

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
SIMS, COOK, and GALLAGHER
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class BRANDON M. WHITE
United States Army, Appellant

ARMY 20100325

Headquarters, Fort Drum
Michael Hargis, Military Judge
Lieutenant Colonel Michael O. Lacey, Staff Judge Advocate (pretrial)
Lieutenant Colonel Robert L. Manley, III, Staff Judge Advocate (recommendation)
Major Joseph A. Fedorko, Acting Staff Judge Advocate (addendum)

For Appellant: Captain Matthew T. Grady, JA (argued); Colonel Patricia Ham, JA;
Lieutenant Colonel Imogene M. Jamison, JA; Major Richard Gorini, JA; Captain
Jennifer A. Parker, JA; Captain Matthew T. Grady, JA (on brief).

For Appellee: Captain Daniel D. Maurer, JA (argued); Major Amber J. Williams,
JA; Major Katherine S. Gowel, JA; Captain Daniel D. Maurer, JA (on brief).

13 June 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

SIMS, Senior Judge:

An enlisted panel sitting as a special court-martial convicted appellant, contrary to his pleas, of two specifications of wrongful distribution of a controlled substance in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (2006) [hereinafter UCMJ]. Appellant was sentenced to a bad-conduct discharge, confinement for forty-five days, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

This case is before us for review pursuant to Article 66, UCMJ. The case was originally submitted on its merits. Following the release of the United States Supreme Court decision in *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct.

2705, 180 L. Ed. 2d 610 (2011), appellant filed a supplemental assignment of error. He now alleges the military judge erred in admitting a laboratory documentation report pertaining to the accusing witness, Private (PVT) Kisner, and in allowing an expert in the area of forensic toxicology to testify about that report. Although this assignment of error merits some discussion, it warrants no relief.

FACTS

Pretrial

On 3 July 2009, appellant, Private First Class (PFC) Hernandez, PFC Hilbrich, PVT Kisner, and PVT Suriel traveled from Fort Drum to Syracuse, New York in PFC Hilbrich's car to go to a "rave club." At some point during the trip, several white pills containing a handgun logo were distributed amongst the passengers. Private Kisner believed the pills to be ecstasy and ingested one of them. Within thirty minutes of ingesting the pill, PVT Kisner began to feel an overwhelming sense of happiness. After spending time at the club dancing with glow sticks, the soldiers returned to Fort Drum without further incident. On the following evening, appellant, PVT Kisner and PVT Suriel were dropped off at a movie theater by PFC Hilbrich. While at the theater, Kisner again received and ingested a pill that he believed to be ecstasy.

On 7 July 2009, PFC Hernandez, PVT Kisner, and PVT Suriel provided urine samples as part of a 10% random urinalysis inspection. Not surprisingly, PVT Kisner tested positive for methylenedioxymethamphetamine (also known as ecstasy). When PVT Kisner was informed of his positive urinalysis result by Sergeant (SGT) Storms and questioned about his apparent drug use, he identified appellant as the source of the ecstasy and named the other occupants of the car.

Trial

At trial, the government sought to prove that appellant had distributed one pill each to the four soldiers in the car on 3 July 2009 and one pill each to PVT Kisner and PVT Suriel at the movie theater on 4 July 2009.

In its opening statement, the defense readily agreed that PVT Kisner used ecstasy that weekend, but vehemently disputed that appellant was the source of that ecstasy. In his opening, the trial defense counsel stated:

On that Tuesday morning, the 7th, a random urinalysis was conducted in [appellant's] unit. The only one that came back positive was PVT Kisner. When Private Kisner was confronted with the results, approximately 3 to 4 weeks later, he was in a dilemma. He was frightened about

what was going to happen to him so he dimed out his buddies, and then this story actually begins.

Instead of letting [Criminal Investigation Command], who has jurisdiction over these offenses, investigate, the unit decided to do it. Sergeant Storms was upset that one of his Soldiers pissed hot. He confronted the Soldier. The Soldier is going to tell you that he was scared to death. Private Kisner was scared to death. So he said that everybody did it and then he said that [appellant] was the one that gave them to him. . . .

What this case is going to come down to is the testimony of one person — Private Kisner, who had the most to lose. . . .

. . . All we know is that at some point that weekend, whether it was that night or another, Private Kisner used ecstasy. You are not going to know when and you don't know who gave it to him.

Following the opening statements, the government called only two witnesses. First, PVT Kisner, under a grant of testimonial immunity, testified that appellant told him he was going to give him ecstasy, that the appellant twice gave him ecstasy, that he ingested the ecstasy in the car and at the movie, and that the other soldiers also ingested the ecstasy. The government then called Major (MAJ) Nichols, the deputy commander of the drug testing laboratory at Fort Meade, Maryland. When the government sought to have MAJ Nichols recognized as an expert in forensic toxicology, appellant's trial defense counsel affirmatively stated he had no objection. Major Nichols then explained the testing procedures and stated that it was his opinion that PVT Kisner's urine sample indicated PVT Kisner had ingested ecstasy during the timeframe of the distribution charges. The government successfully moved for the admission of the lab report after appellant's trial defense counsel affirmatively stated he had no objection. Thereafter, the government rested.

The defense then called PFC Hernandez, PFC Hilbrich, PVT Suriel, an Army criminal investigator, and one of appellant's supervisors.

Private First Class Hernandez testified that he fell asleep on the way to the club while riding in the back seat of the car with PVT Kisner and appellant. He recalled being awakened by appellant who tapped him on the shoulder and gestured to a white pill that was lying in the lap of PFC Hernandez. Private First Class Hernandez stated that he decided not to take the pill after texting with PFC Hilbrich and finding out that PFC Hilbrich also had a pill that PFC Hilbrich was not going to

take. Private First Class Hernandez further testified that PVT Kisner appeared to be “on some type of drugs” when they were at the club. In response to the trial defense counsel’s questioning, he also related that both he and PVT Kisner were selected for a random drug test on the following Tuesday, whereupon he tested negative and PVT Kisner tested positive.

Private First Class Hilbrich then took the stand and testified that he was tapped on the shoulder and given a pill as he was sitting in the front seat of the car. He claimed that he did not see who gave him the pill. After deciding not to take the pill, he texted PFC Hernandez, put the pill in the car door handle, and later threw it away. Private First Class Hilbrich also confirmed that he gave appellant, PVT Kisner, and PVT Suriel a ride to a movie theater on the following evening. In response to the trial defense counsel’s questions, PFC Hilbrich testified that he was aware of a “piss test” on which PVT Kisner came back positive and PFC Hernandez came back negative.

At the time of trial, PVT Suriel was no longer in the Army. He nonetheless appeared on behalf of the defense and testified that he neither saw nor ingested any drugs on the evenings in question. He did, however, reveal that he had been told by appellant that PVT Kisner was on ecstasy at the club and that PVT Kisner had thereafter tested positive on a drug test.

Suriel was followed by a criminal investigator who testified that he had been unable to “flip” PVT Kisner and use him for undercover operations because it was commonly known that PVT Kisner had “tested positive.” The defense then called one of appellant’s supervisors who testified that he had been told by SGT Storms that people in the unit had tested positive “because of appellant.”

In his closing, the trial defense counsel argued that his client had been accused wrongfully by PVT Kisner after PVT Kisner was pressured by SGT Storms into naming appellant as the source. In support of his argument, he emphasized that PVT Kisner was “scared to death” because he was the only soldier in the group who “got caught” by a “positive urinalysis” and that he therefore had a very strong motive to wrongfully implicate appellant as the source of the drugs. The defense counsel again readily acknowledged that “some people in the car” received drugs, but argued that it was unclear who actually distributed them and that therefore the panel should acquit his client. After less than one hour of deliberation, the panel found appellant guilty of both distribution specifications, with minor exceptions and substitutions as to the exact number of pills distributed.

LAW AND DISCUSSION

Waiver

We view the issue in this case to be one of a waiver of a constitutional right pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.] 103(a)(1) versus forfeiture pursuant to Mil. R. Evid. 103(d). As noted by our superior court, “[t]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege.” *United States v. Sweeney*, 70 M.J. 296, 303–04 (C.A.A.F. 2011) (citing *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)).

