UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TERRIS N. CAVITT
United States Air Force

ACM S31637

21 October 2010

Sentence adjudged 24 January 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Gary M. Jackson.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $700.00 pay per month for 4 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Jennifer J. Raab, Major Anthony D. Ortiz, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and GREGORY
Appellate Military Judges

PER CURIAM:

The appellant entered pleas of guilty before a special court-martial to one specification of absence without leave (AWOL) for a period of less than 30 days and one specification of abusing over-the-counter medication in violation of Articles 86 and 134, UCMJ, 10 U.S.C. §§ 886, 934. She entered pleas of not guilty to one specification of wrongful use of marijuana, one specification of using provoking speech, and one specification of assault consummated by a battery in violation of Articles 112a, 117, and 128, UCMJ, 10 U.S.C. §§ 912a, 917, 928. After the military judge accepted her pleas and entered findings of guilty to AWOL and abuse of over-the-counter medication, a

panel of officers convicted her of wrongfully using marijuana and assault, acquitted her of using provoking speech, and sentenced her to a bad-conduct discharge, confinement for four months, forfeiture of $700 pay per month for four months, and reduction to the lowest enlisted grade. The convening authority approved the sentence adjudged.

The appellant assigns four errors on appeal. She first argues that admission of a drug testing report to prove the marijuana use charge without requiring the testimony of laboratory technicians involved in the testing process violated her Sixth Amendment[1] right to confront the witnesses against her. In her remaining assignments of error, she contests the factual and legal sufficiency of the evidence to support her conviction of marijuana use and assault.[2] Finding no errors prejudicial to the substantial rights of the appellant, we affirm.

Admissibility of the Drug Testing Report

The appellant consented to provide a urine specimen for drug testing following her return from AWOL on 8 July 2008. An official from the local Drug Demand Reduction office transported the specimen to the Air Force Drug Testing Laboratory (AFDTL) where the sample tested positive for the metabolite of marijuana at a level of 44 nanograms per milliliter (ng/mL), which is above the Department of Defense cut-off level of 15 ng/mL. Testing included an initial immunoassay, a second immunoassay, and a gas chromatography/mass spectrometry test. AFDTL documented the test results in a 31-page drug testing report consisting mostly of machine-generated data printouts and chain of custody forms. The remaining pages consist of a cover memorandum summarizing the test result, a confirmation intervention log, and a blind quality control memorandum. Except for the cover memorandum and the blind quality control memorandum, all documentation was created at or near the time of testing.

Dr. AJ, the Program Manager for AFDTL, testified as an expert in forensic toxicology. The trial defense counsel did not conduct any additional questioning of Dr. AJ concerning his qualifications as an expert and did not object to the court recognizing him as an expert in forensic toxicology. During preliminary questioning concerning the drug testing report on the appellant's sample, Dr. AJ stated that the report was "prepared in the normal course of business." He then added, "It's prepared for the purposes of any litigation or actions that may be taken on the sample." The trial defense counsel objected to admission of the report based on this latter testimony that the report was prepared for litigation. The military judge overruled the objection. Using the drug testing report, Dr.

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

[2] The appellant's second assignment of error contests the factual and legal sufficiency of the evidence to support the assault conviction. The third assigned error disputes the sufficiency of the evidence to support the marijuana use conviction based on chain of custody. The fourth assigned error disputes the same specification based on the alleged location of the offense. The assigned errors regarding factual and legal sufficiency are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

AJ provided his expert opinion that the results were forensically sound and showed that the appellant's urine specimen contained the metabolite of marijuana. The trial defense counsel extensively attacked the reliability of AFDTL, questioning Dr. AJ on multiple discrepancies.

While the expert's testimony concerning the preparation of the drug testing report is facially ambiguous, the report itself resolves the ambiguity. All of the chain of custody documents and machine-generated data documents in the report were created at or near the time of testing during the normal course of business. Upon request, AFDTL provides a copy of those documents that will, as the expert testified, be used for litigation. Therefore, the expert is correct that the entries in the report are made in the normal course of business. He is also correct that the copy of those documents and the accompanying cover memorandum made pursuant to government request are produced for purposes of litigation or other action. With this distinction in mind, we turn the question of admissibility.

Citing *Melendez-Diaz v. Massachusetts*, the appellant asserts that the military judge erred by admitting the AFDTL report. *Melendez-Diaz*, 129 S. Ct. 2527 (2009) (applying *Crawford v. Washington*, 541 U.S. 36 (2004), to hold that admission of a laboratory official's affidavit summarizing test results violates the right of confrontation). Writing for the majority, Justice Scalia states: "This case involves little more than the application of our holding in *Crawford* . . . . 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.

