UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman SAMMY D. ROWE JR.
United States Air Force

ACM 34776

26 November 2002

Sentence adjudged 13 July 2001 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Steven A. Gabrial.

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Captain Steven M. Kelso.

Before

SCHLEGEL, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT

ORR, W.E. Judge:

The appellant, contrary to his pleas, was convicted of one specification of wrongfully using 3,4-methylenedioxymethamphetamine, also known as MDMA or ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; one specification of communicating a threat, and one specification of committing adultery, both in violation of Article 134, UCMJ, 10 U.S.C. § 934. The appellant also pled guilty to wrongfully using marijuana on divers occasions, wrongfully using lysergic acid diethylamide (LSD), in violation of Article 112a, UCMJ, disrespect to a commissioned officer in violation of Article 89 UCMJ, 10 U.S.C. § 889, and failing to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892. His approved sentence included a bad-conduct

discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority deferred $1,042.00 pay per month until the date of the action, waived that same amount for six months, and directed payment to the appellant's dependents. On appeal, the appellant alleges that the military judge erred by admitting a prosecution exhibit over defense objection that the trial counsel had failed to lay an adequate foundation for admitting the exhibit. He asks that we set aside Specification 2 of Charge I (wrongful use of ecstasy) and the sentence. We affirm the findings and the sentence.

I. Background

The appellant was a helicopter maintenance apprentice assigned to the 551st Special Operations Squadron at Kirtland Air Force Base (AFB), New Mexico. He was convicted of a single use of ecstasy between 30 May 2000 and 22 February 2001. The appellant was one of several airmen investigated by the Air Force Office of Special Investigations (AFOSI) detachment at Kirtland AFB for illegal drug activity. On 11 December 2000, several AFOSI agents searched the appellant's home looking for evidence of illegal drug use. Special Agent (SA) Douglas Bonaro, the lead agent on the appellant's case, testified that during the search, one of the other agents found a document entitled "MDMA Frequently-Asked Questions" lying on a table in the appellant's living room. That AFOSI SA placed an Air Force Form 52 (evidence tag) on the document and gave it to the alternate evidence custodian. Neither the AFOSI agent who found the document and prepared the evidence tag, nor the alternate evidence custodian who received the document, testified at trial.

Prior to the trial, appellant's counsel filed a motion in limine to suppress the document as well as certain testimony regarding that document. The military judge denied the motion in limine and admitted the document subject to the laying of a proper foundation. After the trial counsel called the primary evidence custodian to testify and asked some preliminary questions, he moved to admit the document as Prosecution Exhibit 1. The trial defense counsel objected, asserting that the trial counsel failed to lay an adequate foundation for the document. The military judge overruled the defense counsel's objection, made specific findings of fact as to the relevance of the document, and admitted it as Prosecution Exhibit 1.

II. Analysis

Our superior court defined the standard of review for the admissibility of evidence in the case of *United States v. Sullivan,* 42 M.J. 360, 363 (1995). Specifically, a military judge's ruling admitting or excluding evidence is reviewed for an abuse of discretion. We will only reverse a military judge's decision if the findings of fact are clearly erroneous or if it was influenced by an erroneous view of the law. *Id.* A military judge receives no deference on conclusions of law and they are reviewed de novo. *Id.*

In his findings on the defense's motion in limine, the military judge stated:

> Sometime prior to 11 December 2000, but during the timeframes alleged in one or both of the specifications that have been referred to trial, the accused showed the challenged document to Airman Basic Kircher, to check the document out or words to that effect, and told Airman Kircher that he, the accused, had printed the document at work. On 11 December 2000, OSI agents found the challenged document in the accused's on-base residence during a valid search. Military Rule of Evidence 404(b) provides that evidence of other crime, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity with that character or therewith. Such evidence may be admissible for other purposes, including to prove the accused's knowledge.

The military judge then performed a balancing test under Mil. R. Evid. 403 and 404(b) and ruled that even though the document may be evidence of other crimes, wrongs, or acts, the probative value of the document outweighed any unfair prejudice.

