UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KENNETH J. BURTON, JR.
United States Air Force

ACM S31632 (f rev)

17 July 2012

Sentence adjudged 8 January 2009 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $933.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Major Shannon A. Bennett; Major Michael S. Kerr; Major Jennifer J. Raab; and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Jeremy S. Weber; Major Joseph Kubler; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

UPON REMAND

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant contrary to his pleas of one specification alleging wrongful use of ecstasy and one specification alleging wrongful use of methamphetamine in violation of Article 112a, UCMJ; 10 U.S.C. § 912a. The convening authority approved the adjudged bad-conduct discharge, forfeiture of $933.00 pay per month for 6 months, and reduction to the lowest enlisted grade but approved only 5 of the 6 months of adjudged confinement. We

affirmed the findings and sentence. *United States v. Burton*, ACM S31632, (A.F. Ct. Crim. App. 18 June 2010) (unpub. op.).

The Court of Appeals for the Armed Forces (CAAF) granted review on two issues: (1) whether admission of the Drug Testing Report (DTR) denied the appellant his constitutional right to confront the witnesses against him; and (2) whether trial defense counsel's lack of objection waived or forfeited the issue. In a summary disposition, CAAF set aside our decision, and remanded the case for consideration of the granted issues in light of *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011), *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010), and *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010), and to determine whether the "erroneous admission of the cover memorandum and specimen custody document of the drug testing report was harmless beyond a reasonable doubt.[1] *United States v. Burton*, 70 M.J. 353 (C.A.A.F. 2011) (mem.).

The appellant provided a urine specimen for urinalysis testing during a unit readiness inspection. The Air Force Drug Testing Laboratory (AFDTL) tested the specimen, and documented the results in a 112-page DTR. Page 1 of the DTR is a cover memorandum which certifies that the subject specimen identified by the appellant's Social Security Account Number (SSAN) was "confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS)" for d-methamphetamine at a concentration of 652 ng/ml and methylenedioxymethamphetamine (MDMA) at a concentration of 1538 ng/ml. Maria Correa certified the memorandum. A two-page Specimen Custody Document – Drug Testing (DD Form 2624) follows the cover memorandum. It shows that the specimen linked to the appellant's SSAN was positive for the same drugs named in the cover memorandum and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." Jai Dev signed the certification as a Laboratory Certifying Official (LCO). Neither Correa nor Dev testified at trial.

The primary evidence against the appellant was the DTR and the testimony of Lieutenant (Lt) J, an expert in forensic toxicology assigned to the Armed Forces Institute of Pathology. Trial defense counsel did not object to either the DTR or the qualifications of the expert witness and did not request the presence of any AFDTL personnel involved in the test. Trial counsel provided each court member a copy of the DTR to review along with the expert. Lt J referred to the cover memorandum at the outset of his testimony concerning the DTR, but in the remainder of his testimony provided a detailed explanation of the tests performed and his own expert opinion that the test results are valid.

[1] *Williams v. Illinois*, 132 S. Ct. 2221 (2012), does not appear to substantively impact our superior court's decisions in *Blazier* and *Sweeney*. We had awaited release of this decision before proceeding.

In cross-examination defense counsel emphasized that the DTR did not show knowing use of any drug. He even chose to use the cover memorandum to make the point and to clarify the expert's testimony:

> Q. I am looking at the first page of Prosecution Exhibit 1, to be clear, your testimony today is that the second paragraph, listing those test results. Your testimony here today is to explain how the Brooks Lab got to this final completion?
>
> A. That is correct.
>
> Q. So, you can't testify that [the appellant] knowingly used methamphetamine?
>
> A. I didn't see [the appellant] do anything.
>
> Q. So, you can't testify that he knowingly used methamphetamine?
>
> A. That's correct. All I can say is that the urine that was produced by the service member was collected under the chain of custody contained in these materials that are not normally found in the body.

Defense counsel made no attack whatsoever on the proficiency of laboratory personnel or procedures. Nor were these areas of concern to the court members in their questions to the expert.

The appellant testified that he had never knowingly used either methamphetamine or ecstasy. Over government objection, the appellant testified that a subsequent urinalysis test was, in fact, negative. Asked by trial counsel if he had any reason to think that his urine specimen was not tested properly, the appellant replied, "No, sir. I am not an expert."

The trial counsel did not specifically refer to any of the testimonial hearsay in his closing argument, choosing instead to emphasize the science involved and the expert's testimony. Defense counsel argued the lack of evidence to show knowing ingestion of the substances found in the appellant's urine: "Keep in my [sic] mind that the prosecution has yet to even prove that there was a crime committed in this case. It is not a crime to have these substances in your urine. It is a crime to knowingly use them." Defense counsel actually used the accuracy of laboratory results in arguing that the subsequent negative urinalysis result tends to show that the appellant did not knowingly use illegal drugs.

The posture of this case presents a strong argument for forfeiture rather than waiver of the confrontation issue, but *Blazier* and *Sweeney* lead us to find plain error in the admission of the certifications on the cover memorandum and the DD Form 2624 as well as the expert's reading of the cover memorandum to the members. Although an expert may properly rely on inadmissible evidence in forming an independent opinion, an expert may not "act as a conduit for *repeating* testimonial hearsay." *Blazier*, 69 M.J. at 225 (citing *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008) Lt J's reference to the certification on the cover memorandum resulted in him acting as a conduit of testimonial hearsay. This testimony and the certifications on the respective cover memorandum and Specimen Custody Documents (DD Form 2624) violate the Confrontation Clause. Because the error is constitutional we must, as directed by the remand order, determine whether the erroneous admission of testimonial hearsay in the cover memorandum and the DD Form 2624 as well as the expert's reference to that testimonial hearsay in his testimony were harmless beyond a reasonable doubt.

In assessing constitutional error, the question is not whether the admissible evidence is sufficient to uphold a conviction but "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Blazier*, 69 M.J. at 227 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). 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) (citations omitted).

Although the drug test results were the foundation of the Government's case and the testimonial hearsay tended to validate those results, the record shows that the testimonial hearsay had little, if any, importance. In many urinalysis cases the defense chooses to attack laboratory personnel and procedures, and in those cases testimonial hearsay which blunts those attacks is clearly prejudicial. Here, however, rather than attack the results, the defense based its case on what the results could not show – that the appellant *knowingly* used drugs. Further, as with the written certifications themselves, the relatively brief mention by the expert of the testimonial hearsay was cumulative with his own detailed analysis and opinion of the testing. The expert's interpretation and opinion of the results along with the permissible inference of wrongfulness provided strong evidence of guilt. In the posture of this case, the testimonial hearsay added nothing significant. Having viewed the entire record and balanced the *Van Arsdall* factors, we are convinced the error in admitting the testimonial hearsay in this case was harmless beyond a reasonable doubt.

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