UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, HAYES, and EWING[1]
Appellate Military Judges

UNITED STATES, Appellee
v.
Lieutenant Colonel ROBERT M. BABA
United States Army, Appellant

ARMY 20210199

Headquarters, 1st Theater Sustainment Command
Mary Catherine Vergona, Military Judge
Lieutenant Colonel Richard E. Gorini, Staff Judge Advocate

For Appellant: Captain Sarah H. Bailey, JA (argued);[2] Colonel Michael C. Freiss, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Christian E. DeLuke, JA; Captain Sarah H. Bailey, JA (on brief); Colonel Michael C. Freiss, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Mitchell Herniak, JA; Captain Sarah H. Bailey, JA (on reply brief).

For Appellee: Captain Timothy R. Emmons, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Jacqueline J. DeGaine, JA; Major Kalin P. Schlueter, JA; Captain Patrick S. Barr, JA (on brief).

22 June 2023

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

EWING, Judge:

Appellant, the former Chief of Pharmacy at Camp Arifjan, Kuwait, was convicted of numerous drug offenses related to his official duties. Appellant

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[1] Judge Ewing decided this case on active duty.

[2] The court heard oral argument on 13 April 2023 at the Inter American University School of Law in San Juan, Puerto Rico, as part of the court's outreach program.

contends many of these convictions were legally and factually insufficient. We partially agree and set aside five specifications. However, we also hold that appellant is not entitled to sentencing relief and affirm the adjudged sentence of a dismissal.

BACKGROUND

A. The Investigation

Appellant was an Army Reserve officer who activated and deployed to Kuwait in 2019 to serve as the Chief of Pharmacy and Officer in Charge (OIC) at the United States Military Hospital at Camp Arifjan. During a hand-over inventory towards the end of appellant's scheduled tour in 2020, pharmacy personnel discovered two missing bottles of hydroxychloroquine. The outgoing Noncommissioned Officer in Charge (NCOIC), along with the incoming OIC, investigated the issue via the pharmacy's computer system and discovered a prescription linked to appellant for the missing drugs. While appellant was a pharmacist and could *dispense* drugs, he did not have authorization to *prescribe* drugs. The missing hydroxychloroquine made the other pharmacy leaders suspect that appellant may have been dispensing drugs to himself without appropriate prescriptions. They reported their suspicions to the military police who opened an investigation.

Appellant consented to a search of his personal quarters on Camp Arifjan where the authorities found diazepam (also known as Valium), zolpidem (Ambien), and oxycodone—all three are controlled substances. Appellant possessed prescriptions for all of these drugs at some point during his military career, but all of his prescriptions had expired at the time of the search.

The authorities also seized several so-called "legend drugs" from appellant's quarters. These noncontrolled-but-prescribed substances included metformin (a diabetes medication), albendazole (de-worming), a bottle labeled metoprolol tartrate (blood pressure), ketorolac (anti-inflammatory), and piroxicam (also anti-inflammatory). Pharmacy records further reflected dispensations of metoprolol (blood pressure) and citalopram (antidepressant) to appellant, although these drugs were not definitively found in appellant's quarters. [3] The missing bottles of hydroxychloroquine were likewise not found.

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[3] The government contended that a partial pill found in appellant's quarters had markings consistent with metoprolol. This partial pill was too small for laboratory analysis. Prosecution Exhibit 44, the evidence and property custody document, states an open bottle labeled "'citalopram' containing approximately 200 pills" with the writing "E 20" was found in appellant's quarters. However, only a picture of the

(continued . . .)

Appellant gave a written sworn statement to investigators in which he admitted to self-prescribing metoprolol XL, metformin, and citalopram.

The government charged appellant with negligent dereliction of duty in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (2018) [UCMJ]; three specifications of wrongful possession of controlled substances (diazepam, zolpidem, and oxycodone) in violation of Article 112a, UCMJ; nine specifications of larceny of military property (metformin, albendazole, metoprolol tartrate, ketorolac, piroxicam (two specifications), metoprolol (toprol XL), citalopram, and hydroxychloroquine) in violation of Article 121, UCMJ; and one specification of making a false official statement in violation of Article 107, UCMJ.

B. Trial

Appellant pled guilty to negligent dereliction of duty and admitted during his providence inquiry to dispensing metoprolol and citalopram to himself without valid prescriptions.

Appellant pled not guilty to the other charges and specifications, and the parties proceeded to a contested judge-alone trial. Following trial, the military judge acquitted appellant of making a false official statement and convicted him of the remaining charges. We address appellant's contested convictions below.

1. Wrongful Possession

The government's Article 112a theory was that while appellant had multiple prior prescriptions for diazepam, zolpidem, and oxycodone, all of those prescriptions were expired by the time the drugs were found in his Kuwait quarters. Therefore, according to the government, his continued possession of those substances was wrongful.

Appellant had received nine total prescriptions for diazepam during his military career, with the most recent prescription having expired in 2016. Appellant likewise had six prior prescriptions for oxycodone, including two during his Kuwait deployment, with the most recent prescription expiring approximately five months before the search of his quarters. The government clarified at trial that they charged appellant for wrongfully possessing only the oxycodone tablets they believed were prescribed *prior to* appellant's deployment, and not for possessing the drugs from

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(. . . continued)
outside of the bottle was entered into evidence as Prosecution Exhibit 74. The contents of the bottle do not appear to have been inventoried by law enforcement or tested by the United States Army Criminal Investigation Laboratory (USACIL).

his two Kuwait prescriptions (even though those two prescriptions were also expired). Appellant had two prescriptions for zolpidem, both dating back to 2011.

The government introduced, and the military judge admitted, an excerpt from Army Regulation 600-85, The Army Substance Abuse Program (23 July 2020) (AR 600-85), in effect at the time of the search of appellant's Kuwait quarters. Relevant here, paragraph 4-2(l)(7) of that regulation provides:

> Soldiers are prohibited from using the following substances for the purpose of inducing excitement, intoxication, or stupefaction of the central nervous system . . . [a]ny prescription drug without a current prescription written specifically for the Soldier.

AR 600-85, para. 4-2(l)(7).

A later passage from the same chapter states:

> A Soldier's use of their lawfully prescribed and dispensed medication, for medical purposes, after the prescription's expiration date, does not in itself constitute a violation of Art. 112a, UCMJ and such use does not require an automatic "illegitimate use" finding under this regulation.

AR 600-85, para. 4-14(c)(4)(a).

Both of the above passages were included in the excerpt from the regulation admitted at appellant's trial. Following the regulation's admission early in appellant's court-martial, neither party discussed it further until the government argued in closing simply that the regulation "require[d] current written prescriptions for Soldiers." The defense contended that appellant's expired prescriptions were germane to whether the government had proven wrongful possession of the drugs.

The government presented no evidence that any diazepam, oxycodone, or zolpidem was ever missing from the Kuwait pharmacy, and appellant was not charged with the theft of any controlled substance.

2. Larceny

The nine larceny specifications related to the eight different legend drugs discussed above, as the government charged appellant with stealing piroxicam on two separate occasions. The government's case consisted of: (1) testimony from medical personnel listed as having prescribed the drugs to appellant; (2) drugs

recovered from appellant's quarters; (3) pharmacy records; and (4) appellant's own statement. We address these in turn.

The government contended that appellant misused his access to the pharmacy's computer system to fraudulently enter medical officers' names as prescribing authorities to effectuate his theft of drugs. Pharmacy records listed one of three medical officers—COL O, LTC Z, and MAJ A—as having prescribed appellant the drugs comprising the larceny specifications. These three officers testified at appellant's trial that, with one exception, they had not prescribed the drugs to appellant. The exception was MAJ A's testimony that he provided appellant with oral authority to use his name as the prescribing officer for piroxicam. Specifically, when asked whether he gave permission to appellant to enter his name in the pharmacy's system as prescribing officer, MAJ A said, "I did for piroxicam." The government pointed out that the pharmacy's records showed that COL O and LTC Z were listed as the prescribing authorities for appellant's two piroxicam prescriptions.

At least some of five of the eight different types of legend drugs were found in appellant's quarters, including metformin, albendazole, a bottle labeled metoprolol tartrate, ketorolac, and piroxicam. Pharmacy records reflected that these five drugs were dispensed to appellant along with metoprolol, citalopram, and two bottles of hydroxychloroquine.

