UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant KIM L. SHARPE
United States Air Force

ACM S32011

30 May 2013

Sentence adjudged 13 October 2011 by SPCM convened at Hurlburt Field, Florida. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $1,977.00 pay per month for 2 months, reduction to E-5, and a reprimand.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and HARNEY
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant contrary to her pleas of cocaine use, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced her to a bad-conduct discharge, confinement for two months, forfeiture of $1,977 pay per month for two months, reduction to the grade of E-5, and a reprimand. The convening authority approved the sentence as adjudged. The appellant assigns as error: (1) the admission of a third party's negative drug screens to rebut an innocent ingestion defense, (2) the admission of the appellant's drug testing

report, and (3) ineffective assistance of counsel.[*] We find error in the admission of the third-party negative drug screens, but we conclude that the error did not materially prejudice the appellant.

Law enforcement agents interviewed the appellant after notification that a random urinalysis was positive for cocaine. An investigator testified that she denied knowingly using cocaine, but she stated that her boyfriend, Mr. CE, "smoked crack" cocaine in her presence and speculated that she unknowingly absorbed the drug from him. The appellant made similar statements to a co-worker. To counter the defense theory of innocent ingestion, the prosecution called Mr. CE's probation officer, Ms. SW, to testify that Mr. CE was subject to random drug screening and had tested negative on tests administered on 12 April 2011, 12 May 2011, 2 June 2011, and 9 June 2011. Ms. SW testified over defense objection that she was a certified probation officer with more than 500 hours of training, to include how to conduct drug screens. As part of her duties she supervised Mr. CE and conducted random drug screens for illegal drugs, including cocaine.

The random drug screens are conducted by inserting a chemically treated stick into a urine specimen. The stick indicates the possible presence of drugs by the absence of a line at a particular location marked on the stick with a "T." If the stick indicates the presence of drugs, the urine specimen is sent to a laboratory for further testing. If not, the specimen and the stick are discarded.

Ms. SW conducted four such drug screens on Mr. CE, and all were negative. She testified that "[a] male officer goes into the restroom with the offender and watch[es] as they do the drug test. And, again, a stick test is . . . stuck into the urine." Although the drug screens were negative, Ms. SW testified that Mr. CE had been involved with drugs.

The defense objection to the testimony of Ms. SW was based on relevance, hearsay, and lack of foundation, arguing that the witness did not observe the test and lacked the training necessary to interpret the results. The military judge ruled:

> It would appear to me that evidence to show that Mr. [CE] may not have been using drugs during that time frame is extremely relevant. And unlike a drug test that would be used against the accused where [*Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011)] may be an issue, I don't believe it to be here. I think that the witness could certainly say that he's on probation. As a result of probation we drug test. He was tested during the time frame and those tests were negative and there's nothing else that we're aware of that would have violated his probation.

[*] The assigned errors regarding admission of the appellant's drug testing report and the effectiveness of her counsel are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Implicit in the ruling is a conclusion that the test results are not testimonial hearsay, but the military judge made no findings regarding the appellant's argument at trial that Ms. SW did not observe the drug testing, and her testimony indicates that she did not: "[A] male officer goes into the restroom with the offender and watch[es] *as they do the drug test*" (emphasis added). Based on the record, we find that Ms. SW relayed the results reported to her by the male officer observer, and her statement of those results is hearsay.

We next determine de novo whether the statement is testimonial. Key to the inquiry is whether the statements "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington*, 541 U.S. 36, 52 (2004) (citations and internal quotation marks omitted), *quoted in United States v. Clayton*, 67 M.J. 283, 287 (C.A.A.F. 2009). Here, the circumstances plainly show that an objective witness would not believe that such a report of negative drug screen results to the probation officer would be used at a trial. The results of the drug screens are presumptive only and would not be used at trial. Only laboratory results following a positive screen would potentially be used at trial. Reviewing the issue de novo, we find that the statements by the male officer to Ms. SW were not testimonial hearsay.

Although not testimonial, we find that the admission of the results violated the rule against hearsay and are not admissible under an exception. Mil. R. Evid. 802. We find that the error was not constitutional, however, because the appellant was not deprived of her right to present a defense. Ms. SW testified that the appellant's boyfriend, Mr. CE, had a history of drug abuse. Trial defense counsel extensively cross-examined the expert toxicologist on scenarios of innocent ingestion. Moreover, the appellant's statements claiming innocent ingestion were before the members, and trial defense counsel strongly argued this defense in closing. *See United States v. Scheffer*, 523 U.S. 303, 317 (1998) (applying a significant impairment standard for a constitutional violation).

We review de novo whether a non-constitutional error "had a substantial influence on the members' verdict in the context of the entire case." *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). In answering this question, "[w]e consider four factors: (1) the strength of the [G]overnment's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. *Id*. Applying these factors, we do not find that the error had a substantial influence on the verdict.

The forensic toxicologist provided her expert opinion that the drug testing completed on the appellant's urine specimen showed that the appellant had used cocaine. She also addressed the various innocent ingestion scenarios raised by the appellant. Concerning innocent ingestion by contact with the sweat of someone who had used cocaine, the expert stated that a positive result based on such contact would be "very improbable." On the theory of innocently inhaling second-hand crack pipe smoke, the

expert stated that "it's very rare to even come close" to the cutoff level for a positive result and that the conditions of such an inhalation would be "quite extreme." Finally, in response to the appellant's speculation that oral sex with Mr. CE may have caused her to test positive, Ms. SW testified that neither dermal nor sexual contact was a realistic theory for a positive result. The defense argued to the members that, as Ms. SW testified, Mr. CE had a history of drug abuse. They also argued that, after his negative drug screens, Mr. CE would feel safe to pull out his crack pipe, and he ultimately infected the appellant. On the whole of the evidence in the case and applying the *Harrow* factors, we do not find that the erroneously admitted testimony concerning Mr. CE's negative drug screens materially prejudiced the appellant.

We have considered the remaining assignments of error raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Contrary to the appellant's argument, the admitted portions of the appellant's drug testing report did not contain testimonial hearsay. *See United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). Concerning the alleged ineffectiveness of trial defense counsel, we applied the criteria in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), and we conclude that we can resolve this issue without additional factfinding. Examining the appellate filings and the record as a whole, we hold that the appellant was not denied effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Conclusion

The approved findings and the 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). Accordingly, the approved findings and the sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist