UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSHUA C. BLAZIER
United States Air Force

ACM 36988 (f rev)

09 August 2012

Sentence adjudged 22 November 2006 by GCM convened at Luke Air Force Base, Arizona. Military Judge: Joseph Kiefer.

Approved sentence: Bad-conduct discharge, confinement for 45 days, and reduction to E-3.

Appellate Counsel for the Appellant: Colonel Eric Eklund; Colonel James B. Roan; Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Maria A. Fried; Lieutenant Colonel Mark R. Strickland; Major Shannon A. Bennett; Major John Fredland; Major Marla J. Gillman; Major Michael S. Kerr; Major Daniel E. Schoeni; and Major Lance J. Wood.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Coretta E. Gray; Major Scott C. Jansen; Major Joseph Kubler; Major Donna S. Rueppell; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

GREGORY, Senior Judge:

A general court-martial composed of officer members convicted the appellant, contrary to his pleas, of negligent dereliction of duty,[1] wrongful use of ecstasy, wrongful use of methamphetamine, and wrongful use of marijuana, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The approved sentence consists of a bad-conduct discharge, 45 days of confinement, and reduction to E-3.[2] We previously affirmed the findings and sentence. *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *rev'd*, 69 M.J. 218 (C.A.A.F. 2010). The Court of Appeals for the Armed Forces reversed and remanded the case for consideration of whether the admission of testimonial hearsay in drug testing reports and an expert witness' repetition of that hearsay was harmless beyond a reasonable doubt in light of the entire record. *Blazier*, 69 M.J. at 227.[3]

The Evidence Presented at Trial

On 5 June 2006, the appellant provided a urine specimen pursuant to a random urinalysis inspection. The Air Force Drug Testing Laboratory (AFDTL) tested the specimen and reported it positive for methamphetamine and ecstasy in a drug testing report (DTR). On 10 July 2006, the Air Force Office of Special Investigations (AFOSI) questioned the appellant, and the appellant agreed to talk.

The appellant testified at trial that he told the agents he went to a party on the night of Saturday, 3 June 2006. His wife dropped him off at the party at about 2100 hours and picked him up the next day at about noon. The appellant did not know anyone at the party except for a civilian who invited him. As the party wound down in the wee hours of the morning, the appellant was sitting on the couch when the civilian he knew came to him with a small blue pill that had a cartoon etched on it. The appellant took the pill, which made him feel "happy," "speedy" and "out of it." The appellant testified that he was "quite angry" with the civilian for giving him the pill and told him later that day that he "didn't want to be involved in those types of situations."

The appellant testified that during the AFOSI interview he brought up the subject of drinking alcohol at the Saturday night party. He testified that although he does not like the taste of alcohol he sometimes drinks to get drunk. On the night of the party he consumed 10 beers plus several shots of whiskey. On cross-examination, the appellant acknowledged that despite his consumption of alcohol that evening he specifically recalled taking the blue pill with the cartoon etched on it.

[1] The military judge previously granted a Rule for Courts-Martial 917 motion as to the willful dereliction of duty.
[2] The convening authority deferred and waived the mandatory forfeitures.
[3] *Williams v. Illinois*, 132 S. Ct. 2221 (2012), does not appear to substantively impact our superior court's decisions in *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010), and the more recent related opinion of *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). We had awaited release of this decision before proceeding.

The appellant consented to provide another urine specimen, which was collected and shipped to AFDTL where it tested positive for marijuana. Contemporaneous with his consent to provide a urine specimen, the appellant consented to a search of his residence and told the agents where in his apartment they would find a pipe used to smoke marijuana. In the exact location described by the appellant, agents found an aluminum foil pipe. The appellant's wife testified that the pipe found in their home was used to smoke marijuana, but that she had not seen her husband use it.

To prove the specifications alleging illegal drug use, the Government offered two DTRs – one for the 5 June specimen, which was positive for methamphetamine and ecstasy, and one for the 10 July specimen, which was positive for marijuana. As our superior court noted, each DTR consists largely of various machine-generated printouts – 111 of 128 pages in the first DTR, and 19 of 32 pages in the second. *Blazier*, 69 M.J. at 226 n.7. Each DTR also contains various routine chain-of-custody entries which do not review, summarize, or certify any results.

Other documents in the DTR, however, do involve review or certification of results. First, a cover memorandum for each DTR contains a summary of the results signed by a Results Reporting Assistant. Marina Jaramillo signed the summary in the first DTR and Andrea Lee signed the summary in the second; neither testified at trial. Second, each DTR contains a DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1998), with the certification of a Laboratory Certifying Official (LCO) that "the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated." Constantinos Zachariades signed as the LCO in the first DTR, A. S. Vallon signed the second, and neither testified at trial. Finally, each DTR contains reviews of initial immunoassay, rescreen immunoassay, and gas chromatograph/mass spectrometry (GC/MS) confirmatory tests signed by multiple reviewing authorities, of whom none testified at trial.

The Government called Dr. Vincent Papa, a forensic toxicologist and LCO at the AFDTL, to explain the DTRs. As our superior court noted, Dr. Papa's testimony consisted in large part of explaining and analyzing the various machine-generated reports and providing his own expert opinion of the results. *Blazier*, 69 M.J. at 226. But, he also referred to the internal reviews contained in the reports. For example, in describing various quality control measures at the AFDTL, Dr. Papa testified that laboratory certifying officials "make sure everything . . . is both scientifically and forensically correct" and expressly referenced the results certified in the respective cover memoranda and DD Forms 2624.