The government admitted appellant's sworn statement to law enforcement. There, appellant stated in pertinent part as follows:

> The medications that I self-prescribed were the following:
> Metoprolol XL to go back to my old regimen . . . .
> Metformin not for diabetes but, a skin condition.
> Citalopram for onset of depression to due to the fact of workload, SAV's, 15-6 investigation leading to lack of sleep and depression.

Both at trial and on appeal, appellant pressed the issue that, with the exception of hydroxychloroquine, pharmacy records did not reflect that the legend drugs were missing. However, the pharmacy's NCOIC described a system wherein the pharmacy kept tight accountability, including regular inventories, on its *controlled* substances, but not on its noncontrolled-but-prescribed legend drugs. Appellant himself said in his sworn statement that the pharmacy's computer systems could not "audit non[-]controlled medications[,]" and that the "only items that are constantly monitored and accounted for are the controlled medications (CII-V)."

LAW AND DISCUSSION

In his brief, appellant has challenged the legal and factual sufficiency of all three of his wrongful possession convictions and eight of his nine larceny convictions. Additionally, he has made a sufficiency claim as to the sole remaining larceny conviction (citalopram) via *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).[4] We address the legal and factual sufficiency of all of these convictions here.

A. Standard of Review

This court reviews questions of legal and factual sufficiency de novo. *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (citation omitted). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (cleaned up).

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, the members of the service court are themselves convinced of appellant's guilt beyond a reasonable doubt." *Rosario*, 76 M.J. at 117 (cleaned up). This court applies "neither a presumption of innocence nor a presumption of guilt" but "must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). This "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). "In considering the record, [this court] may weigh the evidence, judge the credibility of witness[es], and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(d)(1). "The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case." *United States v. Zimmer*, ARMY 20200671, 2023 CCA LEXIS 1, at *21 (Army Ct. Crim. App. 4 Jan. 2023) (mem. op.) (citing *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015)).[5]

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[4] We have given full and fair consideration to the additional matters personally raised by appellant pursuant to *Grostefon*, 12 M.J. 431 (C.M.A.1982), and find they merit neither discussion nor relief.

[5] We note changes to our factual sufficiency review authority under Article 66, UCMJ, for offenses occurring on or after 1 January 2021. The offenses in this case all occurred before that date.

B. Wrongful Possession

Appellant's Article 112a sufficiency claims turn on wrongfulness.

To prove that appellant wrongfully possessed controlled substances, the government was required to prove beyond a reasonable doubt at trial that:

> (1) Appellant possessed a certain amount of diazepam, zolpidem, and oxycodone; and
>
> (2) Appellant's possession of those drugs was wrongful.

Manual For Courts-Martial, United States (2019 ed.) [MCM], pt IV, ¶50.b.(1).

The law defines wrongfulness as possession of a controlled substance "without legal justification or authorization." *MCM*, pt. IV, ¶50.c.(5). The *MCM* further explains that "[p]ossession . . . is not wrongful if such act or acts are . . . without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine but actually believes it to be sugar, is not guilty of wrongful possession of cocaine)." *Id.* Where a question related to wrongfulness "is raised by the evidence presented, then the burden of proof is upon the United States to establish that the . . . possession . . . was wrongful." *Id.*

The facts are largely undisputed. Appellant possessed diazepam, zolpidem, and oxycodone in his quarters. All three of those drugs are controlled substances.[6] On the charged "on or about" date of 11 September 2020, appellant did not have current prescriptions for any of those drugs. It is also uncontested that appellant had prior valid prescriptions for all three drugs.

Paragraph 4-14(c)(4)(a) of AR 600-85 is germane. That passage provides that a "[s]oldier's use of their lawfully prescribed and dispensed medication, for medical purposes, *after the prescription's expiration date, does not in itself constitute a violation of Art. 112a, UCMJ* and such used does not require an automatic 'illegitimate use' finding under this regulation." AR 600-85, para. 4-14(c)(4)(a) (emphasis added).

