UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRANDON R. BUTLER
United States Air Force

ACM 36811

21 March 2008

Sentence adjudged 25 May 2006 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Barbara Shestko (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 years, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Michael A. Burnat, Captain Griffin S. Dunham, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Roberto Ramirez.

Before

THOMPSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

PETROW, Judge:

In accordance with his pleas, the appellant was found guilty of dereliction of duty, escape from confinement, operating a vehicle while drunk, using marijuana and cocaine, and stealing military property, in violation of Articles 92, 95, 111, 112a, and 121, UCMJ, 10 U.S.C. §§ 892, 895, 911, 912a, and 921. In opposition to his plea, the appellant was found guilty of possession of marijuana with the intent to distribute, in violation of Article 112a. Appellant raises the following issue:

WHETHER THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF AN UNLAWFUL INVENTORY OF APPELLANT'S AUTOMOBILE.[1]

We find the appellant's contention to be without merit for the reasons stated below.

Background

Prior to entering pleas, the appellant made a motion to suppress approximately ten pounds of marijuana discovered during an inventory search of his vehicle, claiming that the contraband was the product of an illegal search. On the evening of 5 August 2005 through the early morning of 6 August 2005, several officers of the Las Cruces, New Mexico, Police Department were engaged in an underage alcohol enforcement operation. The focus of the operation that night was the Brew Ha Ha Club in Las Cruces. Sitting in an unmarked vehicle outside of the club, the officers observed four individuals, one of whom was the appellant, walking towards the club. They were staggering, talking loudly, and slurring their speech. They attempted to enter the club, but were refused. They then proceeded towards a parking lot in the rear of the club.

The officers next observed a green Honda exit the parking lot by going over the curb rather than the regular exit. The officers followed the Honda in their vehicle, suspecting that a driving while intoxicated (DWI) offense was in progress. The Honda pulled into a parking lot behind a Denny's restaurant and the officers followed. The three occupants of the vehicle were from the same group of four individuals whom they had earlier observed being refused entrance to the club. The appellant was the driver of the Honda. A field sobriety test was administered to the appellant, who failed. All three occupants were placed under arrest.

During a hearing on the suppression motion at issue, Sergeant (Sgt) KE of the Las Cruces Police Department testified that the regular practice of the department was to impound vehicles associated with a DWI arrest. It was the practice in place for the 20 years he had been on the force. There were limited exceptions, not applicable to the appellant's situation, such as where a sober relative is in the car. The purpose of the towing was to ensure the safety of the vehicle and its contents. Sgt KE testified that, although the department's written policy generally left the decision to impound a vehicle to the officer's discretion, in DWI cases the department's practice is to impound the vehicle. The reason for the policy in DWI cases is that the driver's ability to decide whether to leave the car and its contents parked is impaired due to intoxication. The department policy is also to conduct an inventory of a vehicle when it is impounded.

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Pursuant to the policy described above, Officer MC of the Las Cruces Police Department conducted an inventory of the Honda while it was still in the Denny's parking lot. When Officer MC opened the trunk, he discovered a black duffle bag. He opened the duffle bag and discovered a green leafy substance contained in a one gallon plastic Ziploc bag. Another officer conducted a field test[2] on the contents of the Ziploc bag. The contents tested presumptively positive for marijuana. A further search of the trunk and duffel bag revealed a rectangular brick of a green, leafy substance in the duffle bag. The Ziploc bag and its contents as well as the brick of the green leafy substance were seized and subjected to further testing. The green leafy substance in the Ziploc bag, weighing slightly less than a pound, was tested by the New Mexico Department of Public Safety Crime Lab, and was positively identified as marijuana. The brick was positively identified by the United States Army Criminal Investigation Laboratory as an 8.78 pound brick of marijuana.

The military judge announced the following findings of fact with regard to the evidence on the motion: that the arrest of the appellant for DWI was proper; that the police department's policy was to impound a vehicle involved in a DWI; that the officers have limited discretion not to impound, such as where a relative is present and the driver is sober enough to give his consent to release the car to the relative; that all vehicles impounded will have an inventory conducted; that such an inventory is an exception to the Fourth Amendment's warrant requirement; and that the decision of the law enforcement officers to impound the vehicle under the circumstances of the case were in accordance with the department's policy, and was reasonable and in good faith. The defense motion to suppress was denied.

Discussion

"A military judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard." *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *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." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995).

In *Colorado v. Bertine*, 479 U.S. 367 (1987), a police officer arrested a driver for operating his van while under the influence of alcohol. After the driver was taken into custody and before the tow truck arrived to take the van to an impoundment lot, another officer, acting in accordance with local police procedures, inventoried the van's contents, opening a closed backpack in which he found various containers holding controlled substances. *Id.* at 368-69. The Court upheld the admission of the contraband at trial, holding "an inventory search may be 'reasonable' under the Fourth Amendment even

[2] A chemical reaction test which yields a presumptive, but not conclusive, result.

though it is not conducted pursuant to a warrant based upon probable cause." *Id.* at 371. In deciding *Bertine*, the Court referenced its decision in *South Dakota v. Opperman*, 428 U.S. 364 (1976), wherein the Court found that "inventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Bertine*, 479 U.S. at 372 (citing *Opperman*, 428 U.S. at 371). The policies behind the warrant requirement are not implicated in an inventory search nor is the related concept of probable cause. *Bertine*, 479 U.S. at 371.

The facts in the case before us are very similar to those in *Bertine*. We find nothing in the facts adduced at trial that would support a conclusion that the impoundment and inventory of the vehicle was a subterfuge for a criminal investigation. Accordingly, we conclude that the military judge did not abuse her discretion by denying the appellant's motion to suppress the discovered contraband.

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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Judge ZANOTTI did not participate.

OFFICIAL

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