UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JERROD D. NUTT
United States Air Force

ACM S31600

06 May 2010

Sentence adjudged 03 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, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

HELGET, Senior Judge:

The appellant was found guilty, contrary to his pleas, by a panel of officer members, of one specification of fraudulent enlistment and one specification of wrongfully using cocaine, in violation of Articles 83 and 112a, UCMJ, 10 U.S.C. §§ 883,

912a.[1] The approved sentence consists of a bad-conduct discharge, confinement for two months, and reduction to E-1.

The appellant asserts four assignments of error before this Court: (1) Whether under the recent Supreme Court ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the admission of the drug testing report violated the appellant's rights under the Confrontation Clause of the Sixth Amendment;[2] (2) Whether the trial defense counsel's statement that he did not object to the admission of the drug testing report at trial forfeited the Confrontation Clause issue and the admission of the report constituted plain error; (3) Whether the appellant's conviction for wrongful use of cocaine is factually and legally insufficient;[3] and (4) Whether the appellant's conviction for fraudulent enlistment is factually and legally insufficient.

Background

At the time of trial, the appellant was 27 years old and had been on active duty since 15 June 2000. He was assigned as a firefighter to the 27th Special Operations Civil Engineer Squadron, Cannon Air Force Base (AFB), New Mexico.

On 17 March 2008, the appellant submitted a urine specimen pursuant to a random urinalysis inspection at Cannon AFB. The specimen was sent to the Air Force Drug Testing Laboratory (AFDTL), Brooks City-Base, Texas, for forensic testing. On 31 March 2008, AFDTL reported that the specimen tested positive for benzoylecgonine, the metabolite of cocaine, with a concentration level of 920 nanograms per milliliter (ng/mL), above the Department of Defense cutoff level of 100 ng/mL. On 11 March 2008, the appellant signed his application for reenlistment which became effective on 20 March 2008.

Discussion

Impact of Melendez-Diaz

At trial during the testimony of the government's expert witness, the government offered the drug testing report (DTR) for the results of the appellant's urine specimen. When the military judge asked the appellant's trial defense counsel if he had any objection to the admissibility of the DTR, he replied, "No objection." On appeal, the

[1] Consistent with his pleas, the appellant was found not guilty of assault and battery under Article 128, UCMJ, 10 U.S.C. § 928.
[2] U.S. CONST. amend. VI.
[3] More specifically, the appellant asserts that his conviction for wrongful use of cocaine was factually and legally insufficient because (1) the only evidence against him consisted of a positive urinalysis with a concentration level of 920 nanograms per milliliter and (2) circumstantial evidence and potential unknowing ingestion or sample contamination created reasonable doubt.

appellant asserts that under *Melendez-Diaz*, the admission of the DTR violated his rights under the Confrontation Clause of the Sixth Amendment. In support of this position, the appellant contends: (1) The analysts' statements in the DTR were testimonial since an objective witness would reasonably believe that the statements would be available at a later trial; (2) The analysts' statements within the DTR were functionally similar to in-court testimony; and (3) The confrontation principles of *Melendez-Diaz* support recognizing the analysts' statements in the DTR as testimonial hearsay. The government asserts that: (1) The contents of the DTR are not testimonial because laboratory instruments do not produce testimonial statements; (2) Under the totality of the circumstances, the DTR was created as a result of the appellant's positive urinalysis and was not created under circumstances which would lead an objective witness to reasonably believe that the report would be available for use at a trial; and (3) As the Confrontation Clause does not mandate the automatic production in court of all participants in the process of scientific testing, the appellant fully exercised any applicable confrontation rights by cross-examining the government's expert witness.

We review a military judge's decision to admit or exclude evidence 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)). "Whether evidence constitutes testimonial hearsay is a question of law reviewed de novo." *Id.*

In *Melendez-Diaz*, the Supreme Court held that affidavits used to convict the petitioner were testimonial, making the affiants witnesses subject to the defendant's right to confrontation under the Sixth Amendment. *Melendez-Diaz*, 129 S. Ct. at 2532. In that case, the petitioner was prosecuted for cocaine distribution and trafficking based upon a law enforcement surveillance operation. *Id.* at 2530. The seized evidence was sent to the state laboratory responsible by state law for conducting chemical analysis on evidence upon police request. *Id.* The evidence tested positive for cocaine. *Id.* at 2531. During the trial, the prosecution submitted three "certificates of analysis" that reported the results of the forensic analysis performed on the substances. *Id.*

> The certificates reported the weight of the seized bags and stated that the bags "[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.

