UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL C. MILLER
United States Air Force

Misc. Dkt. 2007-02

25 June 2007

SPCM convened at Hanscom Air Force Base, Massachusetts, on 15 March 2007. Military Judge: Gary M. Jackson

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Captain Jamie L. Mendelson.

Appellate Counsel for Appellee: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Anthony D. Ortiz.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

In response to a trial defense motion, the military judge in this case suppressed a positive drug urinalysis test result and a confession made by the appellee. The military judge ruled that the appellee was not properly subject to urinalysis testing because the inspection of the appellee's urine was not conducted in accordance with Mil. R. Evid. 313. The basis of his ruling was that (1) a written memorandum directing the appellee to provide a urine specimen was invalid, and (2) the installation's standing urinalysis program as applied to the appellee did not amount to an order for inspection. The government has appealed this ruling under Article 62, UCMJ, 10 U.S.C. § 862. We have considered the government's brief in support of this appeal and the appellee's answer

thereto. For the reasons set forth below, we find the military judge's factual determinations to be supported by the record and his conclusions of law to be correct.

Background

The appellee, an Air Force reservist who was ordered to active duty with an effective date of 1 April 2006, and assigned to the 439th Logistics Readiness Squadron at Westover Air Reserve Base, Massachusetts (Westover), was charged with one specification of wrongful use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The evidence against him consisted of a urine specimen he submitted on 12 September 2006, that tested positive for a cocaine metabolite, and a confession he made to the Air Force Office of Special Investigations (AFOSI) after the urinalysis test result was known. The appellee submitted his specimen as part of the random drug testing program at Westover. The question before this Court is whether the inspection of the appellee was valid.

Jurisdiction and Standard of Review

The United States may appeal any "order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(a)(1)(B), UCMJ. A positive drug urinalysis result is an example of such evidence. Standing alone, a positive urinalysis may be legally sufficient to sustain a conviction for wrongful use of a controlled substance, even in the face of contrary evidence offered by the defense. *United States v. Ford,* 23 M.J. 331, 332 (C.M.A. 1987). The military judge's order excluding both the appellee's positive urinalysis test result and his subsequent confession therefore meets the jurisdictional requirements of Article 62, UCMJ.

In ruling on appeals under Article 62, UCMJ, we "may act only with respect to matters of law." Article 62(b), UCMJ. We are bound by the factual determinations of the military judge, except where they are unsupported by the record or are clearly erroneous. *United States v. Burris,* 21 M.J. 140, 144 (C.M.A. 1985); *United States v. Plants,* 57 M.J. 664, 665 (A.F. Ct. Crim. App. 2002). We consider the military judge's conclusions of law de novo. *United States v. Ayala,* 43 M.J. 296, 298 (C.A.A.F. 1995). "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000) (quoting 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999)). If the answer to either question is "no," then the military judge abused his discretion. *Ayala,* 43 M.J. at 298.

Discussion

The military judge in the present case examined the appellee's urinalysis inspection in light of Air Force Instruction (AFI) 44-120, *Drug Abuse Testing Program* (1 July 2000).

This AFI lays out the responsibilities of the various persons and agencies involved in the program, and, among others, it applies to Air Force Reserve members, as well as to active duty members. It requires installation commanders to establish a testing program that reaches all military personnel assigned to the installation, and is administered in accordance with applicable regulations. AFI 44-120, ¶ 4.7.1. The instruction also provides that unit commanders serve as the appropriate official who directs that a drug test be conducted. Unit commanders are also responsible for ensuring that written orders for member notification are properly acknowledged. *Id.* ¶¶ 4.7.6.1-.6.3.

In the present case, the appellee was given a written order on 12 September 2006 from Major R, the 439th Mission Support Group Deputy Commander and an Air Reserve Technician at Westover. The order directed the appellee to provide a urine specimen for drug testing purposes and that his failure to do so could result in disciplinary action. At the time Major R signed the order he was not on orders authorizing him to carry out command duties, was not on active duty, and was working that day in his civilian capacity. The military judge found that Major R did not have the authority to order an inspection of the appellee, and in fact did not issue any such order. This conclusion is well founded, as Major R testified that he was not the appellee's supervisor, was not a commander at the time, and did not consider the memorandum he signed to be an order. He further testified that had he noticed the signature block on the memo listed him as a commander, he would have corrected it.

The appellant argues that Major R was simply a messenger, notifying the appellee that he needed to provide a urine sample for testing pursuant to a valid inspection incident to the command of the Westover installation commander. They rely on an unpublished opinion from this Court, *United States v. Mohammed*, ACM S30838 (A.F. Ct. Crim. App. 30 Oct 2006) (unpub. op.), for the proposition that where there is an installation-wide inspection, the unit commander does not have any role other than to notify the member of the duty to report for testing. A critical aspect in *Mohammed*, however, was the finding by the military judge that there was in existence a valid inspection program set up by the installation commander in accordance with AFI 44-120, and that the appellant in that case was properly required to submit to the inspection. Also present in *Mohammed* was a signed, standing order from the unit commander, notifying members that they were selected for inspection. In the present case, the military judge concluded that the random drug testing program at Westover was not operated in a manner sufficient to subject the appellee to an inspection, and there were no standing orders.

Major R testified that there were no standing orders from the installation commander regarding the execution of the urinalysis testing program, and that he was not directed to notify the appellee regarding the inspection. Senior Master Sergeant (SMSgt) VL was the Drug Demand Reduction Program Manager and the Drug Testing Program Administrative Manager at Westover on 12 September 2006. SMSgt VL also testified

that there were no standing orders from the installation commander regarding urinalysis inspections, and that there were no instructions or wing policy memo indicating that when a name was randomly generated it was equal to an order from the installation commander.

Staff Sergeant (SSgt) K, the trusted agent for the urinalysis program at Westover, testified that the practice at Westover was that no urinalysis testing was done until a written order was provided to the military member whose name was randomly selected. SSgt K stated that the procedure was to have the unit commander sign an order notifying the member who had been selected, and that if the unit commander was not available he would go up the chain of command until a commander was found who could order the member to be tested. SMSgt VL testified that on some occasions the installation commander himself was contacted to sign the urinalysis testing order when there were no other commanders in the chain of command available. As the military judge noted, had there been a valid, standing inspection program in place as the government argues, there would be no need for the installation commander to be contacted to provide an order for testing. Unlike the situation in *Mohammed*, noted above, and similar cases, there is no evidence that personnel at Westover were simply acting as messengers for an installation-wide program in which there were standing orders in place for conducting urinalysis inspections.

Conclusion

The testimony supports the finding by the military judge that the appellee's urine sample was not taken pursuant to a valid inspection. Major R did not have the authority to order an inspection of the appellee. Furthermore, there were no standing orders regarding urinalysis testing at Westover, and personnel did not follow their established procedures for inspection. As applied to the appellee on 12 September 2006, the inspection was not conducted in accordance with Mil. R. Evid. 313. The military judge found no other basis for admitting the urinalysis results and neither do we.

Decision

Applying the Article 62, UCMJ, standard of review, we conclude the military judge did not err in holding that the urinalysis test result and the derivative confession were inadmissible. His factual determinations are supported by the record and his conclusions of law are correct. Accordingly, the appeal by the United States is denied.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator