

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman THOMAS G. WATSON
United States Air Force

ACM S31235

31 March 2008

Sentence adjudged 02 June 2006 by SPCM convened at Eglin Air Force Base, Florida. Military Judge: Donald A. Plude.

Approved sentence: Bad-conduct discharge, confinement for 90 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Darla G. Orndorff, Captain Vicki A. Belleau, and Captain Chadwick Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Carrie E. Wolf, Captain Coretta E. Gray, and Captain Jamie L. Mendelson.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM

Contrary to his pleas, the appellant was convicted of one specification of wrongful use of cocaine and one specification of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 90 days, and reduction to E-1.

The issues on appeal are:

1) Whether the military judge erred when he denied the appellant's motion in limine to prohibit the government from admitting the urinalysis drug testing reports as

being testimonial hearsay, in light of *Crawford v Washington*, 541 U.S. 36 (2004), and *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), and the testimony of Dr. Bruins, the government urinalysis expert witness.

2) Whether the military judge erred when he gave the members an instruction allowing the members to use the permissive inference in finding the appellant wrongfully used cocaine, in light of *United States v. Brewer*, 61 M.J. 425 (C.A.A.F. 2005).

3) Whether Special Court-Martial order #5 should be changed to reflect the action of the members.¹

Background

On 24 Jun 2005, the appellant consented to a urinalysis. The results were positive for cocaine. On 14 Jul 2005, a probable cause urinalysis was obtained from the appellant, and the results were positive for marijuana.

At trial, the defense counsel made a motion in limine to preclude the government from admitting the Drug Testing Reports. The military judge made an extensive ruling and denied the motion. Later in the trial, over defense objection, the military judge gave the members the permissive inference instruction directly from the Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (15 Sep 2002).

Discussion

We review a military judge's decision to exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* at 394 (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge did not abuse his discretion when he ruled that the Drug Testing Reports were nontestimonial and admissible under Military Rule of Evidence 803 (6), UCMJ.² See *United States v. Magyari*, 63 M.J. at 128.

The question of whether an instruction is legally correct is reviewed de novo. *United States v. Grier*, 53 M.J. 30, 34 (C.A.A.F. 2000). Contrary to the actions of the military judge in *Brewer*, the military judge in the case sub judice gave the standard inference instruction without deviation. The instruction was legally correct.

¹ The Court-Martial Order has been corrected since the submission of errors, thereby mooting this issue.

² Once the evidence was admitted, the testimony of the government expert was admissible also.

Conclusion

The findings and the 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



STEVEN LUCAS, GS-11, DAF
Clerk of the Court