This paragraph relates to wrongful use rather than possession. However, as a matter of logic, one generally *possesses* a controlled substance for some period of time in order to *use* it. Thus, an Army regulation admitted at appellant's trial at the

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[6] The government established at trial that diazepam and zolpidem are Schedule IV controlled substances and that oxycodone is a Schedule II controlled substance.

very least implies that possessing prescribed controlled substances with an expired prescription "does not in itself constitute" a violation of Article 112a. Moreover, the regulation does not delineate between a prescription expired for, e.g., one day versus five years. Nor does the military judge's benchbook. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (29 February 2020) [Benchbook], para. 3A-36A-1.d. Note 8 (Article 112a wrongful possession panel instruction) ("Unless you are satisfied beyond a reasonable doubt that the accused's possession of the substance was not . . . as a result of a properly obtained prescription duly prescribed for him by a physician, you may not find the accused guilty.").[7]

At first glance, paragraph 4-14(c)(4)(a) seems to conflict with paragraph 4-2(l)(7) of that same regulation. That paragraph prohibits soldiers from using "[a]ny prescription drug *without a current prescription* written specifically for the Soldier" for the "purpose of inducing excitement, intoxication, or stupefaction of the central nervous system." AR 600-85, para. 4-2(l)(7) (emphasis added). However, a closer read of the passage reveals that it does not necessarily address the use of a prescribed-but-expired drug for its *intended medical use*, but only prohibits use for the listed improper purposes (excitement, intoxication, or stupefaction). This reading of paragraph 4-2(l)(7) also harmonizes that passage with paragraph 4-14(c)(4)(a), which addresses use of prescription drugs "for medical purposes." *Cf. e.g., Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (cleaned up). And at any rate, paragraph 4-2(l)(7) likewise addresses only wrongful *use* and not *possession* of drugs past a prescription's expiration.

The Army's regulatory framework also raised a "fair notice" issue and presented the question of the required *mens rea* of knowledge of the contraband

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[7] While it happened too late to apply at appellant's court-martial, the Army has since clarified its stance on wrongful *use* of controlled substances with expired prescriptions. On 18 May 2021, the Secretary of the Army issued Army Directive 2021-21, entitled "Use of Prescribed Controlled Medications." This directive provided that "[a]bsent an otherwise specified date from the prescriber, use of prescription substances defined as schedules II–V in 21 U.S.C. 812 will be considered expired and illegitimate for use 6 months after the most recent date of fill, as indicated on the prescription label." Army Dir. 2021-21, para. 4(a). This directive also states that "[d]efining the use of controlled substances with expired prescriptions as illegitimate use in the Army Drug and Alcohol Management Information System *represents a significant change* in Army policy." *Id.* at para. 4(b) (emphasis added). Like AR 600-85, this directive likewise did not address wrongful possession in this context.

nature of the drugs. Unlike heroin or cocaine, prescribed controlled substances are not inherently contraband. If a soldier does not know the contraband nature of a controlled substance he possesses, that possession is "not wrongful." *MCM*, pt. IV, ¶50.c.(5). The regulatory guidance discussed above could lead a reasonable soldier to believe that possessing a prescribed controlled substance for at least some period of time after the prescription's expiration date was not wrongful, leading to a lack of fair notice of criminality. *See, e.g., United States v. Caporale*, 73 M.J. 501, 504 (A.F. Ct. Crim. App. 2013) ("Due process requires 'fair notice' that an act is forbidden and subject to criminal sanction.") (citation omitted); *United States v. Pope*, 63 M.J. 68, 73 (C.A.A.F. 2006) ("[R]egulation must provide sufficient notice so that a servicemember can reasonably understand that his conduct is proscribed.").

We have serious doubts that possessing a prescribed controlled substance for one day (or, logically, one hour, minute, or even second) past a prescription's expiration date subjects soldiers to felony-level drug charges. On the other hand, possessing controlled substances for multiple years after a prescription expires presents a different issue. We need not resolve the ultimate legal line between legitimate and wrongful possession of prescribed drugs here. Rather, we find as a *factual* matter that in this case the government simply failed to carry its burden of proving wrongful possession beyond a reasonable doubt. The government offered nothing at trial to rebut the language in paragraph 4-14(c)(4)(a) of AR 600-85, which states that even wrongful *use*, much less possession, of an expired controlled substance "does not in itself constitute" a violation of Article 112a. This language suggests the need for something more than mere possession of drugs with an expired prescription. It was here that the government's proof fell short.

