UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman GREGORY L. WILSON
United States Air Force

ACM 37691

09 May 2012

Sentence adjudged 20 May 2010 by GCM convened at Travis Air Force Base, California. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 140 days, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Phillip T. Korman; Major Robert D. Stuart; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A general court-martial composed of military judge alone convicted the appellant pursuant to his plea of wrongful use of oxycodone and convicted him contrary to his plea of wrongful distribution of Ambien, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced the appellant to a bad-conduct discharge, confinement for 140 days, and reduction to E-1. The convening authority approved the sentence adjudged. The appellant argues that the evidence is factually insufficient to support his conviction of wrongfully distributing Ambien. We will also address appellate delay.

Airman Basic SC testified that she is a recovering addict and was craving "something" when she went to the appellant's dormitory room and asked if he had "any kind of drug." The appellant replied that he had an Ambien, and gave it to her. She testified that she had previously taken Ambien, that the pill provided to her by the appellant looked like Ambien, and that the effects were consistent with Ambien. The Government and the appellant agreed to the expected testimony of a pharmacist who would testify that Ambien is a Schedule IV controlled substance manufactured as a blue, round tablet. The appellant argues that Airman Basic SC's habitual drug use renders her testimony unreliable.

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 (C.M.A. 1987)). "[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). Our assessment of legal sufficiency is limited to the evidence produced 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 [. . .] and making allowances for not having observed the witnesses,' [we ourselves are] 'convinced of the appellant's guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

We find the evidence legally and factually sufficient to support the appellant's conviction of wrongful distribution of Ambien. Despite her admitted drug habit, Airman Basic SC unequivocally testified that the appellant offered her an Ambien, that the pill looked like Ambien, and that the effects were consistent with Ambien. An experienced military judge observed her demeanor on the stand and convicted the appellant on her testimony. Having taken a fresh, impartial look at the evidence and making allowances for not having observed the witness ourselves, we are convinced of the appellant's guilt beyond a reasonable doubt.

We note that the overall delay of over 18 months between the time the case was docketed at the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of

the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *See United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. The post-trial record contains no evidence that the delay has had any negative impact on the appellant. Moreover, the appellant consented to a delay request to submit an assignment of errors that extended the period from initial docketing on 16 July 2010 to 7 September 2011, a period of 419 days. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

Conclusion

The 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); *Reed*, 54 M.J. at 41. Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court