UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic HEATHER N. STEVENS
United States Air Force

ACM S30170

20 July 2004

Sentence adjudged 27 June 2002 by SPCM convened at Keesler Air Force Base, Mississippi. Military Judge: Sharon A. Shaffer (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 60 days.

Appellate Counsel for Appellant: Major Andrew S. Williams (argued), Colonel Beverly B. Knott, Lieutenant Colonel Gilbert J. Andia Jr., and Major Terry L. McElyea.

Appellate Counsel for the United States: Major James K. Floyd (argued), Colonel LeEllen Coacher, and Lieutenant Colonel Robert V. Combs.

Before

PRATT, MALLOY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MALLOY, Senior Judge:

The appellant was tried by a special court-martial composed of a military judge alone on specifications alleging fraudulent enlistment, use and distribution of 3,4-methylenedioxymethamphetamine (MDMA), also known as ecstasy, and solicitation of another to use ecstasy, in violation of Articles 83, 112a, and 134, UCMJ, 10 U.S.C. §§ 883, 912a, 934. She pleaded not guilty to all offenses as charged but guilty to the lesser-included offenses of attempted use and attempted distribution of ecstasy in violation of Article 80, UCMJ, 10 U.S.C § 880. The military judge granted a motion for a finding of not guilty of the solicitation offense and found the appellant guilty of the remaining offenses as charged. The appellant was sentenced to a bad-conduct discharge and

confinement for 60 days. The case is now before this Court for mandatory review under Article 66, UCMJ, 10 U.S.C. § 866.

The appellant raises three assignments of error: (1) Her uncorroborated admission concerning pre-service drug use is insufficient to corroborate her statement to Air Force law enforcement personnel that she used ecstasy before enlisting; (2) The evidence is legally and factually insufficient to support her conviction for fraudulent enlistment because it is based solely on these uncorroborated admissions; and (3) The evidence is legally and factually insufficient to support her conviction for use and distribution of ecstasy. We heard oral argument on the first two issues at Scott Air Force Base (AFB), Illinois, as part of our Project Outreach Program.

After carefully considering the record of trial, and the excellent briefs and oral arguments of counsel, we conclude that the evidence is insufficient to support the appellant's convictions for fraudulent enlistment and distribution of ecstasy but sufficient to support her convictions for use and attempted distribution of ecstasy.

I. Background

The facts in this case come almost exclusively from the appellant's version of events. They are drawn from her pretrial confession to an Air Force Joint Drug Enforcement Team (JDET) agent, her casual admissions to a fellow airman concerning her pre-service use of ecstasy, her sworn testimony during the providence inquiry on her pleas of guilty to attempted use and distribution of ecstasy, and a defense statement of fact presented to the military judge during the providence inquiry.[*]

At the time of the alleged use, distribution and solicitation offenses, the appellant was a technical training student at Keesler AFB, Mississippi. On 3 May 2002, she and her then-boyfriend, Airman Timothy Marshall, went to a dance club in New Orleans, Louisiana. While there, an individual offered to sell the appellant an ecstasy pill for $20. After declining the offer on several occasions, the appellant purchased the pill and orally ingested it. Later that evening, she purchased a second pill for $20 from another individual who represented it to be ecstasy. The appellant admitted in her pretrial confession that she gave this pill to Airman Marshall and "convinced" him to take it. Other than this statement, which was ultimately suppressed by the military judge for lack of corroboration, there was no evidence that Airman Marshall actually took the pill. And there was no evidence that the pill the appellant gave to Airman Marshall was actually ecstasy. The parties stipulated to the testimony of the director of the Drug Demand Reduction Program at Keesler AFB. His testimony indicates "[s]ome pills sold as

[*]This latter document is similar to the stipulation of fact commonly seen in guilty plea cases except that it was unilaterally submitted by the defense without government input or objection.

'ecstasy' contain little to no MDMA, and some pills sold as 'ecstasy' have been found to only contain caffeine or ephedrine."

On the Monday following her return to Keesler AFB from New Orleans, the appellant was selected to provide a urine sample for drug testing as part of a unit inspection. This sample later tested negative for the presence of any illicit substances. The day after submitting the urine sample, a JDET agent questioned the appellant about her drug use. She confessed to purchasing both pills, to taking one of them, and to convincing Airman Marshall to take the other. She described the "roll" from the pill she took as lasting about two hours and similar in effect to being "spun around really fast." The appellant concluded her statement by noting that she knew the effects of ecstasy because she tried it three times in high school. It is clear from this statement that she believed that the pill she took was ecstasy.

By the time of trial, the appellant, no doubt armed with the results of the negative urinalysis, was no longer willing to admit that either of the two pills she purchased on 3 May 2002 was ecstasy. She testified during the providence inquiry that she did not know whether Airman Marshall actually took the pill, as her pretrial statement implied, because she walked away after giving the pill to him. The appellant entered provident pleas to attempted use and distribution of ecstasy.

Prior to proceeding to trial on the contested charges, the military judge granted a defense motion to dismiss the solicitation offense because it was missing an element as drafted and therefore failed to state an offense. After correcting this deficiency, the government preferred and referred the charge anew. With defense cooperation, this additional charge was joined for trial with the pending charges. But it did not remain there for long.

Airman Marshall was the only individual who could corroborate the appellant's statement that she "convinced" him to take the pill she purchased for him. Upon being called as a witness, he asserted his Fifth Amendment right against self-incrimination and declined to testify about the events at the dance club on 3 May 2002. In response to a question from the military judge inquiring as to why the government failed to secure a grant of immunity for Airman Marshall, the assistant trial counsel indicated the convening authority had been unavailable to grant him immunity. The military judge declined to admit Airman Marshall's out-of-court written statement and denied the government's request for additional time to seek a grant of immunity for him. As a result of its failure to secure immunity for Airman Marshall, the government had no independent evidence to corroborate the appellant's pretrial statement that she "convinced" Airman Marshall to take ecstasy. And it had no evidence to prove that the pill the appellant gave Airman Marshall was ecstasy, other than the appellant's uncorroborated statement repeating what she was told by the unidentified drug dealer from whom she purchased it.

The appellant challenged the admissibility of her confession to the JDET agent on the grounds that it was not corroborated by anything other than other uncorroborated admissions made by her. The military judge granted the motion, in part, ruling that the appellant's admission that she "convinced" Airman Marshall to use ecstasy was uncorroborated and therefore inadmissible. Since this left the government without evidence to prove the appellant solicited Airman Marshall to use ecstasy, the military judge granted a defense motion for a finding of not guilty on that charge.

The appellant's one-line admission that she used ecstasy three times in high school, coupled with some of her enlistment documents, was the basis for the fraudulent enlistment charge. On 23 July 2001, the appellant certified as part of the enlistment process that, inter alia, she never experimented with, used, or possessed any illicit drug or narcotic. The appellant's statement of fact indicates that her enlistment began on 19 November 2001, and her personal data sheet (first introduced in sentencing) indicates that it began one day later on 20 November 2001.

The government sought to corroborate the appellant's statement that she used ecstasy in high school with statements that she made to Airman Amy Reising, a fellow technical student. Airman Reising's stipulated testimony was that the appellant told her on 10 occasions that she had used ecstasy before joining the Air Force. Citing this Court's decision in *United States v. Baldwin*, 54 M.J. 551 (A.F. Ct. Crim. App. 2000) (en banc), *aff'd*, 54 M.J. 464 (C.A.A.F. 2001), the military judge ruled that the appellant's statements to Airman Reising were admissible under Mil. R. Evid. 801(d)(2) without the need for corroboration. Thus, the military judge ruled they could be used to corroborate the appellant's statement to the JDET agent that she used ecstasy three times in high school.

II. Discussion

A. Insufficiency of the evidence--fraudulent enlistment

We need not decide whether the military judge correctly ruled that the appellant's uncorroborated admissions to Airman Reising could be used to corroborate her admission of pre-service drug use to the JDET agent. Even assuming arguendo that both statements were admissible, the evidence is still legally and factually insufficient to support the appellant's conviction for fraudulent enlistment.

Article 66(c), UCMJ, is, of course, our "center of gravity" when we undertake our statutory duty to review a record of trial for legal and factual sufficiency. *United States v. Walters*, 58 M.J. 391, 395 (C.A.A.F. 2003). Under Article 66(c), we may affirm only those findings of guilty that we find correct in law and fact and determine, based on the entire record, should be affirmed. The test for legal sufficiency of the evidence is

whether, viewing the evidence in a light most favorable to the government, a factfinder could rationally have found all the essential elements of an offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991). The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court is convinced of the appellant's guilt beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

Despite this unique and awesome power to review de novo factual issues, there are limitations on our statutory authority. We cannot use our factfinding powers to sustain a conviction where the prosecution has failed to prove all elements of the charged offense. *United States v. Holt* 58 M.J. 227, 232 (C.A.A.F. 2003). Article 66(c) limits this Court "to a review of the facts, testimony, and evidence presented at the trial." *Id.* (quoting *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). Such use would be contrary to the longstanding recognition that our factfinding authority is generally designed to benefit, and not prejudice, an appellant during the appellate process. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). More importantly, it would run afoul of the bedrock constitutional principle that a plea of not guilty puts the prosecution to its proof as to all elements of the offense charged. *See Estelle v. McGuire*, 502 U.S. 62 (1991); *United States v. Mason*, 59 M.J. 416, 424 (C.A.A.F. 2004) ("The Due Process Clause of the Fifth Amendment to the Constitution requires the Government to prove the defendant's guilt beyond a reasonable doubt").

