UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HARLEY T. LUSK
United States Air Force

ACM S31624

14 October 2010

Sentence adjudged 10 December 2008 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Darrin K. Johns, Major Reggie D. Yager, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

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 pleas, of one specification and charge of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge and reduction to the lowest enlisted grade. The basis of the charge is a positive urinalysis test. The appellant challenges: (1) the admission of the Air Force Drug Testing Laboratory (AFDTL) drug testing report; (2) the disclosure of the result of an Armed Forces Institute of Pathology (AFIP)

confirmation test by the government's expert witness;[*] and (3) the cross-examination of the appellant concerning his knowledge of a defense witness's arrests for marijuana possession. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

The appellant provided a urine specimen for drug testing pursuant to a unit inspection on 17 March 2008, and the local Drug Demand Reduction office shipped the specimen to AFDTL the next day. The sample tested positive for cocaine at a level of 201 nanograms per milliliter (ng/mL) of urine. The Department of Defense cutoff level is 100 ng/mL. Testing included an initial immunoassay, a second immunoassay, and a gas chromatography/mass spectrometry (GC/MS) test. AFDTL documented the test results in a 33-page drug testing report, of which 21 pages are machine-generated data printouts and 11 pages are chain of custody forms. The remaining page is a cover memorandum summarizing the test result. Except for the cover memorandum, all documentation was created at or near the time of testing. At the request of the government, AFDTL shipped an aliquot of the specimen to AFIP for a confirmation test. AFIP also determined that the specimen was positive for cocaine, although at a slightly lower level.

The appellant did not contest the admissibility of the AFDTL drug testing report, but did move to exclude the AFIP confirmation test results. The military judge granted the motion, finding that the AFIP report was testimonial hearsay since AFIP prepared it for purposes of prosecution at the request of the government. The military judge deferred ruling on whether the AFIP result might become proper rebuttal evidence.

Dr. MS, a board-certified forensic toxicologist with AFIP, testified as an expert in forensic toxicology. AFIP provides oversight of drug testing for all the armed services by conducting inspections, sending out proficiency samples, providing training, and making recommendations to the Assistant Secretary of Defense on whether a service laboratory should be certified. Based on his duties with AFIP, Dr. MS knows the AFDTL testing and quality assurance procedures and is competent to provide expert interpretation of AFDTL testing. The trial defense counsel did not conduct any additional questioning of Dr. MS concerning his qualifications as an expert and did not object to the court recognizing him as an expert in forensic toxicology.

Using the AFDTL drug testing report, Dr. MS provided his expert opinion that the results were forensically sound and showed that the appellant's urine specimen contained

[*] We combine the appellant's separate issues concerning the disclosure of the Armed Forces Institute of Pathology retest and the application of the correct balancing test into one issue as they both relate to the disclosure of the retest under Mil. R. Evid. 703.

the metabolite of cocaine. The trial defense counsel extensively attacked the reliability of AFDTL, questioning Dr. MS on multiple discrepancies documented by AFDTL as well as inspections conducted by AFIP. Based on the trial defense counsel's attack on the AFDTL results that Dr. MS relied on in reaching his opinion, the military judge permitted Dr. MS to testify in rebuttal that he considered the AFIP confirmation test in reaching his conclusions concerning the reliability of the AFDTL test. The military judge still refused to admit the AFIP report.

Two civilians who spent time with the appellant during the weekend preceding the unit sweep testified that they did not see the appellant exhibit unusual behavior and did not see the appellant use cocaine. The appellant testified that he did not knowingly use cocaine. On cross-examination, the military judge permitted the trial counsel to ask the appellant if he knew that one of his two friends who testified had been arrested for marijuana possession.

Admissibility of the AFDTL Results

Citing *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the appellant asserts that the military judge erred by admitting the AFDTL report. Although the appellant did not object to the admission of the AFDTL report at trial, we find that the issue was not waived. Lack of objection based on an oversight forfeits the issue, whereas an intentional relinquishment of a known right waives the issue. *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). We review forfeited issues for plain error, but do not review waived issues "because a valid waiver leaves no error of us to correct." *Id*. (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). When the settled law at the time of trial has clearly changed by the time of appeal, we will find that an error based on the changed law is forfeited rather than waived and we will then review the issue for plain error. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Further, when the record does not clearly show waiver, the issue should be reviewed for plain error. *Campos*, 67 M.J. at 333 n.4.

Plain error exists when a plain, clear, or obvious error occurs which materially prejudices a substantial right of the appellant. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)). The threshold question under this analysis is whether an error occurred. Under the law as it exists at the time of this appeal, we find that the admission of the drug testing report's computer-generated data printouts and chain of custody forms was not error. Admission of the covering memorandum was error, but we find that it was harmless error.

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court applied *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006), to drug testing reports to conclude that such reports were non-testimonial:

> [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 [the] 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.

United States v. Magyari, 63 M.J. 123, 126-27 (C.A.A.F. 2006) (citations omitted). Like *Melendez-Diaz*, *Magyari* applied *Crawford* to evaluate the admissibility of evidence derived from laboratory analysis. Unlike the summary affidavits at issue in *Melendez-Diaz*, the drug testing reports at issue in *Magyari* did not violate *Crawford's* interpretation of the Confrontation Clause; thus, they were admissible as a business record pursuant to this firmly rooted hearsay exception. *Id*. at 128; *see also* Mil. R. Evid. 803(6). With the exception of the cover memorandum, such is the case here.

Looking at this issue from the perspective of the law as it exists at the time of appeal, *Magyari* remains controlling precedent. Our superior court recently revisited the issue of admissibility of drug testing reports in the wake of *Melendez-Diaz* and has, so far, left *Magyari* intact. *United States v. Blazier*, 68 M.J. 439, 442 n.6 (C.A.A.F. 2010). While *Magyari* supports admission of the 21 pages of machine-generated printouts and 11 pages of chain of custody forms, *Melendez-Diaz* and *Blazier* clearly show that admission of the cover memorandum constituted plain error. *Melendez-Diaz*, 129 S. Ct. at 2532-33 (finding that drug analyst certificates are testimonial); *Blazier*, 68 M.J. at 443 (holding that drug testing report cover memoranda are testimonial). However, we find that this error was harmless beyond a reasonable doubt because the expert forensic toxicologist testified concerning the entire drug testing report as well as how the data contained therein supported *his* opinion that the specimen showed the presence of a cocaine metabolite.

Admissibility of the AFIP Retest Result

The military judge permitted the expert toxicologist to testify in rebuttal that he considered the AFIP retest in reaching his opinion. Citing the extensive defense cross-examination into discrepancies at AFDTL that may have impacted the integrity of the test results, the military judge found that the door had been opened to this rebuttal testimony. Although the military judge applied the incorrect balancing test, we apply the correct test and determine that the expert properly disclosed the AFIP retest result as part of the basis for his opinion.

The appellant argues that the expert should not have disclosed the AFIP retest result to the members even in rebuttal testimony since the military judge had found it to be inadmissible hearsay. An expert witness, however, may disclose the facts or data upon which his opinion is based *even if such facts or data are inadmissible* provided that: (1) the facts or data are of a type reasonably relied upon by experts in the particular field and (2) the probative value substantially outweighs any prejudicial effect. Mil. R. Evid. 703. The appellant does not dispute that experts may reasonably rely on testing performed by other experts, so our focus is on determining whether the expert witness could disclose otherwise inadmissible facts by using the balancing test required by Mil. R. Evid. 703.

As the appellate defense counsel correctly notes, the balancing test to determine admissibility of hearsay upon which an expert bases an opinion under Mil. R. Evid. 703 is the reverse of the standard balancing test for the admissibility of evidence under Mil. R. Evid. 403—only if the probative value substantially outweighs the danger of unfair prejudice may the expert testify concerning the otherwise inadmissible hearsay. As in the present case, the balancing test "would be tilted more toward allowing disclosure of the inadmissible information if it was necessary to respond to an attack on the expert's basis." Stephen Saltzburg et al., *Federal Rules of Evidence Manual* § 703.02[4] (9th ed. 2006).

Although the military judge cited the standard balancing test under Mil. R. Evid. 403, his analysis shows that the balance still tilts toward disclosure under the more restrictive test of Mil. R. Evid. 703:

> [C]learly the laboratory at Brooks was attacked, [and] the basis for the expert's opinion was attacked. I am very concerned that it would be a misrepresentation of the evidence to the members in this case to exclude confirmatory results or at least part of that to the members . . . Again, in the terms of a balancing test that weighs heavily on this court's mind.