During the prosecution's case in chief, Ms. Joan Weber, the primary evidence custodian for AFOSI at Kirtland AFB was called to testify. She said that as the evidence custodian, she receives evidence from the agents and ensures evidence tags are properly filled out. Once the evidence is properly packaged, she logs it into an electronic tracking system. Ms. Weber testified that usually, the agent who seizes the evidence fills out the evidence tag and turns it over to the evidence custodian. Ms. Weber remembered receiving the document in question from Mr. Huntsman, the alternate evidence custodian. This occurred several months after the search of the appellant's residence, when Mr. Huntsman was transferred to Osan Air Base, Korea. She concluded by saying that the chain of custody was intact.

Trial defense counsel initially, objected that a proper foundation required an evidence custodian. Later counsel objected that a proper foundation required the testimony from a witness who actually confiscated the document, not just an evidence custodian. The military judge, however, admitted the exhibit without further explanation.

The authentication referred to by the trial defense counsel is set forth in Mil. R. Evid. 901(b)(1). This rule permits authentication of a document by the testimony of a witness who has knowledge that a matter is what it is claimed to be. Although the better practice would have been to have testimony from the agent who seized the evidence or the evidence custodian who originally received the document, Ms. Weber as the primary custodian had sufficient knowledge to authenticate the document. Although she received the document seven months after the search, she remembers receiving the document with

the chain of custody intact. Chain of custody documents are specifically listed as the type of records of regularly conducted activities encompassed by Mil. R. Evid. 803(6). It is common practice in the military for evidence custodians to lay the foundation for documents such as evidence tags. In fact, Mil. R. Evid. 803(6) allows the evidence custodian to lay the foundation for admission and there is no requirement that the witness know how the recording was made. *See generally* Stephen A. Saltzburg, et al., *Military Rules of Evidence Manual* 937-56 (4th ed. 1997).

Even if Ms. Weber's testimony by itself was not sufficient to authenticate the document, Mil. R. Evid. 901(b) lists examples but does not limit ways a proponent may use to seek admission of a document. Accordingly, the military judge was not limited to this method of authentication before admitting the document into evidence. Mil. R. Evid. 901(a) states that "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This rule merely requires that the military judge be satisfied that the document marked as Prosecution Exhibit 1 was the document seized from the appellant's home. The military judge must find by a preponderance of the evidence that it is reasonably probable that the evidence is what it purports to be. *United States v. Maxwell*, 38 M.J. 148 (C.M.A. 1993). In making this determination, the military judge may consider direct or circumstantial evidence. *Id.* at 151.

While it is unclear what basis the military judge used in determining that the prosecution had laid an adequate foundation, the timing of his ruling suggests that he may have only considered the direct evidence provided by Ms. Weber. However, it is more likely that he considered other evidence as well. Specifically, the evidence established that the appellant showed this document to Airman Basic (AB) Kircher and asked him to "check the document out", or words to that effect. Further, AFOSI agents found this same document in the accused's on-base residence during a lawful search.

In his brief, the appellant asserts that the evidence tag contained inadmissible hearsay that unfairly prejudiced him. We disagree. The evidence tag attached describes an 18-page document, as well as the date and location the document was found. It also states that the appellant is the owner of the document. The evidence contains no opinion as to the guilt of the appellant. Therefore, we find no unfair prejudice to the appellant.

Even if the evidence tag contains inadmissible hearsay, there was ample circumstantial evidence to support the admission of the exhibit. First, SA Bonaro, the lead agent on the case, stated that he was present during the search of the appellant's home on 11 December 2001. He knew a document similar to Prosecution Exhibit 1 was seized. Next, Ms. Weber testified that the markings on the front, the initials and the date on the back of the document were consistent with the markings AFOSI agents in her detachment made. Finally, AB Kircher said that the appellant showed him a computer-

generated document concerning ecstasy. Although any one of the above factors by itself may not have been a sufficient foundation for admitting the document, taken as a whole, they provide a sufficient basis for the military judge's decision that this document is what it purports to be. As a result, the military judge did not err by admitting Prosecution Exhibit 1.

The approved 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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator