UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM E. DUNN, V.
United States Air Force

ACM S31584 (f rev)

29 August 2012

Sentence adjudged 1 August 2008 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Paula B. McCarron.

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $1,193.00 pay per month for 3 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett; Major Michael A. Burnat; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

ROAN, Senior Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas of, inter alia, one specification of wrongful use of marijuana on divers occasions, one specification of wrongful use of ecstasy, and one specification of breaking restriction, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. The convening authority approved a sentence of a bad-conduct discharge,

confinement for 90 days, forfeiture of $1,193.00 pay per month for 3 months, and a reprimand. We previously affirmed the findings and sentence. *United States v. Dunn*, ACM S31584 (A.F. Ct. Crim. App. 31 August 2010) (unpub. op.), *rev'd*, 70 M.J. 359 (C.A.A.F. 2011).

In a summary disposition, the Court of Appeals for the Armed Forces 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 memoranda and specimen custody documents of the drug testing report [DTR] was harmless beyond a reasonable doubt." *Dunn*, 70 M.J. at 359.

Background

The appellant provided three separate urine samples that were subsequently tested at the Air Force Drug Testing Laboratory (AFDTL). The first sample tested positive for marijuana and ecstasy. The second and third samples each tested positive for marijuana. During an interview with agents of the Office of Special Investigations, the appellant confessed to smoking marijuana on two weekends. He initially denied using ecstasy, but when confronted with the positive urinalysis result he said that one of the marijuana cigarettes had tasted "weird" and made him feel "different" and claimed he did not know the cigarette contained ecstasy. He admitted that the civilian friends he lived with would lace marijuana with ecstasy and it was possible that they had mixed ecstasy with the particular marijuana cigarette he smoked. He also said that he was told after the fact that the marijuana contained ecstasy. During a subsequent interview, he admitted to smoking marijuana on a regular basis and to using ecstasy on two occasions. In addition to his verbal admission, the appellant made two written confessions stating that he had used both marijuana and ecstasy while in the Air Force. During a lawful search, two ecstasy tablets were found in the appellant's room and a small residue of marijuana was detected in his car.

At trial, the appellant's counsel moved to exclude the DTRs from evidence and to prevent testimony about the DTRs absent compliance with the Confrontation Clause.[1] The military judge denied the appellant's motion and permitted the Government to introduce the three DTRs into evidence and allowed the Government's expert to testify about the information contained within the reports. In her conclusions of law, the military judge relied on *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), and specifically determined that the laboratory technicians' reports were "simply routine, objective cataloging of an unambiguous factual matter" and were therefore nontestimonial.

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

Dr. DT testified for the Government as an expert in forensic toxicology. He was employed by AFDTL as a forensic toxicologist and laboratory certifying official (LCO), but was not personally involved in any of the tests associated with the appellant's urine samples. Dr. DT testified specifically about laboratory procedures and the information contained with the three drug testing reports. When asked to explain the purpose of the DTR cover memorandum (page 1 of the DTR), Dr. DT stated:

> This is basically our declarations page . . . It states it's the Drug Testing Report [and] identifies what we have here. It says the urine specimen identified by Base Identification Number [ ], Social Security Number [ ], and Laboratory Accession Number [ ] was tested at the Air Force Medical Operations Agency Drug Testing Division. The specimen was determined to be presumptive positive by the screen and re-screen immunoassay procedures. The specimen was then confirmed positive by Gas Chromatography/Mass Spectrometry. The subject specimen is reported to have the following concentrations . . . [Tetrahydrocannabinol (THC)] was 225 nanograms per [milliliter] . . . The [methylenedioxymethamphetamine (MDMA)] concentration detected was 1192 nanograms per [milliliter].

Dr. DT further testified that the DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1993), indicated that there were no irregularities or discrepancies in the packaging, receipt or chain of custody of the tested sample. The DD Form 2624 contained a handwritten annotation of "THC" and "MDMA" in Block G (Result). The form was signed by A.S. Vallon as a LCO. Although Dr. DT did not read the certification to the members, it was plainly visible for their consideration: "I certify that I am a laboratory official, that the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and that they are correctly annotated." The LCO did not testify at trial.

Dr. DT testified similarly concerning the two other DTRs, stating the cover memorandums for both reports denoted that THC was found in the appellant's urine sample. The DD Form 2624 for each sample was admitted into evidence, again with a certifying official's signature attesting that proper laboratory procedures were followed and the results were correctly annotated. Both documents contained a handwritten comment that THC was detected. The LCO did not testify at trial.

Discussion

Our superior court previously held that the cover memoranda and specimen custody documents of the drug testing reports in this case were erroneously admitted. *Dunn*, 70 M.J. at 359. 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)). The admission of the cover memoranda and Dr. DT's testimony concerning its contents to the members resulted in him acting as a vessel for the introduction of testimonial hearsay. In light of *Blazier* and *Sweeney*, we find that admission of the certifications on the respective cover memoranda, the LCO's certifications and handwritten annotations on the DD Form 2624, and the expert's reading of the cover memorandum violated the Confrontation Clause.

Because the error is constitutional we must determine whether the erroneous admission of the testimonial hearsay was 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).