Our conclusion is buttressed by the fact that the government has cited to no case from any court where a defendant was convicted of wrongfully possessing drugs because of an expired prescription, and we are aware of no such case. *Cf. United States v. Haller*, No. 202100069, 2022 CCA LEXIS 50, at *6-10 (N.M. Ct. Crim. App. 24 Jan. 2022) (mem. op.) (reversing a guilty plea to Article 133 for possessing prescribed-but-expired controlled substances as factually and legally insufficient, and noting, *inter alia*, that "[t]here was no evidence that [Haller's] possession violated any state law").

In light of the foregoing, we find appellant's convictions for Charge III and its three specifications to be factually insufficient.

C. Larceny

We have little trouble affirming seven of appellant's nine larceny convictions. The government proved that appellant used his official position and access to the pharmacy's computer systems to dispense himself each of these drugs without valid prescriptions. The government also showed both that these drugs were military

property and that they had some value. Appellant admitted to self-prescribing metoprolol, metformin, and citalopram; pharmacy records corroborated this. At least some of five of the drugs were found in his quarters, including metformin, albendazole, metoprolol tartrate, ketorolac, and piroxicam. Eyewitnesses testified to first seeing the two bottles of hydroxychloroquine in the pharmacy and then later, after appellant printed prescription labels for the drug, discovering they were missing. With the piroxicam exception discussed below, the three medical officers listed as the prescribing authorities for all of the legend drugs testified that they did not prescribe the drugs to appellant.

Appellant's two piroxicam convictions are different. Major A testified that he approved a piroxicam prescription for appellant. Specifically, when asked whether he gave permission to appellant to enter his name in the pharmacy's system as a prescribing officer, MAJ A said, "I did for piroxicam." Major A explained that he had done this verbally and, to his recollection, had not followed up with a written prescription.

Major A and the other medical officers testified that it was highly irregular to prescribe a drug via a verbal command with no underlying written prescription. Appellant's two piroxicam prescriptions in the system bore not MAJ A's name, but the names of the other two medical officers. Nevertheless, if appellant had a prescription from a medical officer for piroxicam, then taking that drug from the pharmacy would not have amounted to larceny. Major A's trial testimony that he prescribed piroxicam to appellant, albeit orally, gives rise to a reasonable doubt in our minds as to whether appellant stole that drug. We therefore find appellant's two convictions for larceny of piroxicam to be factually insufficient.

D. Sentence Reassessment

While this was a judge-alone case arising under the 2016 Military Justice Act with segmented and unitary sentencing, the military judge here adjudged only the unitary sentence of a dismissal. Thus we can proceed with the traditional sentence reassessment analysis.

Having set aside and dismissed appellant's three possession convictions and two of his larceny offenses, we must determine whether we should reassess the sentence or remand for a rehearing. We do so by analyzing: (1) whether there are dramatic changes to the penalty landscape; (2) the sentencing forum; (3) whether the remaining offenses capture the gravamen of the criminal conduct; and (4) whether we have experience and familiarity with the remaining offenses. *See United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013).

We find that we can reassess appellant's sentence. The penalty landscape related to potential confinement changed from a maximum of 27 years and 3 months

to a maximum of 14 years and 3 months—but appellant received no confinement. The remaining offenses include negligent dereliction of duty and seven specifications of larceny of drugs from the Army. All seven larceny convictions carry with them the possibility of a dismissal.

We have experience and familiarity with these offenses. They capture the gravamen of appellant's criminal conduct—namely, his brazen abuse of authority. The Army entrusted appellant to dispense drugs from the Kuwait pharmacy. He violated that trust repeatedly. We are confident that the military judge would have imposed a sentence no less than a dismissal for the remaining offenses and therefore affirm the adjudged dismissal.

CONCLUSION

The findings of guilty to Charge III and its Specifications, and Specifications 8 and 9 of Charge IV, are SET ASIDE and DISMISSED WITH PREJUDICE. The remaining findings and the reassessed sentence of dismissal are correct in law and fact and no error materially prejudicial to appellant's substantial rights remains. Accordingly, the remaining findings and sentence as reassessed by this court are AFFIRMED.

Senior Judge WALKER and Judge HAYES concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court