UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SHANNON L. DOLLAR
United States Air Force

ACM S31607 (f rev)

21 July 2010

Sentence adjudged 02 June 2008 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Maura T. McGowan.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, Major Michael A. Burnat, Major Marla J. Gillman, and Major Imelda L. Paredes.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

HELGET, Senior Judge:

The appellant was found guilty, contrary to his pleas, by a panel of officer members of four specifications of wrongfully using cocaine, and consistent with his pleas, was found guilty by a military judge of one specification of adultery, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.

This case is before our Court for the second time. In *United States v. Dollar*, ACM S31607 (A.F. Ct. Crim. App. 22 Mar 2010) (unpub. op.), we affirmed the findings and the sentence. On 24 March 2010, the appellant submitted a Motion for Reconsideration asserting that our decision was in conflict with our superior court's initial decision in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010). On 15 April 2010, we granted the Motion for Reconsideration. For the reasons stated below, we continue to find no error and affirm our initial decision.

Background

At the time of trial, the appellant was 27 years old and had been on active duty since 28 May 2002. He was assigned to the 27th Special Operations Logistics Readiness squadron at Cannon Air Force Base (AFB), New Mexico.

On 23 August 2007, the appellant submitted a urine specimen, pursuant to a random urinalysis inspection at Cannon AFB. The specimen was sent to the Air Force Drug Testing Lab (AFDTL), Brooks City-Base, Texas, for forensic testing. On 6 September 2007, AFDTL reported that the specimen tested positive for benzoylecgonine, the metabolite of cocaine. On 10 September 2007, pursuant to the Cannon AFB Wing Commander's memorandum, dated 18 February 2007, directing follow-up testing as part of the random urinalysis inspection program, the appellant submitted another urine specimen that also tested positive for benzoylecgonine. According to witness testimony, the appellant used cocaine on two other occasions in late July and early August 2007.

On 26 May 2008, the government filed a motion for appropriate relief requesting that the military judge preadmit into evidence the two drug testing reports (DTRs) for both of the appellant's positive drug tests that were prepared by AFDTL. On 29 May 2008, during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, after considering the expert testimony of Dr. DT, a forensic toxicologist at AFDTL, and the documentary evidence submitted by the parties, the military judge granted the government's request to preadmit the two DTRs.

The military judge found the facts underlying the 23 August 2007 report to be almost identical to the facts of *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), and consistent with our superior court's holding in *Magyari*, concluded that the 23 August 2007 drug testing report is non-testimonial. The military judged stated:

> The laboratory technicians who handled the specimen were merely cataloging the results of the routine tests, and they could not reasonably know that their data entries would "bear testimony" against an Accused. The laboratory technicians worked with batches of urine samples that each contained hundreds of individual samples, and they could not equate a particular sample with a particular person. Only a small number of such

> random samples yield a positive result. Further, the laboratory personnel had no reason to anticipate that any particular sample would test positive and be used at trial.

Concerning the 10 September 2007 report, the military judge stated:

> The Defense has raised the argument that as the AFOSI [Air Force Office of Special Investigations] instructed the First Sergeant on the testing procedure and as they brought the accused to the clinic to give a urine sample this sample was taken with an eye to litigation. While the unit commander and AFOSI did not comply with the steps of the 27 FW Memo, these were only minor discrepancies. This did not make the inspection a law enforcement inspection. The labeling of this second inspection as Commander Directed gave less credence to any argument that the lab technicians would believe the test results would be used in a criminal proceeding.

The military judge then concluded that the 10 September 2007 report was also non-testimonial.

In his initial appeal to this Court, the appellant asserted that in light of the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the DTRs in this case constituted testimonial hearsay. Although arguably all three tests conducted at AFDTL are testimonial, the appellant contended that both of the forensic confirmatory tests, specifically the second immunoassay screen and the gas chromatography/mass spectrometry test, constituted testimonial hearsay because they are performed with an eye towards prosecution. The appellant argued that the DTRs were only created to serve as evidence in his court-martial and do not fit within the Supreme Court's definition of a business record, nor do they document the day-to-day operations of the laboratory. Additionally, the appellant asserted that he has the right to cross-examine the analysts at AFDTL who conducted his tests because they interpret the outputs to determine if an anomaly occurred, and they make recommendations to the laboratory certifying officials.

Considering our initial decision in *Blazier*, our superior court's decision in *Magyari*, and the Fourth Circuit's decision in *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert denied*, 129 S. Ct. 2856 (2009), we found that the military judge did not abuse her discretion by allowing the government to preadmit the DTRs. The testing conducted at AFDTL was essentially the same for both the initial random inspection and the follow-up test. We did not find that *Melendez-Diaz* applied in this situation because the raw data contained in the DTRs are not statements made by the lab technicians and the government intended to call, and in fact did call, an expert, who was also an

employee of AFDTL and was subject to cross-examination by the appellant. Accordingly, under these circumstances, we found that the DTRs were non-testimonial.[1]

Impact of United States v. Blazier

On 23 March 2010, a day after our original decision in this case, our superior court issued its initial decision in *Blazier*. The Court held that the cover page of a DTR is testimonial, primarily because the cover page is not generated at the time of testing but rather in response to a request from the command for use at a later court-martial. *Blazier*, 68 M.J. at 442, 43. The Court made no further rulings and ordered additional briefing on two issues: (1) whether the Confrontation Clause of the Sixth Amendment[2] was nevertheless satisfied by the testimony of the government's expert who was an employee of the AFDTL, and (2) whether even if the expert's testimony did not itself satisfy the Confrontation Clause, whether the introduction of testimonial evidence was nevertheless harmless beyond a reasonable doubt.

In his Motion for Reconsideration, the appellant renews his claim that the two DTRs contain testimonial hearsay. In addition to the cover memorandum, the appellant claims that the DTRs also contain various handwritten notes and signed certifications from the analysts which are likewise testimonial hearsay. The appellant claims his rights under the Confrontation Clause were violated because he was never afforded the opportunity to cross-examine the analysts.

We disagree with the appellant that our superior court's decision in *Blazier* extends beyond the cover memorandum. Considering that the data entries and the certifications in the appellant's DTR were made at the time of testing and as part of AFDTL's normal course of business, they were not "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington*, 541 U.S. 36, 50-52 (2004). In *Blazier*, our superior court emphasized that "[i]n *Magyari*, the focus was on 'whether the data entries in Appellant's urinalysis lab report made by the Navy Drug Screening Laboratory technicians,' resulting from a random, non-investigative urinalysis screening, were 'testimonial,' and concluded that such entries were not testimonial when such samples are not equated with particular individuals." *Blazier*, 68 M.J. at 442 (quoting *Magyari*, 63 M.J. at 125-26). The Court in *Magyari* noted:

[1] In the initial appeal to this Court, the appellant also raised a second assignment of error alleging that the military judge erred in finding that the appellant's additional urinalysis conducted pursuant to *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990) was for a permissible purpose. We also found no error regarding this issue. This second assignment of error is not included as part of the Motion for Reconsideration and our initial holding on this issue still stands and will not be addressed again in this opinion.

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

> [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 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.

Magyari, 63 M.J. at 126-27 (internal citations omitted). Furthermore, our superior court in *Blazier* specifically stated that "[w]e need not address, at this point, the application of *Crawford* or *Magyar*i to the other documents." *Blazier*, 68 M.J. at 442 n.6.

Although the military judge admitted testimonial evidence (the cover memorandum), we nevertheless find that the Confrontation Clause was satisfied by the testimony of the government's expert witness, Dr. DT. As is done in many drug urinalysis cases, the government provided the testimony of an expert forensic toxicologist to explain the contents of the DTR. In this case, Dr. DT is a laboratory certifying official for AFDTL and is responsible for verifying that the data from the various tests at the lab are correct. Dr. DT testified about the procedures and tests used by AFDTL, the science involved with the tests, the security measures at the lab, the various controls used with the tests, and the results of the tests. Dr. DT also provided his independent opinion after reviewing the two DTRs and opined that both of the appellant's urine specimens tested positive for benzoylecgonine. Dr. DT was subjected to extensive cross-examination by the trial defense counsel and is better qualified to explain the testing results than the document custodian who signed the cover memorandum.[3] Under these circumstances, we find that the Confrontation Clause was satisfied by the testimony of Dr. DT.

We further find that even if Dr. DT's testimony does not satisfy the Confrontation Clause, the introduction of the testimonial evidence was harmless beyond a reasonable doubt because Dr. DT provided his opinion based upon his independent review of the DTRs without relying upon the cover memorandum.

Finally, concerning the remaining data entries in the DTRs, we also find that even if data entries in the DTRs were considered to be testimonial, as the Fourth Circuit noted in *Washington*, the statements Dr. DT testified about did not come from the lab analysts but from data generated by machines that are non-testimonial. The Confrontation Clause

[3] We note that Dr. DT is in an equivalent position as the laboratory certifying official who also signed the cover memorandum.

requires that an accused be confronted with the witnesses against him. In this case, the primary witness against the appellant was Dr. DT, an employee of AFDTL, who testified and was subjected to cross-examination. Although the appellant points to some data entries made in the DTR by the analysts, the interpretation of the raw data is the primary evidence against the appellant. Further, even if the data entries made by the analysts were considered testimonial statements, as the Supreme Court noted in *Melendez-Diaz*, not everyone who laid hands on the urine sample must be called a witness because any "gaps in the [chain of custody] normally go to the weight of the evidence rather than its admissibility." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (alteration in original) (quoting *United States v. Lott*, 854, F.2d 244, 250 (7th Cir. 1988)). Accordingly, the testimony of Dr. DT satisfied the appellant's rights under the Confrontation Clause of the Sixth Amendment.[4]

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

HELGET, Senior Judge, participated in the decision of this Court prior to his reassignment on 1 July 2010.

OFFICIAL

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

[4] *See also Pendergrass v. State*, 913 N.E.2d 703, 707-08 (Ind. 2009) (holding that documents pertaining to DNA evidence were admissible as material on which a DNA expert could testify, and a laboratory supervisor satisfied the Confrontation Clause because she could testify to the accuracy of the tests and the standard operating procedures at the laboratory and could state whether the tests diverged from those procedures), *cert. denied*, *Pendergrass v. Indiana*, 560 U.S. ___, 2010 WL 197668 (Jun. 1, 2010).