As the military judge noted, this case appears to have been rushed to trial. Preferral and referral of charges occurred on the same day and trial began two days later. The record also suggests that the government was as ill-prepared to prove the contested fraudulent enlistment charge as it was to prove the contested solicitation charge. Indeed, after review of this record, we are left with the impression that the trial and assistant trial counsel may not have even been aware of their burden of proof on the fraudulent enlistment offense.

The elements of fraudulent enlistment under Article 83(1), UCMJ, are as follows:

> (1) That the accused was enlisted or appointed in an armed force;
>
> (2) That the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment;
>
> (3) That the accused's enlistment or appointment was obtained or procured by that knowingly false representation or deliberate concealment; and

(4) That under this enlistment or appointment that accused received pay or allowances or both.

Manual for Courts-Martial, United States (MCM), Part IV, ¶ 7b(1) (2000 ed.). In this case, the government failed to prove that the appellant's misrepresentation concerning pre-service drug use would have barred her enlistment. Such proof is necessary to establish that her misrepresentation or concealment was material. *United States v. Danley*, 45 C.M.R. 260 (C.M.A. 1972); *United States v. Holloway*, 18 C.M.R. 909, 911 (A.F.B.R. 1955). The conditions that make applicants ineligible to enlist in the Air Force are set forth in Air Force Instruction (AFI) 36-2002, *Regular Air Force and Special Category Accessions*, Attachment 2 (7 Apr 1999). It would have been a simple task for the government to prove that the use of ecstasy was the type of drug use that was disqualifying under this AFI, absent a waiver. *See United States v. White*, 14 C.M.R. 84, 86 (C.M.A. 1954) (Army regulations proved discharge for fraudulent enlistment prohibited enlistment); *United States v. Brockwell*, 14 C.M.R. 653 (A.F.B.R. 1954) (Air Force regulation barring the appellant's enlistment based on the number of dependents proper subject of judicial notice). Here, however, the government neither offered evidence on this issue nor asked the military judge to take judicial notice of the AFI.

Although we are quite capable of drawing our own conclusions from AFI 36-2002 concerning what conditions bar enlistment, we are unable to do so from evidence adduced at trial and within the record of trial. For us to now find on appeal a fact that is critical to sustaining an element of the offense, where no such evidence appears in the record, would violate the most basic tenet of military due process. An accused must be convicted based on evidence admitted at trial that is factually and legally sufficient. *See Mason*, 59 M.J. at 424; *United States v. Whitner*, 51 M.J. 457, 461 (C.A.A.F. 1999) (the failure of the defense to contest an element does not remove the government's burden of proof on that element). We cannot make extrajudicial determinations on appeal on this element to determine the appellant's guilt or innocence. *Holt*, 58 M.J. at 232.

We ground our determination of legal and factual insufficiency on the failure of the government to prove a material misrepresentation. Normally, our discussion would end at this point. But in this case, we think additional comments on the government's proof are warranted. First, we note the government did not offer any evidence concerning the circumstances surrounding the appellant's pre-service statements and the completion of her enlistment application. Fraudulent enlistment is a specific intent crime requiring proof that the appellant knowingly misrepresented or deliberately concealed a material fact. *Holloway*, 18 C.M.R. at 911. The only evidence supporting this element is the discrepancy between the appellant's enlistment documents and her in-service statements to the JDET agent, as corroborated by her uncorroborated statements to Airman Reising. It would have been a relatively easy task to call the appellant's recruiter--his name in on the documents--to elucidate the court-martial and this Court on the circumstances surrounding her completion of the enlistment application, including

what the recruiter told her about disclosing drug use. *See United States v. Hawkins*, 37 M.J. 718, 723 (A.F.C.M.R. 1993) (clear and positive testimony of recruiters and documentary evidence strongly supported inference of willful concealment of disqualifying facts). While we do not suggest that appellant's intent could not be proven by circumstantial evidence, we do suggest that some evidence beyond the discrepancy in her one-line statement to the JDET agent and her enlistment documents would have been helpful in determining her specific intent.

Finally, and perhaps most surprising, we note the government took no steps to prove what has been the gravamen of the offense of fraudulent enlistment since it was made so under Article of War 54--the receipt of pay or allowances. It has long been recognized that the gravamen of the offense under Article 83, UCMJ, and its predecessor Article of War is not just a false statement or concealment of a material fact during enlistment, but the receipt of pay or allowances after procuring enlistment based on that intentional or willful misrepresentation. *United States v. Taylor,* 15 C.M.R. 232, 236 (C.M.A. 1954) ("the offense of fraudulent enlistment requires as an element of proof the establishment of pecuniary loss to the United States in the form of pay and allowances furnished to the enlistee . . . by reason of his misrepresentations"). *See also United States v. LaRue*, 29 C.M.R. 286 (C.M.A. 1960); *United States v. Loyd*, 7 C.M.R. 453 (N.B.R. 1953). It is this receipt of pay or allowances that consummates the offense and confers jurisdiction under the Uniform Code of Military Justice. *United States v. King*, 27 C.M.R. 732 (A.B.R. 1959).

