UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSEPH S. HEGARTY
United States Air Force

ACM S32055

18 September 2013

Sentence adjudged 9 March 2012 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Joshua E. Kastenberg (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 45 days, forfeiture of $350.00 pay per month for 1 month, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Gerald R. Bruce, Esquire; and Captain Brian C. Mason.

Before

ROAN, SARAGOSA, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SARAGOSA, Judge:

A military judge sitting at a special court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine; one specification of wrongful use of oxymorphone, a Schedule II controlled substance; and two specifications of wrongful use of oxycodone, a Schedule II controlled substance; each in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence included a

bad-conduct discharge, confinement for 45 days, forfeiture of $350.00 pay per month for one month, reduction to E-1, and a reprimand.[1]

The appellant raises two issues on appeal: 1) Whether the appellant was denied his Sixth Amendment[2] right to confront the witnesses against him where the Government's case included expert opinion parroting testimonial hearsay; and 2) Whether the appellant's convictions under Article 112a, UCMJ, are factually and legally insufficient.

Background

Between 29 November 2011 and 7 February 2012, the appellant was selected on four separate occasions to provide a urine sample as part of the random urinalysis inspection program. Each of these samples was collected at Seymour Johnson Air Force Base (AFB) and sent to the Air Force Drug Testing Laboratory (AFDTL) for forensic testing. Each of the four samples tested positive for the presence of a controlled substance. Prior to trial, the Government presented a Motion for Appropriate Relief to pre-admit the drug testing reports (DTR) for three separate urinalysis tests stemming from collection dates of 29 November 2011, 20 December 2011, and 19 January 2012. Within the motion, the Government sought to introduce redacted versions of the DTRs. For each specimen tested, the redaction proposed would omit the summary affidavit, the letter requesting the DTR, the affidavit from the reviewing official, and blocks G and H of the DD Form 2624 shipping forms. A second identical Government motion was presented seeking pre-admission of the DTR for the fourth urine sample collected on 7 February 2012. The defense objected, presented written opposition to the motions, and declared the DTRs in their entirety should be suppressed or, at the very least, only machine-generated portions admitted.

A full hearing on the motions was held, including testimony from Dr. HN, an expert in the field of toxicology and laboratory certifying official at the AFDTL, during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session. The military judge ultimately ruled that a significantly redacted version of the DTRs for each of the four tests could be admitted, essentially limiting the prosecution to machine-generated data, and excluding all chain of custody documents and redacting all initials, signatures, and stamps from all internal worksheets.

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[1] The record of trial indicates the adjudged sentence included a reprimand. The Action signed by the convening authority indicates his approval of this sentence and has reprimand language; however, the Special Court-Martial Order (CMO) omits this part of the sentence. Promulgation of a corrected CMO, properly reflecting the adjudged reprimand as part of the sentence, is hereby ordered.
[2] U.S. CONST. amend. VI.

Confrontation Clause

On appeal, the appellant acknowledges our superior court's ruling in *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010) (hereinafter "*Blazier II*") that an expert witness may "(1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generate data, and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own." (citations omitted). At its very core, the appellant's argument is that Dr. HN's trial testimony inappropriately relied upon and repeated testimonial hearsay in the form of laboratory accession stickers placed on the urine specimen bottles and previously ruled inadmissible by the military judge during testimony of the Drug Demand Reduction Program (DDRP) manager. Ultimately, he argues this is prejudicial because it is the only evidence that linked the appellant's urine samples collected at the base and then shipped to AFDTL to the DTRs. A close review of the record of trial and more recent decisions of our superior court do not support the appellant's position.

At trial, Ms. AM, testified regarding her role as the DDRP manager, the Air Force Instructions governing the program, and procedures followed when a member is selected to provide a urine specimen. She further testified that a label including the member's social security number, Seymour Johnson AFB's base number of F574, and the specimen number is automatically printed out on a label that is placed on the bottle by DDRP personnel and verified during the collection process by the member. It was during this testimony that the defense objected to the stickers on the bottle from AFDTL. That objection was sustained, noting:

> MJ: What I will, do counsel for both sides, is I won't order the [G]overnment to remove the label, but I will not consider the labels that were placed by the drug – by the Air Force Drug Testing Laboratory, or any information on those bottles related to the Air Force Drug Testing Laboratory into evidence, or in my consideration at this time. It may be that the [G]overnment has other witnesses that can testify to them, it maybe they don't. But at this time, I won't consider it, counsel.