Reviewing the military judge's decision de novo in light of the more restrictive balancing test of Mil. R. Evid. 703, we find that the probative value of the AFIP retest substantially outweighs any prejudicial effect.

The trial defense counsel conducted an extensive cross-examination of the expert concerning the reliability of AFDTL using multiple discrepancy reports as well as an AFIP quality assurance report. This attack made the AFIP retest highly probative concerning the basis for the expert's opinion because not only did the expert work directly for AFIP, which was responsible for certifying AFDTL, but also his direct testimony had been limited to only the AFDTL report which the defense so thoroughly attacked. In the context of the attack on the expert's opinion, the probative value of the AFIP retest is highly relevant.

On the other side of the scale, the prejudice, if any, is minimal. First, as the military judge pointed out, the low level detected in the AFIP retest was consistent with the defense theory of unknowing ingestion. In fact, the trial defense counsel even argued in findings that "we know for certain" that the test showed a low nanogram level. Second, the trial defense counsel effectively bootstrapped the AFIP result to possible problems at AFDTL by highlighting that any problems with pouring samples at AFDTL would impact the AFIP retest since AFDTL poured the sample tested by AFIP. Third, the trial defense counsel brought out through the testimony of the appellant that after the positive result, the appellant had other negative urinalysis tests—tests which the appellant apparently views as accurate. Under these circumstances, the probative value of providing the members with the full basis of the expert's opinion after the partial basis disclosed on direct had been so thoroughly attacked outweighs any minimal prejudice.

When an expert references inadmissible hearsay in relating the basis for an opinion, a military judge should provide an instruction that limits consideration of such testimony to evaluating the basis of the expert's opinion. *See* Mil. R. Evid. 105; *United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1987). The military judge initially stated that he would provide a limiting instruction to address the expert's disclosure of his reliance on the AFIP retest, but later declined to do so because of the extensive questioning concerning the AFIP retest result. The military judge should have provided an appropriate limiting instruction, but his failure to do so was harmless beyond a reasonable doubt. As mentioned above, the AFIP retest was consistent with the defense theory of unknowing ingestion and did not undermine the defense attempt to attack the handling of samples at AFDTL since the sample tested by AFIP was poured by and shipped from AFDTL. Essentially, the AFIP retest only confirmed the GC/MS testing by AFDTL, a test that was not a significant point of attack by the defense. For these reasons, we find that the failure to give a limiting instruction was harmless beyond a reasonable doubt.

Cross-Examination of the Appellant Concerning Drug Arrests of a Defense Witness

At trial, the appellant called two civilians who testified that they did not see the appellant exhibit any unusual behavior or use cocaine during the weekend preceding the Monday morning unit drug sweep. After their testimony, the appellant took the stand and denied using cocaine. On cross-examination, the trial counsel questioned the appellant about his relationship with the two witnesses who were with him, bringing out that he had known both for 10-12 years but had initially told only one of them, Mr. VH, about his positive drug test.

Exploring why he would tell one but not the other, the trial counsel asked if Mr. VH had told the appellant about his arrests for marijuana possession. The military judge overruled an objection to the question, stating that he considered it relevant to the nature of the relationship between the appellant and Mr. VH and, in that context, found that the probative value was not outweighed by the danger of unfair prejudice. The appellant replied that Mr. VH had told him about the arrests. The military judge gave a limiting instruction that restricted consideration of this information to evaluating the relationship between the appellant and the witness as well as any potential biases.

A military judge's decision to admit evidence is reviewed for abuse of discretion and will not be overturned unless it is "'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous,'" or influenced by an erroneous view of the law. *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004) (citations omitted). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a 'clear abuse of discretion.'" *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998)). We find that the military judge did not abuse his discretion by permitting the trial counsel to explore the relationship between the appellant and a defense witness by questioning the extent to which each confided in the other, particularly in light of the appellant's admission that he initially told only one of the two witnesses about his positive drug test. The prompt limiting instruction following the testimony placed proper bounds on consideration of the evidence and preempted any unfair prejudice.

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.

OFFICIAL

STEVEN LUCAS
Clerk of the Court