Id. (alterations in original) (internal citation omitted). The certificates were admitted into evidence without any live testimony, unlike typical military urinalysis cases where an expert testifies.

After concluding that the certificates were "quite plainly affidavits," the Supreme Court held that the affidavits clearly fell within testimonial evidence because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination;'" the analysts swearing their accuracy were witnesses for Sixth Amendment purposes; and "[a]bsent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial." *Id.* at 2532 (citations omitted). The Supreme Court described the affidavits as including only a "bare-bones statement" that the substance was found to be cocaine and emphasized that the petitioner "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." *Id.* at 2537.

In a footnote, the Supreme Court stated that they

> do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . *this does not mean that everyone who laid hands on the evidence must be called*. As stated in the dissent's own quotation, . . . *"gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility."* It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

Id. at 2532 n.1 (emphasis added) (alterations in original) (internal citation omitted).

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court addressed lab reports and random urinalysis tests, concluding that lab reports contained non-testimonial hearsay with indicia of reliability and the appellant's rights under the Confrontation Clause were not violated. *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). Concerning whether or not the data recorded on lab reports are testimonial statements, the Court noted:

> [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 Appellant at his court-martial. . . . This conclusion is consistent with the *Crawford*[4] 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.

Id. at 126-27 (internal citations omitted)

The government also relies on this Court's decision in *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 29 Oct 2009), where we held that a consent urinalysis following an earlier positive random urinalysis was non-testimonial because the second sample was treated exactly the same as the first by the lab.

The government further relies on the holding in *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), where the Fourth Circuit approved the prosecution's use of drug testing reports. The Fourth Circuit held: (1) The toxicology data generated by the lab machines were not the out-of-court statements of the lab technicians; (2) The data did not constitute hearsay evidence; and (3) The data was non-testimonial. *Id*. at 227. At the trial in *Washington*, the prosecution offered, over the appellant's objection, the expert testimony of Dr. BL, the Director of the Forensic Toxicology Laboratory of the Armed Forces Institute of Pathology. *Id.* Dr. BL did not see the blood sample and did not conduct any of the tests; however, lab technicians under his supervision did conduct the tests. *Id.* at 228. In his testimony, Dr. BL relied on the raw data. *Id*. at 229. The appellant objected to Dr. BL's testimony arguing that his reliance upon the raw data obtained by the lab technicians violated the appellant's rights under the Confrontation Clause of the Sixth Amendment as he was entitled to confront the lab technicians. *Id.* The Fourth Circuit noted that

> the inculpating "statement"—that Washington's blood sample contained PCP and alcohol—was made by the machine on printed sheets, which were given to Dr. [BL]. The technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by the machine.

Id. at 230. Further, there would have been no value in cross-examining the lab technicians about the data because the role of the technicians was only to operate the machine. *Id.* Therefore, there was no violation of the Confrontation Clause because the statements to which Dr. BL testified did not come from the lab technicians. *Id*. at 231.

[4] *Crawford v. Washington*, 541 U.S. 36 (2004).

The raw data generated by the machines were not hearsay statements. *Id.* Pursuant to Fed. R. Evid. 801(a), a statement is made *by a person*; therefore, the raw data generated by the machines were not the statements of technicians. *Id.* Further, the reports generated by the machines were non-testimonial in that they did not relate to past events but rather related to the present condition of the blood. *Id.* at 232. Accordingly, the court concluded that the raw data printed by the machines were not testimonial hearsay statements; therefore, Dr. BL's testimony did not violate the Confrontation Clause or the hearsay rule. *Id*.

Considering our opinion in *Blazier*, our superior court's decision in *Magyari*, and the Fourth Circuit's decision in *Washington*, we find that the admission of the DTR in this case was not in error. We do not find that *Melendez-Diaz* applies in this situation because the raw data contained in the DTRs are not statements made by the lab technicians and the government called an expert, an employee of AFDTL, who was subject to extensive cross-examination by the appellant's counsel. Accordingly, under these circumstances, the DTR was non-testimonial and admissible at trial.