In determining whether waiver or forfeiture applies, we consider whether the failure to raise the objection “at the trial level constituted an intentional relinquishment or abandonment of a known right.” *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citing *Harcrow*, 66 M.J. at 156) (internal citations omitted). Without the intentional relinquishment of a known right, such an objection is merely forfeited, which then requires the application of the plain error doctrine to determine whether there was an error that should be corrected. *Id.*

Applicable Factors

The clarity of the waiver and record depend on the facts and circumstances surrounding the right and the alleged waiver. In determining whether there was a clearly established intentional relinquishment of a known right, we examine five factors: whether the waiver was part of the defense tactics or strategy; whether the right was known or knowable at the time of the alleged waiver under *Harcrow*, 66 M.J. at 156-58; whether the defense had knowledge of the expected testimony or documentary evidence and had time and opportunity to review it; whether the defense was given opportunity to object to the admissibility of the evidence; and whether the appellant alleges ineffective assistance of counsel in regard to the waiver. *Campos*, 67 M.J. at 332–333. Each of these factors clearly supports the existence of waiver in the case before us.

It is readily apparent that the waiver was a “strategic trial decision” and an integral part of the appellant’s defense. *Sweeney*, 70 M.J. at 304. The defense trial strategy hinged exclusively on impeaching PVT Kisner’s allegation that appellant was the source of the ecstasy. In support of this strategy, the defense sought to prove, and repeatedly argued, that PVT Kisner falsely accused appellant of distributing the ecstasy only after being informed that he had tested positive for ecstasy.

The right at issue in this case was knowable at the time of appellant’s trial. Our superior court had previously alerted practitioners as to the testimonial nature of some portions of drug testing reports and called into question the admissibility of expert testimony regarding such reports in *United States v. Blazier*, 68 M.J. 439 (2010) (based upon the United States Supreme Court’s decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009) and *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). As such, the trial defense counsel in this case easily could have made a “colorable objection” to the admission of the drug testing report and/or to the testimony of the government expert, but chose not to do so for tactical reasons. *Sweeney*, 70 M.J. at 304.

Furthermore, the record indicates that appellant’s trial defense counsel was very familiar with the lab report and the testimony of the government expert. The defense counsel had fully reviewed the lab report, possessed detailed knowledge of its contents, was well aware of the expected testimony in regard to the report, and actively sought to use the lab report to show that PVT Kisner was a drug user who could not be trusted. During the cross-examination of MAJ Nichols, the defense counsel not only verified that PVT Kisner had tested positive for ecstasy, but established that the lab report also indicated that PVT Kisner may well have ingested another drug in addition to the ecstasy. After the government rested, the defense deliberately elicited testimony from each and every defense witness as to their knowledge of PVT Kisner’s positive urinalysis test.

In light of the trial defense counsel’s emphasis on PVT Kisner’s testing positive in order to show PVT Kisner’s motive to lie, it is not at all surprising that the trial defense counsel, when specifically given opportunities early in the proceedings to object to the testimony of MAJ Nichols and the admissibility of the lab report, clearly and unambiguously responded that he had no objection. This tactical choice was further highlighted when, after the trial counsel realized that he had failed to link PVT Kisner to the lab report, the trial defense counsel offered to stipulate that the social security number found on the lab report was PVT Kisner’s in order to provide the necessary linkage.*

Lastly, there is no indication that appellant is alleging that he received ineffective assistance of counsel in regard to the waiver at issue. The record before us provides no evidence that appellant dissented from his attorney’s tactical decision to make use of PVT Kisner’s positive urinalysis to show a motive for PVT Kisner’s false identification of appellant as the distributor of the ecstasy.

* As noted by the majority in *Bullcoming v. New Mexico*, 564 U.S. ____, 131 S.Ct. 2705, 2718 (2011), defendants in contested cases regularly stipulate as to the admission of a forensic analysis such as the lab report in question in this case.

CONCLUSION

On consideration of the entire record and the submissions of the parties, to include those matters raised personally by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), we hold the findings of guilty and the sentence as approved by the convening authority to be correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAUULT ELDRIDGE
Deputy Clerk of Court