UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JERROD D. NUTT
United States Air Force

ACM S31600 (f rev)

24 July 2012

Sentence adjudged 3 October 2008 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Gregory O. Friedland.

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett; Major Michael A. Burnat; Major Daniel E. Schoeni; Captain Phillip T. Korman; and Dwight H. Sullivan, Esquire.

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

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A special court-martial composed of officer members convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and one specification of fraudulent enlistment, in violation of Article 83, UCMJ, 10 U.S.C. § 883. The convening authority approved a sentence of a bad-conduct discharge, confinement for 2 months, and reduction to the

grade of E-1. On 6 May 2010, this Court set aside the fraudulent enlistment conviction. *United States v. Nutt,* ACM S31600 (A.F. Ct. Crim. App. 6 May 2010) (unpub. op.), *rev'd*, 70 M.J. 353 (C.A.A.F. 2011) (mem.). We affirmed the conviction for wrongful use of cocaine and approved a sentence of a bad-conduct discharge, confinement for 1 month, and reduction to the grade of E-1. *Nutt*, slip op. at 10.

On 13 September 2010, the Court of Appeals for the Armed Forces granted review on the following issues: (1) whether admission of the Drug Testing Report (DTR) denied the appellant his constitutional right to confront the witnesses against him; (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; (3) whether the confrontation clause was satisfied by testimony from an expert witness; and (4) if the expert's testimony did not satisfy the confrontation clause, whether the introduction of testimonial evidence was harmless beyond a reasonable doubt. *United States v. Nutt,* 69 M.J. 271 (C.A.A.F. 2010). In a summary disposition, the Court 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 memorandum and specimen custody document of the [DTR] was harmless beyond a reasonable doubt.

Nutt, 70 M.J. at 353.

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 34-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*, 70 M.J. at 303-04.

The cover memorandum to the DTR certifies that the subject specimen identified by the appellant's Social Security Account Number (SSAN) was "confirmed positive by [GC/MS]" for the metabolite of cocaine at a concentration of "920 [nanograms per milliliter (ng/mL)]." Cynthia Caballero signed the memorandum. 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 SSAN was positive for cocaine and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." Jai Dev signed the certification as a Laboratory Certifying Official (LCO). Neither Mr. Dev nor Ms Caballero testified at trial.

Dr. DT, an expert in the fields of toxicology, urinalysis drug testing, and pharmacology, who at the time of trial was a lab Certifying Official at AFDTL, testified for the government. After asking Dr. DT to explain the drug testing procedures at AFDTL, the trial counsel then referred Dr. DT to the cover memorandum for the DTR. He asked Dr. DT what it indicated concerning the results of the testing. Referring directly to the certification, Dr. DT testified as follows:

> [The DTR] states also on it that the urine specified identified by base identification number F5440052868, [appellant's SSAN], and the laboratory accession number B0803164034 was tested at the Air Force Medical Operations Agency Drug Testing Division. The specimen was determined to be presumptive positive by . . . gas chromatography . . . .

Dr. DT also testified "the last sentence on the DTR on the front, say [sic] it was confirmed positive by the [GC/MS]." Trial counsel then directed Dr. DT to the DD Form 2624. Dr. DT testified that the SSAN and lab accession number for the appellant on the DTR matched the same numbers on the DD Form 2624. He further testified as follows:

> To the far right, you'll see the letters NEG for negative and COC for [sic] was for the presumptive the confirmation of the cocaine and along the very bottom line we see signatures, date, etcetera. Those two sections were not put in or filled in until completion of review. This is already been – all this had already been reviewed by the technicians working, making sure that data was correct in the instrument room, quality control, making sure the controls were correct, and also two laboratory certifying officials had gone through and looked at all of this with the last laboratory certifying official signing and dating the bottom as well as annotating the negatives and the COC on the right side.

Dr. DT concluded his testimony on direct by providing his independent expert opinion that the appellant's urine was subject to valid, reliable testing, and that the metabolite of cocaine was "actively detected" in the appellant's urine specimen.

On cross-examination, Dr. DT admitted that he was not involved in either the testing of the appellant's specimen or in compiling the results. Upon questioning from defense counsel, he explained how other individuals at the AFDTL were involved with testing the appellant's sample. He also confirmed that one of the individuals involved with the testing process had been reprimanded for "careless workmanship or negligence" prior to the date the appellant's sample was tested. Defense counsel also questioned Dr. DT about the base-level procedures for collecting urine, the length of time it takes to mail and receive the samples at AFDTL (8 days in this case), and the likelihood that the sample could have been contaminated with cocaine at some point after it was collected from the appellant.

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. DT provided his independent expert opinion; however, by relaying testimonial hearsay of laboratory officials, Dr. DT 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 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

Accordingly, the finding of guilty to wrongful cocaine use alleged in the Specification of Charge II and the sentence are set aside. A rehearing on this charge may be ordered by the same or a different convening authority.

OFFICIAL

STEVEN LUCAS
Clerk of the Court