UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class TERRIS N. CAVITT
United States Air Force

ACM S31637 (f rev)

31 July 2012

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: Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael A. Burnat; Major Anthony D. Ortiz; Major Jennifer J. Raab; Captain Andrew J. Unsicker; Captain Ja Rai A. Williams; and Captain Luke D. Wilson.

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

GREGORY, Senior Judge:

The appellant entered pleas of guilty before a special court-martial to one specification of absence without leave (AWOL) for a period 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, respectively. 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 the wrongful marijuana use and assault, but acquitted her of using provoking speech. The court sentenced her to a bad-conduct discharge, confinement for 4 months, forfeiture of $700.00 pay per month for 4 months, and reduction to the lowest enlisted grade. The convening authority approved the sentence adjudged. We affirmed the findings and sentence in an unpublished opinion. *United States v. Cavitt*, ACM S31637 (A.F. Ct. Crim. App. 21 October 2010), *rev'd*, 69 M.J. 413 (C.A.A.F. 2011).

The Court of Appeals for the Armed Forces reversed and remanded the case for reconsideration of whether the erroneous admission of testimonial hearsay was harmless beyond a reasonable doubt in light of *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).[*] *Cavitt*, 69 M.J. at 414. 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) (citations omitted), *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. *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (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).

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). Testing included an initial immunoassay, a second immunoassay, and a gas chromatograph/mass spectrometry (GC/MS) test.

AFDTL documented the test results in a 31-page drug testing report (DTR). Page 1 of 31 is the erroneously admitted cover memorandum, which certifies that the subject specimen identified by the appellant's Social Security Account Number (SSAN) was "confirmed positive by [GC/MS]" for the metabolite of marijuana at a concentration of

[*] Our previous decision found only the cover memorandum contained testimonial hearsay, but our superior court's later decision in *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011), also determined that certifications on the specimen custody document are testimonial hearsay. *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 *Sweeney*. We had awaited release of this decision before proceeding.

"44 ng/mL." Andrea Lee signed the memorandum. The DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1998), follows the cover memorandum, shows that the specimen linked to the appellant's SSAN was positive for marijuana, and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." A.S. Vallon signed the certification as a Laboratory Certifying Official (LCO). Neither Lee nor Vallon testified at trial.

To prove the charge of wrongful use of marijuana, the Government offered the DTR and the testimony of Dr. AJ, an expert in forensic toxicology. Using the DTR as a basis, Dr. AJ explained the machine-generated printouts and other documents in the DTR. Our superior court appears to question our finding that Dr. AJ provided an independent expert opinion based on his review of the DTR, but the record shows that he did: "I have reviewed this packet and I see nothing wrong with any of the testing or any of the data here. Everything is in place and the sample that was in that bottle was positive at 44 [ng/mL]."

Dr. AJ, however, bolstered that opinion by the certifications of the LCO. Describing the multi-step review process at the AFDTL, he stated that "we have an individual called a [LCO] who will review all of the data before it's reported to make sure that everything is in place and everything is accurate." He expressly referenced the LCO review and certification in his testimony:

> This report is prepared by people in the lab. The results reporting section holds all the results and they will pull all the results on the sample. They will review to make sure that everything that was done on this sample is included in this report. It will then be sent to a [LCO] for review to make sure that everything is here, and once again, that everything is correct in the report.

Even when referring to the machine-generated results, Dr. AJ continued to emphasize the importance of reviewing officials: "[T]hough the equipment does all of the work, *it still has to be reviewed by humans to make sure that everything is working*." (Emphasis added).

After Dr. AJ explained the machine-generated GC/MS printouts, trial counsel asked who reviewed them. Dr. AJ replied, "The [LCOs] that are certified to look at all pieces of data to determine that everything is accurate." He further bolstered the importance of the LCO review by testifying that "positive results go through many more layers of review" and will be carefully examined by the LCO who will "look at the positive results on the test and make sure that everything is in place for that positive result." In cross-examination, trial defense counsel emphasized past problems at the AFDTL, meticulously questioning Dr. AJ about numerous discrepancy reports. Court members also questioned Dr. AJ about the reliability of the AFDTL. In closing

argument, trial defense counsel told the members that the expert simply relied on a report that relied on others who make errors.

An expert may properly rely on inadmissible evidence in forming an independent opinion, but 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)). Although Dr. AJ provided his independent expert opinion, he repeatedly bolstered the weight of that opinion with references to the LCO review. His testimony essentially brought the LCO into the courtroom to validate the AFDTL results and his opinion of those results. But the appellant had no opportunity to cross-examine the LCO who, according to the expert, carried such importance in the process of reporting a positive result.

Applying the *Van Arsdall* factors to this case, we find that the admission of this testimonial hearsay cannot be considered harmless beyond a reasonable doubt. The DTR was the only evidence of marijuana use. Although the expert provided an independent opinion based on the DTR, he repeatedly referenced the LCO review to support the validity of the result. That validation was important to shoring up the potential weaknesses at AFDTL highlighted by the defense counsel – weaknesses that lost much of their force by the testimonial hearsay of the LCO who, according to the expert, "made sure that everything is in place for that positive result." Of course, an expert witness need not be involved in the actual testing or even work in the same laboratory to render an expert opinion on data produced by a laboratory – such matters go to the weight of the expert opinion. What the expert may not do is improperly bolster that weight by relaying testimonial hearsay.

We find that the members in all likelihood gave some weight to the testimonial hearsay relayed by the surrogate expert. Defense counsel extensively questioned the competency of the personnel and procedures at the AFDTL, and questions by the court members indicate some concern with this line of attack. The testimonial hearsay relayed by the expert as well as the testimonial hearsay in the DTR certifications by the LCO tended to validate the results, and the members might have used it to satisfy their express concerns about conditions at the AFDTL. Under these circumstances, we conclude there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Therefore, the error is not harmless beyond a reasonable doubt and the finding of guilt must be set aside.

Conclusion

The findings of guilt as to Charge I, Charge III, and Additional Charge II are affirmed. The findings of guilt as to Charge II and the sentence are set aside. The appellant requests that we set aside the finding of guilt of Charge II and the bad-conduct discharge, but does not mention a rehearing. While we agree that the remaining offenses

of which the appellant was found guilty are relatively minor and would likely not have resulted in a punitive discharge, the proper remedy is to authorize a rehearing on the affected charge and the sentence. The record is returned to the Judge Advocate General of the Air Force for remand to an appropriate convening authority, who may order a rehearing.

OFFICIAL

STEVEN LUCAS
Clerk of the Court