We understand, of course, that this element, too, can be proven by circumstantial evidence. *MCM*, Part IV, ¶ 7c(2). We also understand that in a military judge-alone trial Article 51(d), UCMJ, 10 U.S.C. § 851(d) governs the findings and we may presume that the military judge knew the law and applied it correctly. *United States v. Robbins*, 52 M.J. 455 (C.A.A.F. 2000). Nonetheless, we are struck by the fact that, along with the other deficiencies in this case, this record can be read from cover to cover without finding a single reference to this element of the offense or even awareness that the government bore the burden of proof on it. It would have been a simple task to stipulate to this fact or, absent such a stipulation, to offer the appellant's pay records. *See Brockwell*, 14 C.M.R. at 655. The government appears to have missed this element as well and offered nothing on it.

Common sense, of course, tells us that the appellant received pay or allowances from the time her enlistment commenced in November 2001. And we are not going to turn a blind eye to reality. In this case, the appellant and her counsel offered their own statement of fact. Although this statement did not expressly admit the receipt of pay or allowances, it did provide the approximate starting date of her enlistment. This statement was before the military judge during the providence inquiry and indicated she could consider it for any purpose. Under the circumstances, we presume the military judge knew the law, even if the prosecution did not. But, we note for the benefit of trial

practitioners that our conclusion would not necessarily be the same had this case gone before members in this evidentiary posture. *Holt*, 58 M.J. at 232. We, of course, raise these concerns in the context of a case in which a charge was dismissed because it was improperly drafted, a finding of not guilty was entered on a later iteration of this same charge because of a complete failure of proof, and an element was completely missed on another offense.

We hold that the evidence is legally and factually insufficient to support the appellant's conviction for fraudulent enlistment.

B. Sufficiency of the drug convictions

We have no difficulty finding the evidence factually and legally sufficient to support the appellant's conviction for use of ecstasy. The appellant predicates her challenge to this finding on the assertion that her pretrial confession describing the effect of the ecstasy she ingested in New Orleans is uncorroborated. This argument overlooks the fact that she herself provided the necessary corroboration to this description when she testified before the court during her guilty plea. The rule requiring independent corroboration of a confession does not apply to judicial confessions. Mil. R. Evid. 304(g); *Landsdown v. United States*, 348 F.2d 405, 409-10 (5th Cir. 1965). Since the appellant's sworn testimony before the court did not require independent corroboration, it could properly be used to corroborate her description of the effects the pill she purchased and ingested had on her. Mil. R. Evid. 304(g). Accordingly, we conclude the evidence is factually and legally sufficient to support her conviction for use of ecstasy.

We do not reach same conclusion regarding the distribution specification, however. Unlike with the appellant's use, there is nothing in the record from which it can be concluded beyond a reasonable doubt that the second pill she purchased from a second source, and gave to Airman Marshall, was ecstasy. Both the appellant's pretrial confession and her testimony during the providence inquiry establish that she purchased the pill and gave it to Airman Marshall believing it was ecstasy. Airman Marshall certainly could have described the effects of the pill the appellant gave him, assuming he took it. But Airman Marshall did not testify. And there were no other witnesses who observed his behavior after the appellant gave him the pill from which it could be inferred that the pill was ecstasy. As we have noted, the stipulated testimony before the court indicates this pill could have been anything from ecstasy to caffeine. For us to conclude it was ecstasy based on this record, we would have to conclude that the unidentified drug dealer who sold this second pill to the appellant was truthful in his representation to her. Since this pill was from a different source than the one she took, the appellant could do no more than repeat what she was told by this drug dealer. Under the circumstances, we find the evidence is insufficient to support the finding that she distributed ecstasy.

III. Reassessment of Sentence

The appellant was sentenced to a bad-conduct discharge and confinement for 60 days. This, in our view, is a light sentence and would have been adjudged for the use and attempted distribution specifications alone. We are satisfied that she would have received this sentence for those offenses. Accordingly, upon reassessment, we affirm the adjudged and approved sentence of a bad-conduct discharge and confinement for 60 days. *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

IV. Conclusion

The findings of guilty as to the Specification of Charge I and Charge I are set aside and dismissed. The findings of guilty as to Specification 1 of Charge II and Charge II are affirmed. In respect to Specification 2 of Charge II, only so much of the specification finding the appellant guilty of attempted distribution of ecstasy in violation of Article 80, UCMJ, is affirmed. 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