UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TERRIS N. CAVITT
United States Air Force

ACM S31637 (rem)

16 September 2013

Sentence adjudged 25 January 2013 by SPCM convened at Joint Base San Antonio-Lackland, Texas. Military Judge: Donald R. Eller, Jr.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael A. Burnat; Major Anthony D. Ortiz; Major Jennifer J. Raab; Major Daniel E. Schoeni; Major Ja Rai A. Williams; Captain Christopher D. James; and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Daniel J. Breen; Major Tyson D. Kindness; Major Joseph J. Kubler; Major John M. Simms; Capt Adam D. Bentz; and Gerald R. Bruce, Esquire.

Before

STONE, ORR, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

PER CURIAM:

In January 2009, the appellant entered pleas of guilty before a special court-martial to one specification of absence without leave (AWOL) for a period of less than 30 days and one specification of abusing over-the-counter medication, in violation of

Articles 86 and 134, UCMJ, 10 U.S.C. §§ 886, 934. She entered pleas of not guilty to one specification of wrongful use of marijuana, one specification of using provoking speech, and one specification of assault consummated by a battery in violation of Articles 112a, 117, and 128, UCMJ, 10 U.S.C. §§ 912a, 917, 928. After the military judge accepted her pleas and entered findings of guilty to AWOL and abuse of over-the-counter medication, a panel of officers convicted her of wrongfully using marijuana and assault. They acquitted her of using provoking speech and sentenced her to a bad-conduct discharge, confinement for 4 months, forfeiture of $700.00 pay per month for 4 months, and reduction to E-1. On 10 April 2009, the convening authority approved the adjudged sentence.

This case is before the Court a second time for further review. In an unpublished decision, issued 21 October 2010, this Court affirmed the approved findings and sentence. *United States v. Cavitt*, ACM S31637 (A.F. Ct. Crim. App. 21 October 2010) (unpub. op.), *rev'd*, 69 M.J. 413 (C.A.A.F. 2011). By decision issued on 25 February 2011, the United States Court of Appeals for the Armed Forces vacated our decision and remanded the case to us in light of *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) to consider whether the error under the Confrontation Clause was harmless beyond a reasonable doubt. Upon further review we determined that the members in all likelihood gave some weight to the testimonial hearsay from the surrogate expert in concluding that the appellant wrongfully used marijuana. As a result, on 31 July 2012, we set aside Charge II and its Specification and returned the case to The Judge Advocate General for remand to the appropriate convening authority. *United States v. Cavitt*, ACM S31637 (f rev) (A.F. Ct. Crim. App. 31 July 2012) (unpub. op.).

At a rehearing on 22-25 January 2013, contrary to her pleas, a panel of officers found the appellant guilty of wrongfully using marijuana at or near San Antonio, Texas, between on or about 8 June 2008 and 8 July 2008. She was sentenced to a bad-conduct discharge, confinement for 3 months, forfeiture of $505.00 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence except for the forfeiture of pay.

Legal and Factual Sufficiency

The appellant once again contests the legal and factual sufficiency of the evidence to support her conviction for wrongfully using marijuana. Finding no errors prejudicial to the substantial rights of the appellant, we affirm.

The appellant consented to provide a urine specimen for drug testing following her return from AWOL on 8 July 2008. An official from the local Drug Demand Reduction office transported the specimen to the Air Force Drug Testing Laboratory (AFDTL) where the sample tested positive for the metabolite of marijuana at a level of 44 nanograms per milliliter (ng/mL), which is above the Department of Defense cutoff

level of 15 ng/mL. Testing included an initial immunoassay, a second immunoassay, and a gas chromatography/mass spectrometry test.

Although the appellant does not contest the accuracy of the test results, she argues there is insufficient evidence to show that she used marijuana while in San Antonio, Texas. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citing *United States v. Rogers*, 54 M.J. 244, 246 (C.A.A.F. 2000); *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). Our assessment of legal sufficiency "is limited to the evidence presented at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). 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, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Concerning the location of the offense, the government alleged that the use occurred at or near San Antonio, Texas, which is the location of the appellant's base of assignment. Dr. AJ, the program manager for the AFDTL, testified as an expert witness for the Government and explained the test results and procedures at the AFDTL. He told the members, "The testing on the appellant's sample was all in order. Everything is correct, everything was reviewed properly, and everything is in place for this sample to be reported positive." However, during cross-examination, Dr. AJ acknowledged that with a nanogram level of 44 ng/mL, he could not tell how or exactly when someone used marijuana.

Based upon Dr. AJ's testimony, the appellant argues that the evidence is factually and legally insufficient to show she used marijuana at or near San Antonio, Texas, because she stated during the *Care*[1] inquiry on the AWOL offense that she was out of the state during the four days preceding the collection of her urine specimen. The appellant's counsel highlights the portion of Dr. AJ's testimony where he said that in his opinion the test results indicate that "it was some time on 8 July or prior -- shortly before 8 July."

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

The crux of the appellant's argument is that there exists a real possibility that if she actually used marijuana, it could have been in a different place other than San Antonio, Texas.

We first note that the location of illegal drug use is not determinative of criminal liability. *United States v. Rounds*, 30 M.J. 76, 81 (C.M.A. 1990). Nevertheless, the expert's testimony concerning the time of possible ingestion of marijuana does not preclude the appellant's marijuana use before she departed or returned to the San Antonio area. Specifically, Dr. AJ testified that, based upon the appellant's nanogram level, she could have ingested the substance "as short as 20 minutes before the test. It could have been four or five days before it if there was a huge amount or [the user] had experience with the drug." This combined with other circumstantial evidence supports a finding that the use occurred in the San Antonio area. Having considered the evidence produced at trial in light of the above standards, we are satisfied that the appellant wrongfully used marijuana.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court