In accordance with the military judge's ruling, the bottles from each of the four urine specimen collections were introduced into evidence subject to the noted limitation. In addition, Ms. AM testified about the procedures used to ship urine samples to AFDTL. The prosecution introduced the DD Forms 2624 completed by Ms. AM for the appellant's urine specimens collected on 29 November 2011 and 20 December 2011. These forms identified the base code as F574, batch number as 0032, and specimen number 417 and 604, respectively. These identifiers, as well as the social security number, match the label on the respective urine specimen bottles placed by DDRP personnel and subsequently testified to by the respective observers to the appellant's

specimen collection on those dates. Master Sergeant CS, another employee at the base DDRP office, then gave similar testimony regarding her role in the shipment of the appellant's urine specimens collected on 19 January 2012 and 7 February 2012. The military judge again admitted the DD Forms 2624 for these shipments. The forms both identify the base code as F574, batch number as 0032, and specimen number 855 and 154, respectively. These identifiers, as well as the social security number, match the label on the respective urine specimen bottles and subsequently testified to by the respective observers to the appellant's specimen collection on those dates.

Dr. HN then testified about the AFDTL, its testing methods, internal and external quality control measures, and standard operating procedures. Dr. HN was handed prosecution Exhibit 1, the previously admitted specimen collection bottle from the appellant's 29 November 2011 urine collection. When asked if there were any identifiers on the bottle, Dr. N began testifying about the labels on the bottle. The defense counsel objected, noting that the label with the laboratory accession number (LAN) on it had previously been objected to and sustained by the military judge:

> DC: If he's [sic] just talking about bottles in general, and what's done generally speaking, no objection, but if she's testifying specifically to what's on the bottle then obviously my – then I would object.
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> TC: Well, I believe she can identify – the witness can identify the bottle as one, based on the identifiers – as one that was taken in by the Air Force Drug Testing Lab.
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> MJ: I – counsel I – defense counsel, I agree with the trial counsel that for the limited purpose of saying that this gives – of an expert's testimony that says this is really part of her ultimate opinion as to – this is, Prosecution Exhibit 1 was a bottle brought into the Air Force Drug Testing Lab, I'll let it go that far.

Dr. HN proceeded to testify that there was a LAN on the side and cap of the bottle. Trial counsel then handed Dr. HN Prosecution Exhibit 16, the redacted version of the DTR for the urine specimen collected on 29 November 2011. The documents within this exhibit included the AFDTL's copy of the DD Form 2624 shipped to them with the specimen; however, based on the military judge's previous ruling, the form was redacted to remove all references to the LAN. As such, the redacted bottle could be connected by the base identifiers to the DD Form 2624, but in their redacted state, neither the bottle nor the DD Form 2624 could be connected to the DTR which only referenced the sample by LAN. When asked what the DTR was, the following colloquy ensued:

> Q. And Dr. [HN], what is that exhibit?

A. This is a report that contains information related to the bottle I was handed.

DC: Objection, Your Honor. I object to that.

MJ: Trial counsel?

TC: Your Honor, the bottle was identified by the witness as one that was taken in by the lab. I believe she can review the bottle in conjunction with Prosecution Exhibit 16 for identification and note that they match up.

MJ: I believe – Captain [JG], I believe that – again, the court is not necessarily going to take that statement as a definitive statement of fact, but rather as something – evidence that the court will weigh appropriately in determining whether the government meets their burden of proof beyond a reasonable doubt. In other words, within the expert witness' opinion the test results reflect that are contained within Prosecution Exhibit 16 for identification appear to be the results that were taken from the bottle that's referenced within Prosecution Exhibit 16 for identification and has been admitted into evidence as Prosecution Exhibit 1. [sic]

DC: Your Honor, I just want to make it clear that the expert is precluded from testify [sic] about testimonial hearsay. We objected to the bottle and it was sustained that the stickers on the bottle are hearsay. So, to allow her testify about the connection between the bottle and then the test is for her to lay – is for her to testify regarding something that is testimonial in nature. Because she's basing it – she's repeating what she may not repeat.

MJ: The court will take it though as that she is – I understand the nature of your objection, and I'm going to sustain your objection as to that. I will permit the witness to rely upon, but not repeat the hearsay. So, in other words, you can rephrase your question, trial counsel.

The military judge ultimately allowed Dr. HN to testify that, in her expert opinion, that the specimen from Prosecution Exhibit 1 (the bottle) is the specimen that was tested and reflected in Prosecution Exhibit 16 (the DTR). The military judge would not allow her to repeat or testify to the LAN appearing on the bottle's labels. These same objections were lodged for each of the three subsequent bottles and DTR packets during Dr. HN's testimony. The military judge allowed the same testimony for each.

