UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2009-12**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Airman First Class (E-3)	)	
ADAM C. BORGMAN,	)	
USAF,	)	
Appellee	)	**Special Panel**

GREGORY, Judge:

On 29 October 2009, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

The appellee reported for training at a Navy installation where he along with other trainees provided a urine specimen for drug testing pursuant to a lawful military inspection. The Navy Drug Screening Laboratory (NDSL) processed the specimen and reported the result as positive for cocaine. A retest of the specimen at the Air Force Drug Testing Laboratory (AFDTL) also found cocaine.

At the appellee's special court-martial for wrongful use of cocaine, the United States offered the NDSL Documentation Package concerning the appellee's specimen through an expert witness from NDSL. The military judge denied admission of the report except for the results of the initial immunoassay screening test. After the military judge agreed to reconsider, trial counsel called an expert from AFDTL and offered the AFDTL test results through that expert. The military judge again denied admission of any testing results beyond the initial immunoassay screening test.

In denying admission of both drug testing reports beyond the first NDSL immunoassay screening test, the military judge concluded the reports were testimonial hearsay. He ruled that all personnel involved in the testing after the initial screening are subject to confrontation by the appellee as a necessary predicate to admission of the reports. The United States appeals the ruling pursuant to Article 62, UCMJ.

Jurisdiction

The appellee contests this Court's jurisdiction to hear the appeal of the military judge's ruling, claiming that the ruling does not conclusively exclude evidence and,

therefore, fails to meet the jurisdictional requirements for interlocutory appeal under Article 62, UCMJ. In arguing that the ruling does not exclude evidence but simply tells the Government to produce certain witnesses as a necessary predicate to admission of the drug testing reports, the appellee ignores the practical effect of the ruling: without compliance with the conditions for admissibility set forth in the ruling and regardless of the ruling's legal correctness, the government would be forced to either try the case without this substantial evidence or dismiss the charge.

Rulings that are the practical equivalent of a suppression or exclusion order may be appealed under Article 62, UCMJ. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). The term "excludes" in Article 62, UCMJ, is not limited to absolute exclusions of evidence but includes rulings that "limit the pool" of potential admissible evidence. *Id*. at 74 (quoting *United States v. Watson*, 386 F.3d 304, 313 (1st Cir. 2004)). Here, the ruling has the practical effect of excluding the two drug testing reports unless the government complies with the condition predicate imposed by the ruling. Under these circumstances, the practical equivalent of the ruling is exclusion of substantial proof material to the proceedings, making it, therefore, subject to appeal. Article 62(a)(1)(B), UCMJ; Rule for Courts-Martial 908(a); *Wuterich*, 67 M.J. 63.

Admissibility of Drug Testing Reports

We review de novo matters of law in an Article 62, UCMJ, appeal. *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008). On factual determinations we are bound by those of the military judge unless they are unsupported by the record or are clearly erroneous. *Id*. "On questions of fact, [we ask] whether the decision is *reasonable*; on questions of law, [we ask] whether the decision is *correct*." *Id*. (quoting *United States v. Baldwin*, 54 M.J. 551, 553 (A.F. Ct. Crim. App. 2000)) (alterations in original).

The evidence presented on the motion to admit the two drug testing reports shows that they are admissible as nontestimonial business records under our superior court's decision in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), and this Court's decision in *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 29 Oct 2009). However, the military judge concluded that the recent Supreme Court decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), rendered this precedent inapposite and denied admission of the drug testing reports as testimonial hearsay. We disagree.

A forensic chemist employed at the NDSL testified concerning the processing of urine specimens at the lab. The NDSL tests about 800,000 specimens a year with less than one-half of one percent testing positive for any drug. Technicians do not know who provides a specimen or why, and they follow the same procedures regardless of the basis for the test. Technicians do not even know which specimens are blind quality controls.

The job of the technicians is simply to log data and ensure the machines are working accurately.

An expert from the AFDTL testified concerning similar procedures at that lab. Again, technicians doing the testing would not know why the appellee's sample came to the lab and the same testing procedures were followed as with all other samples. He summarized the procedure as follows: "All they do is they'll go down and pick up a sample and stick it on the instrument. And they would have no reason to know what it was. They would just do it." The AFDTL processes about the same number of samples each year as the NDSL with about the same miniscule amount being positive for any drug.

At both labs the machines test the specimens and contemporaneously generate a result. For example, the GC/MS "actually has a small robot that sits on top of it that loads the individual vials from the batch into the machine." Even the chain of custody documents are filled out contemporaneously with the machine-generated reports – the technicians are simply printing off the results from the machine. The same is true with the initial immunoassay screening.

Concerning the first test at the NDSL, the processing of the specimen is like that in *Magyari* where the laboratory report at issue concerned a specimen submitted pursuant to random selection. Like the present case, laboratory technicians worked with batches of urine samples that each contained multiple individual samples. *Magyari*, 63 M.J. at 126. The laboratory technicians could not equate a particular sample with a particular person, the vast majority of samples would not test positive for illegal drugs, and not all positive results would end in prosecution. *Id*. Laboratory personnel had no reason to anticipate that any particular sample would test positive and be used at trial and therefore were "not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial." *Id*. Applying *Crawford*, our superior court reasoned that "[b]ecause the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would 'bear testimony' against [the] [a]ppellant at his court-martial." *Id*. at 127.

The processing of the retest by the AFDTL after the positive result from the NDSL is analogous to that in *Blazier* which involved a second test (on a second specimen) after an initial positive result. Despite the prior positive result, the second specimen was processed in essentially the same manner as the first. Applying our superior court's decision in *Magyari*, we concluded that both reports were nontestimonial and, therefore, admissible. Our sister court reached a similar conclusion in *United States v. Harris*, 66 M.J. 781 (N.M. Ct. Crim. App. 2008), *pet. dismissed*, 68 M.J. 174 (C.A.A.F. 2009).

In relying on *Melendez-Diaz* to reject this precedent, the military judge interprets *Melendez-Diaz* too broadly. Unlike the drug testing reports at issue in both *Magyari* and *Blazier*, the evidence in *Melendez-Diaz* consisted of summary affidavits by laboratory

technicians prepared expressly at the direction of law enforcement personnel for criminal prosecution. The Court held admission of such affidavits violates the right of confrontation and requires the testimony of the affiant. The affidavits at issue in *Melendez-Diaz* failed to even identify the tests performed, whether the tests were routine, and whether the results required interpretation beyond the skills of the technicians running the machine; indeed, the affidavits contained only the "bare-bones" statement that a contraband substance was found. *Melendez-Diaz*, 129 S. Ct. at 2537. In what Justice Scalia described as a "straightforward application" of *Crawford v. Washington*, 541 U.S. 36 (2004), the Court found such affidavits clearly testimonial. *Id*. at 2533. From this the military judge concluded that admission of the type of machine-generated reports offered in the present case would now likewise violate the Confrontation Clause.[1] It does not.

The Confrontation Clause guarantees the right of a criminal defendant to confront the witnesses against him. Whether a particular out-of-court statement triggers the right to confront the person who made it depends on whether the statement is testimonial. *Crawford*, 541 U.S. at 68. Rather than provide an exhaustive list of those statements that would be testimonial, *Crawford* described classes of statements that would be testimonial:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Id. at 51 (internal citations omitted) (alterations in original). A laboratory report falls within the broad range of statements subject to Confrontation Clause analysis, and, as *Crawford* informs us, the circumstances of the report's preparation determine whether it falls within the class of statements described as testimonial.

Laboratories generate many types of reports under a variety of circumstances. At one end of the spectrum are detailed reports of raw data generated by various machines which is simply certified by laboratory technicians. Use of such reports of raw data at trial by an expert witness to render independent conclusions does not require the testimony of the technicians who reported the raw data. *United States v. Washington*, 498 F.3d 225 (4th Cir 2007), *cert. denied*, 129 S. Ct. 2856 (2009). Indeed, in such

[1] U.S. CONST. amend. VI.

circumstances the technicians could neither affirm nor deny the test results independently but could only defer to the raw data printed out by the machine: "[T]here would be no value in cross-examining the lab technicians on their out-of-court statements . . . because they made no such statements." *Id*. at 230. The raw data generated by machines are the statements of the machines themselves, not their operators, and statements made by machines are not out-of-court statements made by declarants that are subject to the Confrontation Clause. *Id*.[2]

In a case more analogous to *Melendez-Diaz*, our superior court in *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), found laboratory reports from a state crime lab testimonial where the reports were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. In reaching this conclusion, the Court applied three factors aimed at objectively evaluating the totality of the circumstances of a particular statement under *Crawford*: "(1) whether the statement was elicited by or made in response to law enforcement or prosecutorial inquiry; (2) whether the statement involved more than a routine and objective cataloging of unambiguous factual matters; and (3) whether the primary purpose for making, or eliciting, the statement was the production of evidence with an eye toward trial." *Harcrow*, 66 M.J. at 158 (citing *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007)). While arresting Harcrow for desertion and other unrelated state charges, sheriff's deputies seized drug paraphernalia from his residence and sent the items to the Virginia Division of Forensic Science which issued two laboratory reports documenting the presence of cocaine and heroin on several of these items. *Id*. at 155. In applying the *Rankin* factors to these facts and finding the reports testimonial, our superior court emphasized that the laboratory tests were specifically requested by law enforcement and the information relayed on the laboratory reports pertained to items seized during the arrest of an identified "suspect." *Id*. at 159. Again, as in *Magyari*, the result is consistent with the application of *Crawford*.

This fact-centered, totality of the circumstances approach also assists in evaluating more complex situations where, for example, an individual is singled out for testing but the laboratory process remains generic, as in both *Blazier* and *Harris*. In *Harris*, the court noted that although the appellant was singled out for testing and his sample was labeled probable cause this did not appear to alter the methods used to test and report the results. The appellant's sample was one among 100, some of which were blind samples provided for quality assurance. The technicians did not associate any sample with a particular person, and they had no expectation that any particular sample would test positive for any particular drug. Finally, as in *Magyari*, the lab technicians testing the appellant's sample had no reason to suspect him of drug use, and no basis upon which to believe that his sample would test positive for methamphetamine.

In distinguishing the application of *Crawford* in both *Harcrow* and *Magyari*, the

[2] The military judge disregarded this persuasive authority as well, finding "the dissent more persuasive than the majority opinion."

Harris court explained that the key to understanding the result in both cases is the application of the *Rankin* factors to distinguish between testimonial and nontestimonial hearsay. The goal in applying these non-exclusive factors is "an objective look at the totality of the circumstances surrounding the statement to determine if the statement was made or elicited to preserve past facts for a criminal trial." *Harris*, 66 M.J. at 788 (quoting *Harcrow*, 66 M.J. at 158). In applying the test and finding the laboratory report nontestimonial, the court emphasized the primary purpose of the testing:

> [W]hile at some level of administrative control within the lab, the designation of the sample as "probable cause" was known, given the range of options for which a positive lab report might be used by a Navy command, it is less than certain that a "probable cause" designation alone would lead a lab official to believe the report would be used in a criminal prosecution. Finally in this regard, the prospective witnesses, the technicians, were unaware the sample had been obtained based on probable cause, so they employed the standard urinalysis testing and reporting protocol, just as in *Magyari* objectively cataloging the facts. Their primary purpose in so doing was the proper implementation of the Navy Lab's drug screening program, not the production of evidence against this appellant for use at trial.

Id. at 788-89. This totality of the circumstances application of *Crawford*, provided in *Davis v. Washington*, 547 U.S. 813 (2006), and expressly adopted by our superior court in *United States v. Gardinier*, 65 M.J. 60 (C.A.A.F. 2007), remains unchanged by *Melendez-Diaz*. Indeed, application of the *Davis* approach to the facts of *Melendez-Diaz* yields the same result and demonstrates the continued vitality of this well-settled method of applying *Crawford*.

The military judge's conclusion that the drug testing reports offered at trial are somehow testimonial under the rationale of *Melendez-Diaz* because "personnel in the chain would have reason to believe that statements that they made" would be used at trial is unsupported by the evidence. First, the evidence clearly shows that the technicians running the machines had no idea who the sample belonged to or why they were testing it. Second, the evidence clearly shows that the technicians simply operate machines that do the actual testing. Third, the reports consist of raw data from the machines themselves which requires expert interpretation. Fourth, only a small fraction (less than one-half of one percent) of the roughly 800,000 specimens processed each year report positive for any drug. *Melendez-Diaz* does not expand *Crawford* to now require rejection of such laboratory reports which under *Crawford* have been found nontestimonial in the prior cases of this Court and others – both military and civilian. The *Melendez-Diaz* opinion itself cautions against such expansive interpretation, stating: "This case involves little more than the application of our holding in *Crawford v. Washington*. . . . The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court

affidavits, and the admission of such evidence against Melendez-Diaz was error." *Melendez-Diaz*, 129 S. Ct. at 2542.

Consistent with this admonition, the totality of the circumstances application of *Crawford* provided in *Davis* and expressly adopted by our superior court in *Gardinier* remains unchanged by *Melendez-Diaz.* The laboratory reports at issue in this case are nontestimonial and their admission as business records does not violate the Confrontation Clause.

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 14th day of December, 2009,

ORDERED:

That the appeal by the United States Under Article 62, UCMJ, is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.[3]

(BRAND, Chief Judge and THOMPSON, Judge participating)

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[3] Pages 2-6 of Prosecution Exhibit 5 for Identification (the Navy Drug Screening Laboratory report) fall outside the scope of this ruling.