "on divers occasions" from the Specification. The finding of guilty as to that language is set aside and the words are dismissed. We are convinced that the court members convicted the appellant of the October 2000 use of LSD at the party in Biloxi, Mississippi. We are likewise convinced beyond a reasonable doubt of the appellant's guilt of that offense. *See United States v. Scheurer*, No. 04-0081/AF (C.A.A.F. 29 Sep 2005); *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). Because the Specification now reflects guilt of a single use of LSD rather than multiple uses, 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 a bad-conduct discharge, confinement for 18 months, and reduction to E-1. *Id*. In reaching this conclusion, we considered the seriousness of the remaining offenses, the lack of change in maximum punishment as a result of the modification, the potential sentencing impact of the additional LSD uses, and the appellant's extenuation and mitigation. Accordingly, we find this sentence appropriate under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The remaining findings of guilty, and only so much of the sentence as provides for a bad-conduct discharge, confinement for 18 months, and reduction to E-1 is approved.

The findings, as modified, 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, as modified, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court