A military judge's decision to admit evidence is reviewed for an abuse of discretion. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009) (citing *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005)). The question of whether the admitted

evidence violates the Confrontation Clause, however, is a question of law reviewed de novo. *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). If we find a violation of the Confrontation Clause, we cannot affirm the decision unless this Court is convinced beyond a reasonable doubt that the error was harmless. *See Rankin*, 64 M.J. at 353.

The military judge properly applied the rules for forensic toxicologist testimony as outlined above, based on our superior court's ruling in *Blazier II.* Perhaps overly cautious and without the benefit of our superior court's more recent rulings, the military judge ruled that only the machine-generated data was admissible. Since then, our superior court has squarely addressed the admissibility of chain of custody documents and internal review worksheets, including the technicians' signatures and annotations in *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013). In *Tearman*, the Court found "none of the statements contained in [these documents] are testimonial and that the military judge did not abuse his discretion in admitting them as business records under Mil. R. Evid. 803(6)." *Id.* at 61. In applying the same analysis used by the Court in *Tearman*, we find the application of the LAN stickers to the bottle during accessioning at the AFDTL and the LAN itself to be routine and objective cataloguing of unambiguous factual matters designed to track the progress of the sample through the testing process which is "part and parcel of the internal controls necessary" for the AFDTL to conduct business. *Id*. at 60. We specifically find the LAN and placement of the LAN labels to be non-testimonial hearsay not invoking the Confrontation Clause. Furthermore, Dr. HN's testimony laid a sufficient foundation for the admissibility of the LAN and LAN labels contained on the appellant's specimen bottles to be admissible as business records under Mil. R. Evid. 803(6).

Finding the LAN and LAN labels admissible under recent case law, we see no abuse of discretion in the military judge allowing Dr. HN to rely upon the labels and render her opinion that the DTRs corresponded to the urine contained in the specimen bottles.

Sufficiency of the Evidence

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). "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) (citing *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)).

Although the sole basis to prove the elements of wrongful use of a controlled substance consists of scientific evidence, the use of expert testimony to interpret the

results of drug tests is required in order for the factfinder to infer that the use was wrongful. *United States v. Green*, 55 M.J. 76, 80 (C.A.A.F. 2001). The military judge has broad discretion to determine admissibility of scientific evidence which may permit consideration of the "permissive inference that presence of the controlled substance demonstrates knowledge and wrongful use." *Id.* As stated above, the testimony of Dr. HN was properly admitted. "A urinalysis properly admitted under the standards applicable to scientific evidence, when accompanied by expert testimony providing the interpretation required . . . provides a legally sufficient basis upon which [the factfinder, in this case the military judge, may] draw the permissive inference of knowing, wrongful use, without testimony on the merits concerning physiological effects. *Id.* at 81.

Here, Dr. HN fully explained the testing procedures of the AFDTL. She articulated how three separate aliquots from each of the original samples are tested using two different methodologies. She discussed the internal and external quality controls used to ensure the accuracy of the testing process. While internal chain of custody documentation was not admitted in this case, Dr. HN testified about the chain of custody procedures that are used in testing every specimen within the AFDTL. The DD Forms 2624 for each sample were introduced showing the external chain of custody from the base to the AFDTL. Base level DDRP personnel and assigned observers provided testimony establishing that the urine in the four bottles belonged to the appellant. Dr. HN further testified regarding her opinion that each of the four specimens previously identified as the appellant's was tested by the AFDTL and the results were reflected in the machine-generated data admitted. She interpreted the machine-generated data and rendered her expert opinion that in each specimen tested there was a positive result above the Department of Defense cutoff level. She further testified that she saw no discrepancies and found the testing process for each specimen to be valid. Dr. HN gave additional testimony regarding the nature of cocaine, oxymorphone, and oxycodone, the effects of each, and that each were, in fact, controlled substances. A medical review officer testified regarding his review of the appellant's medical and prescription records and rendered his opinion that there were no current prescriptions or medical explanations for the presence of the controlled substances in the appellant's urine, although he did point out that the appellant had an old prescription from May 2009 for Percocet, which is oxycodone.

After review of the record of trial, and consideration of the evidence presented in the light most favorable to the prosecution, we are convinced the military judge could have found all the essential elements beyond a reasonable doubt. As such, no relief is warranted.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c),

UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court