We note that our superior court in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010) held that the cover page of a DTR is testimonial. Accordingly, the military judge erred by admitting the cover page of the DTR in this case. However, we find that this error was harmless. The government provided the testimony of Dr. DT, an expert forensic toxicologist assigned to the AFDTL, who testified under direct and extensive cross-examination about the entire DTR and the results of the test. Under these circumstances, the admission of the cover page was harmless error.

Waiver of the Sixth Amendment Right to Confrontation

The appellant asserts that the trial defense counsel's statement that he did not object to the admission of the DTR at trial forfeited, rather than waived, the confrontation clause issue and the admission of the report by the military judge constituted plain error.

In determining whether a particular circumstance constitutes waiver or forfeiture, we consider whether the failure to object "at the trial level constituted an intentional relinquishment of a known right." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *Id.* (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). "While we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *Id.* (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). "The plain error standard is met when (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights."' *Id.* at 332 n.2 (quoting *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 Supreme Court has stated that 'where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration.'" *Harcrow*, 66 M.J. at 159 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

The appellant contends that considering our superior court's decision in *Magyari*, it was reasonable for the trial defense counsel not to object to the admissibility of the DTR. The appellant avers that the facts of this case are similar to the facts in *Harcrow*. In *Harcrow*, the trial defense counsel did not object to the admission of two laboratory reports. *Id.* at 156. On appeal, Harcrow asserted that the laboratory reports were testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), an opinion which was issued after his court-martial and while his case was pending appeal. *Id.* Our superior court held that the trial defense counsel's decision not to object could not possibly be an intentional relinquishment or abandonment of this new potential claim and determined there was no waiver. *Id.* at 157-58. Thus, the appellant in this case argues that considering at the time of trial the trial defense counsel could not have had the same picture of the appellant's right to confront the laboratory analysts as it exists today under *Melendez-Diaz*, waiver does not apply.

The government's position is that the appellant affirmatively waived his right to object to the admission of the DTR. Since the appellant's trial defense counsel specifically stated that he had no objection to the admission of the DTR, this constitutes an intentional relinquishment of a known right. The government also points out that *Crawford* supplied the basis for the objection and was in effect at the time of the appellant's trial. As the *Melendez-Diaz* court noted, its decision involved "little more than the application of [their] holding in *Crawford v. Washington*." *Melendez-Diaz*, 129 S. Ct. at 2542. Accordingly, at the time of the appellant's trial, he was already on notice of any colorable claim he had to object to the admission of the DTR. Further, the government asserts that the facts in this case demonstrate that the trial defense counsel was familiar with the applicability of *Crawford* to testimonial statements, as he effectively limited the testimony of Officer GB concerning the additional charge on Confrontation Clause grounds which ultimately led to a finding of not guilty concerning that charge.

We agree with the appellant that *Melendez-Diaz* changed the landscape concerning whether or not a trial defense counsel should object to the admissibility of DTRs. Similar to the defense counsel's lack of objection in *Harcrow*, the trial defense counsel's decision not to object to the admissibility of the DTR in this case should not be considered an intentional relinquishment of a potential claim. Although *Melendez-Diaz* only further defined the Supreme Court's decision in *Crawford*, it provided an opportunity to confront laboratory analysts that certainly did not exist prior to the Court's decision. Accordingly, we find that the appellant did not waive his right to object to the admission of the DTR.

However, even if the appellant did not waive, but only forfeited the issue, we find that admission of the DTR did not constitute plain error. Although we apply the law at the time of appeal, not whether it was obvious at the time of trial,[5] we find that the military judge did not err in admitting the DTR because our superior court's decision in *Magyari* still applies and *Melendez-Diaz* has not changed the law as it pertains to the admissibility of a DTR from a random urinalysis inspection.

Legal and Factual Sufficiency

The appellant claims that his convictions for wrongful use of cocaine and fraudulent enlistment were legally and factually insufficient. In accordance with Article 66(c), UCMJ, 10 U.S.C. § 866(c), we review 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, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (citing *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987)).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ; *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

Considering our review of the entire record of trial, a reasonable fact finder could have found that the appellant wrongfully used cocaine. The appellant highlights the testimony of the observer who testified that when the appellant was in the restroom, he put the lid of the bottle either down on the sink or on the shelf in front of the mirror, provided a sample, and then put the lid back on the bottle. The appellant asserts that reasonable doubt was established when the government's own expert admitted it was possible that a bottle cap, when placed upon a surface containing a microscopic amount of cocaine, could pick up an invisible speck of cocaine and contaminate the sample when the lid was placed on it. This argument was also raised at trial.