Consistent with his opening statement that highlighted alcohol consumption as a possible defense to the ecstasy and methamphetamine use, defense counsel extensively questioned Dr. Papa about the effects of alcohol. Defense counsel then moved on to explore a variety of "possible" problems with AFDTL's machines and personnel. When

asked if it was "possible" for the GC/MS machine to report a false positive on a blind quality control, Dr. Papa replied that it was "theoretically" possible but that the AFDTL had not had one. For specifics, defense counsel referred to a 2006 validation issue concerning the range of detection for the metabolite of marijuana, but it had been resolved by the time the appellant's sample was tested. He also asked if a technician involved in aliquotting the appellant's sample had ever been decertified. Dr. Papa replied that she had previously been temporarily decertified and undergone retraining.

On redirect, Dr. Papa stated that, in his expert review of the reports in this case, he found no errors and that, in the several months from the time the testing was done, no problems had been identified at the AFDTL which would impact the appellant's testing. He also explained that the GC/MS machine uses a series of "auto-tuning" steps to ensure it is working properly and that the machines involve "very little" human intervention. The court members had no questions for Dr. Papa.

The Admission of Testimonial Hearsay

We next determine the extent of testimonial hearsay admitted at trial. Our superior court has already determined "that 'at least the top portion'" of the DTR cover memoranda is testimonial. *Blazier*, 69 M.J. at 221 (quoting *United States v. Blazier*, 68 M.J. 439, 443 (C.A.A.F. 2010)). Therefore, the summaries of the two results reporting assistants contained at the top of the respective cover memoranda as well as Dr. Papa's reference to them are clearly testimonial hearsay. *Id.* at 226.

In accordance with the remand, we will also consider whether other portions of the reports contain testimonial hearsay. *Id.* at 227. We find that the LCO's certification on the DD Form 2624 that "the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated" is testimonial hearsay as well. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). Additionally, we find that the rescreen and GC/MS reviews, as well as Dr. Papa's reference to them, constituted testimonial hearsay because analysts doing rescreens and confirmation tests on a specimen identified as presumptively positive "must reasonably understand themselves to be assisting in the production of evidence." *Id.* at 302-03 (footnotes omitted).

The Impact of the Testimonial Hearsay

Having found testimonial hearsay was erroneously admitted, we must evaluate its impact on the case. In assessing constitutional error, the question is not whether the admissible evidence is sufficient to uphold conviction but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967), *quoted in Blazier*, 69 M.J. at 227. Among the factors we consider are (1) the importance of the testimonial hearsay to the prosecution's case, (2) whether the testimonial hearsay was cumulative, (3) the existence

of other corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case. *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). We review de novo whether a constitutional error is harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Where the prosecution has only a laboratory report to prove its case, testimonial hearsay that validates the laboratory results increases in importance and, depending on the posture of the case, may have a reasonable possibility of influencing the verdict. But that is not the case here.

The record shows that, as far as the ecstasy and methamphetamine use, the defense attack on the AFDTL was a sideshow – the main event was the defense theory of unknowing ingestion. The defense questioned Dr. Papa extensively about the impact of alcohol consumption, and the appellant testified to consuming large amounts of alcohol at a party where he took a small blue pill with a cartoon etched on it that made him feel euphoric and energetic – all characteristics consistent with Dr. Papa's testimony on the characteristics of ecstasy. Essentially, the appellant all but confessed to taking an illegal drug, and the court members chose to reject his defense of unknowing ingestion based on alcohol consumption after being properly instructed on knowing use and deliberate avoidance.

Concerning the marijuana use, the appellant admitted having a marijuana pipe in his residence when he consented to provide the second urine specimen. He told agents where it was, and they found it exactly where he described. Although the appellant did not expressly admit to using marijuana, he agreed on cross-examination that the pipe was "used to smoke marijuana." Defense counsel offered little argument specifically on the marijuana use other than to say that the Government had failed to show that the appellant should have reasonably known not to possess drug paraphernalia. Again, Dr. Papa thoroughly explained the machine-generated printouts in the second DTR and used them to provide his expert opinion that the specimen was positive for the metabolite of marijuana.

The great majority of documents in both DTRs were properly admitted machine-generated printouts of raw data and calibration charts. Dr. Papa used these documents to provide an independent expert opinion that the respective specimens were positive for methamphetamine, ecstasy, and marijuana. As our superior court noted, Dr. Papa repeated some of the testimonial hearsay contained in the reports, but "presented his ultimate conclusions as his own." *Blazier*, 69 M.J. at 226.

Dr. Papa freely acknowledged the possibility of errors raised by the largely hypothetical defense attacks on the laboratory, but he testified that, in his expert opinion, the results in the appellant's case were forensically and scientifically reliable and that, in the several months from the time the testing was done, no problems had been identified at the AFDTL which would impact the appellant's testing. He also explained that the

GC/MS machine uses a series of "auto-tuning" steps to ensure it is working properly and that the machines involve "very little" human intervention.

Having applied the *Van Arsdall* factors to the record in this case, we are convinced that the erroneous admission of testimonial hearsay was harmless beyond a reasonable doubt. The court members heard the appellant admit to taking a small blue pill with characteristics and effects consistent with those of ecstasy. They heard the appellant claim that he was too drunk to know what the pill was. They heard the appellant admit that he had a pipe in his residence used to smoke marijuana. They heard a qualified expert explain multiple machine-generated printouts of urinalysis testing of the appellant's urine. They heard the expert provide an independent opinion that the tests showed the presence of methamphetamine, ecstasy, and marijuana. They heard the expert acknowledge possible problems at the laboratory, but that, in his opinion, those problems did not impact the appellant's testing. The testimonial hearsay was cumulative with the expert's own opinion, was corroborated in large part by the appellant's admissions, and had little, if any, importance in the overall presentation of the case. Therefore, in the posture of this case, we do not find a reasonable possibility that the evidence complained of might have contributed to the conviction.

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court