Having applied the *Van Arsdall* factors to the record in this case, we are convinced that the erroneous admission of the testimonial hearsay was harmless beyond a reasonable doubt. Even discounting the inadmissible testimony of Dr. DT and the improper admission of various portions of the DD Form 2624 and cover memoranda, the prosecution's evidence concerning the appellant's guilt was overwhelming. The appellant made both written and verbal admissions to having used marijuana and ecstasy. Additionally, ecstasy pills and marijuana residue were found in areas controlled by the appellant. Finally, the members heard Dr. DT's expert testimony that his independent review of the machine generated data produced during the testing of the appellant's three samples showed the presence of ecstasy and marijuana in the appellant's urine.

We are convinced that the testimonial hearsay was cumulative with the expert's own opinion, was corroborated by the appellant's admissions, and did not play a significant part in the appellant's conviction. Therefore, in the posture of this case, we do not find a reasonable possibility that the evidence complained of might have contributed to the conviction.

Failure to State an Offense

Although not specified by our superior court in its remand order, we will address the issue of whether, in light of *United States v. Humphries*, 71 M.J. 209 (C.A.A.F. 2012), the appellant suffered material prejudice to a substantial right as a result of the

Government's failure to allege the terminal element of Article 134, UCMJ, in the Specification of Charge V.[2]

Whether a charge and specification state an offense is a question of law that we review de novo. *United States v. Crafter*, 64 M.J. 209, 211 (C.A.A.F. 2006) (citations omitted). "A specification states an offense if it alleges, either expressly or by [necessary] implication, every element of the offense, so as to give the accused notice and protection against double jeopardy." *Id.* at 211 (citing *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994); Rule for Courts-Martial 307(c)(3)). In the appellant's case, the specification alleging the appellant broke restriction is defective because it does not expressly allege the terminal element of Article 134, UCMJ; nor do we find the terminal element to be necessarily implied as alleged. *United States v. Fosler*, 70 M.J. 225, 230-31 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Although we find error in the failure of to allege expressly or by necessary implication either Clause 1 or 2 of the terminal element, a finding of error does not alone warrant dismissal. *Ballan*, 71 M.J. at 34. Because the appellant failed to object to the sufficiency of the specification at trial, we review for plain error and test for prejudice. *Humphries*, 71 M.J. at 213 (citations omitted) ("[W]here defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error – which, in most cases will turn on the question of prejudice."). The appellant has the burden of demonstrating prejudice when a specification fails to allege an offense. *Id.* at 214 (citing *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

After a thorough review, we cannot find evidence that notice of the missing element is "somewhere extant in the trial record." *Id.* at 215. As in *Humphries*, the Specification of Charge V does not provide notice of which terminal element or theory of criminality the Government pursued in this case. Indeed, the trial counsel did not expressly mention the terminal element in either his opening or closing statements and no witness was even asked whether the appellant's act of breaking restriction was prejudicial to good order and discipline or service discrediting. Additionally, although the military judge's instructions to the members properly delineated the terminal elements of Article 134, UCMJ, this took place after the close of evidence, "and again, did not alert [the appellant] to the Government's theory of guilt." *Id.* at 216 (citing *Fosler*, 70 M.J. at 230).

Based on a totality of the circumstances, we are not convinced the appellant was placed on sufficient notice of the Government's theory as to which clauses(s) of the terminal element he had violated. Consequently, the Government's failure to allege the terminal element in the Specification of Charge V constituted material prejudice to

[2] The Specification of Charge V reads as follows:

> In that [the appellant] . . . having been restricted to the limits of Barksdale Air Force Base, Louisiana, by a person authorized to do so, did, on divers occasions, at or near Bossier City, Louisiana, between on or about 26 March 2008 and on or about 12 April 2008, break said restriction.

appellant's substantial rights to notice. *See* Article 59a, UCMJ, 10 U.S.C. § 859. We therefore set aside the findings of guilty for Charge V and its Specification.

Sentence Reassessment

Having set aside the findings of guilty of Charge V and its Specification, we must assess the impact on the sentence and either return the case for a sentence rehearing or reassess the sentence ourselves. Before reassessing a sentence, we must be confident "that, absent the error, the sentence would have been at least of a certain magnitude." *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002) (citing *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986)). A "dramatic change in the 'penalty landscape'" lessens our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing. *Doss*, 57 M.J. at 185 (citing *Sales*, 22 M.J. at 307).

Our review of the record reveals that the appellant's repeated drug use and possession, multiple instances of making false official statements, failures to go, and larceny were the primary focus of the Government's findings and sentencing case and the appellant's breaking restriction was essentially viewed as a collateral offense. We find the appellant suffered no prejudice as a result of the improper specification being considered by the members during sentencing.

On the basis of the error noted, the entire record, and applying the principles set forth above, we determine that we can discern the effect of the error and will reassess the sentence. Under the circumstances of this case and considering the relative severity of the unaffected charges, we are confident that the panel members would have imposed the same sentence. *See Doss*, 57 M.J. at 185.

Conclusion

The findings, as modified, and sentence, as reassessed, 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 modified findings and reassessed sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court