UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant HARLEY T. LUSK
United States Air Force

ACM S31624 (f rev)

31 July 2012

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: Lieutenant Colonel Darrin K. Johns; Major Shannon A. Bennett; Major Michael S. Kerr; Major Phillip T. Korman; and Major Reggie D. Yager.

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant, contrary to his plea, 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. We affirmed the findings and sentence after addressing, among other issues, whether the failure of the military judge to provide a limiting instruction on the expert's

use of drug retest results was harmless beyond a reasonable doubt. *United States v. Lusk*, ACM S31624 (A.F. Ct. Crim. App. 14 October 2010) (unpub. op.), *rev'd*, 70 M.J. 278 (C.A.A.F. 2011). The Court of Appeals for the Armed Forces set aside our decision and remanded the case for "a new review" of whether the failure to limit the use of testimonial hearsay in the retest report's cover memorandum and the prosecution's reliance thereon resulted in conviction in violation of the Confrontation Clause.[1] *Lusk*, 70 M.J. at 282 (citing *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010)).[2]

The appellant provided a urine specimen for drug testing pursuant to a unit inspection. The local Drug Demand Reduction office shipped the specimen to the Air Force Drug Testing Laboratory (AFDTL), where the specimen tested positive for cocaine at a level of 201 nanograms per milliliter (ng/mL). AFDTL documented the test results in a drug testing report (DTR) which was admitted at trial, without objection. At the request of the Government, AFDTL shipped an aliquot of the specimen to the Armed Forces Institute of Pathology (AFIP) for a retest. AFIP determined the specimen was positive for cocaine, although at a slightly lower level.

Although the appellant did not contest the admissibility of the AFDTL DTR, he moved to exclude the AFIP confirmation test results. The military judge granted the motion, finding the AFIP report 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.

Dr. MS, a board-certified forensic toxicologist with AFIP, was qualified as an expert in forensic toxicology. Using the AFDTL DTR, he provided his expert opinion that the results were forensically sound and showed that the appellant's urine specimen contained the metabolite of cocaine. Based on extensive cross-examination into the reliability of the AFDTL, the military judge permitted Dr. MS to testify in rebuttal that he considered the AFIP confirmation test in forming his opinion:

> Q. And do you recall what was the nature [of] that test?
>
> A. It was a confirmation test, it was a [gas chromatography/mass spectrometry] test.
>
> Q. And you recall what the result was?
>
> A. Yes, it showed the presence of benzoylecgonine.

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

[2] *Williams v. Illinois*, 132 S. Ct. 2221 (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.

Defense counsel began his cross-examination by highlighting that the sample tested at AFIP was poured by personnel at AFDTL and showed signs of leakage when it arrived. Defense counsel also highlighted the very low 60 ng/mL level detected in the retest, an amount below the cutoff for reporting a positive result on an initial test.

Over defense objection, the military judge elected not to give a limiting instruction on the expert's testimony concerning the AFIP result. In closing argument, trial counsel attempted to counter defense attacks on AFDTL by referring to the expert's testimony regarding the AFIP confirmation: "He said there was another test out there and it was the results of that test that help them understand the reliability of the Brooks test and that was from AFIP . . . . That test right there confirmed the Brooks test." Defense counsel responded to the retest by arguing that the AFIP result meant nothing because it came from the problem-plagued AFDTL: "It is so sloppy coming out of Brooks how can you trust everything that comes out of AFIP? If it is garbage in, is it garbage coming out?" He spent the remaining 15 pages of argument in the record on unknowing ingestion.

We previously concluded that the military judge should have provided an appropriate limiting instruction, but that his failure to do so was harmless beyond a reasonable doubt. Although we applied the harmless beyond a reasonable doubt standard of review required for constitutional errors, we did not expressly state that the judge's failure to limit consideration of the AFIP results violated the Confrontation Clause. We conclude that it did.

In granting the defense motion in limine to exclude the AFIP DTR from the Government's case-in-chief, the military judge determined that the AFIP DTR contained testimonial hearsay. *See United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008). In an Article 39a, UCMJ, 10 U.S.C. § 839(a), session on the admissibility of the retest result in rebuttal, the expert testified that he relied on statements in the report by analysts who "are essentially making a statement that they followed the operating procedure." Although the expert did not repeat this in his testimony before the court members, he related that his conclusion was, in part, based on those analysts' statements. When an expert references inadmissible hearsay in relating the basis for an opinion, an instruction should be provided that limits consideration of such testimony to evaluating the basis of the expert's opinion. Mil. R. Evid. 105; *United States v. Neeley*, 25 M.J. 105, 107 (C.M.A. 1987). Therefore, without a limiting instruction, testimonial hearsay was admitted as substantive evidence, in violation of the Confrontation Clause.

Because the error is constitutional, we must determine whether admission of this 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." *Chapman v. California*, 386 U.S. 18, 23 (1967) (citations omitted), *quoted in Blazier*, 69 M.J. at 227. 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. *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011) (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).

As we noted in our previous decision, the relatively low nanogram level in 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 and shipped from AFDTL. Trial counsel argued that the AFIP retest result confirmed the AFDTL result; defense counsel responded that the AFIP result merely reflected the problems at AFDTL. The focus of the evidence and argument remained on unknowing ingestion and mishandling issues at AFDTL – not the retest at AFIP. Applying the factors set forth in *Van Arsdall* to the evidence in this case, we find that the error in admitting testimonial hearsay through expert testimony without an appropriate limiting instruction was harmless beyond a reasonable doubt.

Conclusion

The 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 findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court