UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MOISES GARCIA-VARELA
United States Air Force

ACM S31466 (f rev)

25 July 2012

Sentence adjudged 21 December 2007 by SPCM convened at Travis Air Force Base, California. Military Judge: Charles E. Wiedie.

Approved sentence: Bad-conduct discharge, confinement for 1 month, forfeiture of $400.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael S. Kerr; Major Phillip T. Korman; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Steven R. Kaufman; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his plea, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved a sentence of a bad-conduct discharge, confinement for 1 month, forfeiture of $400.00 pay per month

for 3 months, and reduction to the grade of E-1. We previously affirmed the findings and sentence after addressing assigned errors of legal and factual sufficiency, as well as sentence appropriateness. *United States v. Garcia-Varela*, ACM S31466 (A.F. Ct. Crim. App. 7 April 2009) (unpub. op.), *rev'd*, 69 M.J. 498 (C.A.A.F. 2011) (mem.).

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 and, if forfeited, whether admission of the DTR was plain error. *United States v. Garcia-Varela*, 68 M.J. 241 (C.A.A.F. 2009). In a summary disposition, CAAF set aside our decision and remanded the case "for consideration of the granted issues of in light of *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 of the [DTR] was harmless beyond a reasonable doubt." *Garcia-Varela*, 69 M.J. at 498. Our superior court later found the certification on specimen custody documents to be testimonial hearsay as well.[1] *United States v. Sweeney*, 70 M.J. 296, 305 (C.A.A.F. 2011).[2]

The Air Force Drug Testing Laboratory (AFDTL) tested a urinalysis specimen provided by the appellant. Testing included an initial immunoassay, a second immunoassay, and a gas chromatograph/mass spectrometry (GC/MS) test. The testing is documented in a 57-page DTR. Trial defense counsel's lack of objection to the DTR did not waive the issue, and we will review admission of the DTR under the plain error standard. *See Sweeney*.

The first two pages of the DTR are the DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1993). It shows that the specimen linked to the appellant's Social Security Account Number (SSAN) was positive for cocaine and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." Constantinos Zachariades signed the certification as a Laboratory Certifying Official (LCO). The last page of the DTR is a cover memorandum which certifies that the subject specimen identified by the appellant's SSAN was "confirmed positive by [GC/MS]" for the metabolite of cocaine at a concentration of "137 [nanograms per milliliter (ng/mL)]." Cynthia Caballero signed the memorandum. Neither Mr. Zachariades nor Ms. Caballero testified at trial.

[1] The Government argues that we should essentially ignore the DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1993), because *Sweeney* was decided after the remand in the present case. We decline to do so and will address both the certification memorandum and the chain of custody document in our harmless error analysis.

[2] *Williams v. Illinois*, 132 S.Ct. 1221 (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 *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). We had awaited release of this decision before proceeding.

Dr. MH, an expert in the fields of toxicology, urinalysis drug testing, and pharmacology, who at the time of trial was the Chief of the Confirmation Branch at AFDTL, testified for the Government. Trial counsel began his discussion of the DTR by handing copies to the court members and asking Dr. MH to turn to the last page, the cover memorandum. He asked Dr. MH what it indicated concerning the results of the testing. Referring directly to the certification, Dr. MH stated, "Just below the first paragraph, it indicates that the sample tested positive for the cocaine metabolite benzoylecgonine at a concentration of 137 [ng/mL]."

Trial counsel then directed his attention to the first two pages, which was the DD Form 2624. Dr. MH testified that the document showed the appellant's sample was positive for cocaine. Although Dr. MH 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 they are correctly annotated." Dr. MH then proceeded to explain the machine-generated printouts of the testing. He concluded his testimony on direct by providing his independent expert opinion that the metabolite of cocaine was "accurately detected" in the appellant's urine specimen at the level indicated.

On cross-examination, Dr. MH admitted that he was not involved in either the testing of the appellant's specimen or in compiling the results. He agreed with defense counsel that 18 individuals at the AFDTL were involved with testing the appellant's sample, that there is always the potential for human error, and that errors have in fact occurred at the AFDTL. Questions from the court members followed up on those of defense counsel about procedures at the AFDTL: how often a staff member is decertified, how often samples are received in poor condition, whether any employee proficiency problems occurred around the time the appellant's sample was tested, and details about an incident involving a visitor to the AFDTL. In closing argument, defense counsel argued extensively about possible problems at the AFDTL. Trial counsel responded in rebuttal by arguing that the expert witness can rely on the DTR which "showed this sample was handled properly and that it was tested properly, and the results did produce a positive result." True enough; the expert can rely on the DTR – even the inadmissible testimonial hearsay – but the court members may not.

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). Dr. MH provided his independent expert opinion; however, by relaying testimonial hearsay of laboratory officials, Dr. MH impermissibly validated the AFDTL results and chain of custody procedures. In light of *Blazier* and *Sweeney*, we find plain error in the admission of the certifications on the cover memorandum, the DD Form 2624, and the expert's reading of the cover memorandum to the members.

Because the error is constitutional we must determine whether the erroneous admission of testimonial hearsay in the cover memorandum, DD Form 2624, and expert's 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)

The DTR was the only evidence of drug abuse. Although the expert provided an independent opinion based on AFDTL testing, the testing was validated by testimonial hearsay in the cover memorandum, in the LCO certification on the DD Form 2624, and in the expert's reference to these documents in his testimony. In the context of this naked urinalysis case, that validation was important to rebut potential laboratory problems highlighted by the defense counsel. 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 Government may not do is improperly bolster that weight with testimonial hearsay.

We find that the members in all likelihood gave some weight to the testimonial hearsay relayed by the expert as well as that contained in the documents themselves (the cover memorandum and the DD Form 2624). The testimonial hearsay provided the only evidence from laboratory personnel who were involved in the testing and quality control of the appellant's specimen, and the members might have used it to satisfy concerns raised about personnel and procedures 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.

Conclusion

The findings and sentence are set aside. 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