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court applied *Crawford* to drug testing reports to conclude that such reports were non-testimonial:

> [T]he better view is that these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. Rather, their data entries were "simply a routine, objective cataloging of an unambiguous factual matter." Because 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] Appellant at his court-martial. This conclusion is consistent with the *Crawford* Court's policy concerns that might arise where government officers are involved "in the production of testimony with an eye toward trial" and where there is "unique potential for prosecutorial abuse" and overreaching.

United States v. Magyari, 63 M.J. 123, 126-27 (C.A.A.F. 2006) (citations omitted). Like *Melendez-Diaz*, *Magyari* applied *Crawford* to evaluate the admissibility of evidence derived from laboratory analysis. Unlike the summary affidavits at issue in *Melendez-Diaz*, the drug testing reports at issue in *Magyari* did not violate *Crawford's* interpretation of the Confrontation Clause and were thus admissible as a business record pursuant to this firmly rooted hearsay exception. *Magyari*, 63 M.J. at 128; *see also* Mil. R. Evid. 803(6). With the exception of the cover memorandum, such is the case here.

Looking at this issue from the perspective of the law as it exists at the time of appeal, *Magyari* remains controlling precedent. Our superior court recently revisited the issue of admissibility of drug testing reports in the wake of *Melendez-Diaz* and, so far, has left *Magyari* intact. *See United States v. Blazier*, 68 M.J. 439, 442 n.6 (C.A.A.F. 2010). While *Magyari* supports admission of the machine-generated printouts, chain of custody forms, and the two intra-laboratory memos, *Melendez-Diaz* and *Blazier* clearly show that admission of the cover memorandum constituted error.[3] However, we find that this error was harmless beyond a reasonable doubt because the expert forensic toxicologist testified concerning the entire drug testing report and how the data contained therein supported *his* opinion that the specimen showed the presence of a cocaine metabolite.

Sufficiency of the Evidence to Support Conviction of Marijuana Use

The appellant argues that the evidence is factually and legally insufficient to support her conviction of marijuana use based on (1) alleged errors in the chain of custody, (2) failure of the proof to show the location of the offense, and (3) the relatively low nanogram level. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). "The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (quoting *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). Our assessment of legal sufficiency "is limited to the evidence produced at trial." *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). 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, [we] are [ourselves]

[3] Admission of only the declaration at the bottom of the cover memorandum is not error since this declaration simply provides the self-authentication necessary for admission of regularly conducted activity and does not state or summarize the results of the data contained in the attached documents. Mil. R. Evid. 902(11).

convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Concerning chain of custody, the witnesses involved in the collection of the appellant's sample testified that although the date written on the urine collection bottle was slightly smudged, the date of collection was correctly noted as 8 July 2008. Additionally, as with the date, the appellant's Social Security number had to be rewritten because of smudging. This was accomplished in the appellant's presence, and the appellant initialed the bottle. The military judge properly instructed the members that minor administrative discrepancies do not necessarily destroy chain of custody but that the members must be satisfied beyond a reasonable doubt that the sample tested belonged to the appellant. Having considered the evidence produced at trial in light of the above standards we are likewise satisfied that, despite these minor administrative errors, the sample tested belonged to the appellant.

Concerning location of the offense, the government alleged that the use occurred at or near San Antonio, Texas, which is the location of the appellant's base of assignment. The appellant argues that the evidence is factually and legally insufficient to show that she used marijuana in Texas, particularly considering that during the *Care*[4] inquiry on the AWOL offense she stated that she was out of the state during the four days preceding the collection of the urine specimen. We first note that the location of illegal drug use is not determinative of criminal liability. *United States v. Rounds*, 30 M.J. 76, 81 (C.M.A. 1990). Nevertheless, the expert's testimony concerning the time of possible ingestion of marijuana does not preclude marijuana use before the appellant departed the San Antonio area. This combined with other circumstantial evidence supports a finding that the use occurred in the San Antonio area.

Finally, a relatively low nanogram level does not necessarily create reasonable doubt since the expert testified that the level was still above the established Department of Defense cut-off level, and the military judge properly instructed the members concerning the permissible inference of wrongfulness. Again, having considered the evidence produced at trial in light of the above standards, we are satisfied that the appellant wrongfully used marijuana.

Sufficiency of the Evidence to Support Conviction of Assault

The appellant also argues the insufficiency of the evidence to support her conviction of assault, claiming that the victim's "story is unbelievable" because the evidence shows that the appellant "never hit her, and if she did, it was in self-defense."

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

The record conclusively refutes these inconsistent alternative theories. The victim testified that the appellant struck her from behind on the back of the head. Another witness testified that she saw an injury on the victim, and that the appellant admitted to her that she had assaulted the victim. The evidence shows beyond a reasonable doubt that the appellant is guilty of the charged assault consummated by a battery.

Conclusion

The approved 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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court