To counter this argument, the government provided the testimony of Mr. RW, the Drug Demand Reduction Program Manager, who testified that the restroom had been cleaned by contractors and inspected before the appellant provided his urine sample. Accordingly, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found that the appellant wrongfully used cocaine.

[5] *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008).

Furthermore, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses' in-court testimony, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt. Therefore, we find that the evidence is legally and factually sufficient to sustain the conviction for the wrongful use of cocaine.

However, we reach a different result concerning the conviction for fraudulent enlistment. On 11 March 2008, the appellant requested to be reenlisted in the United States Air Force. Block III (A) of the form he signed states, "I acknowledge that I am not pending any military or civil action (other than civil suit); not under investigation by military or civilian authorities; have not declined a PCS or TDY assignment, or have not refused training." At trial, the government called Airman First Class (A1C) AJ who testified that when airmen sign this statement, "they don't have any kind of Article 15, [UCMJ, 10 U.S.C. § 815,] court-martial, any—nothing like, under investigation, basically, saying they are a law abiding citizen, you know, not drinking under age, not driving under the influence, not using drugs, not doing anything like that." After his commander approved his reenlistment on 16 March 2008, the appellant again signed confirming that the effective date of his reenlistment was 20 March 2008.

Under Article 83, UCMJ, one of the elements of fraudulent enlistment is "[t]hat the accused knowingly misrepresented or deliberately concealed a certain material fact or facts regarding qualifications of the accused for enlistment or appointment." *Manual for Courts-Martial, United States*, Part IV, ¶ 7.b.(1)(b) (2008 ed.). We do not concur with the testimony of A1C AJ that the certification statement includes the wrongful use of drugs as there is no mention of misusing drugs in the statement. A1C AJ also did not testify that she orally briefed the appellant that he was certifying that he had not wrongfully used drugs. Accordingly, we find that the certification the appellant signed does not meet the cited element of deliberate concealment of a material fact required for the commission of fraudulent enlistment. We therefore set aside the conviction for Charge I and its Specification.

Sentence Reassessment

Having determined that it is appropriate to set aside the appellant's conviction for fraudulent enlistment, it is also necessary to determine whether we can reassess the sentence or must order a new sentencing hearing. *See United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). Before reassessing a sentence, this Court must be confident that absent the error, "the sentence adjudged would have been of at least a certain severity." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). A "dramatic change in the 'penalty landscape'" gravitates away from our ability to reassess a sentence. *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2003). Ultimately, a sentence can be reassessed only if we "confidently can discern the extent of the error's effect on the sentencing authority's decision." *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991).

In *United States v. Harris*, 53 M.J. 86 (C.A.A.F. 2000), our superior court decided that "if the [appellate] court cannot determine that the sentence would have been at least of a certain magnitude absent the error, it must order a rehearing." *Harris*, 53 M.J. at 88 (citing *United States v. Poole*, 26 M.J. 272, 274 (C.M.A. 1988)).

Considering the two charges in this case, we are confident that even if the members had found the appellant not guilty of the fraudulent enlistment charge, they still would have imposed a bad-conduct discharge and the reduction in rank. We are also confident that they would have imposed at least one month of confinement. However, they may not have imposed two months of confinement. Accordingly, we reassess the sentence and approve only so much of the sentence as provides for a bad-conduct discharge, confinement for one month, and reduction to E-1.

Conclusion

Charge I and its Specification are set aside. The approved findings, as modified, and sentence, as reassessed, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[6] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[6] We note that there are errors in the court-martial order (CMO). The charge alleging a violation of Article 128, UCMJ, is erroneously listed as "CHARGE III" on the CMO rather than as "ADDITIONAL CHARGE" as it appears on the charge sheet. Also, the CMO fails to indicate that a panel of officer members adjudged the sentence. This Court hereby orders the preparation of a corrected CMO.