UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CURTIS T. SPAIN
United States Air Force

ACM S30878

11 September 2006

Sentence adjudged 10 March 2005 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: James L. Flanary and Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $823.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

PER CURIAM:

A special court-martial comprised of officer and enlisted members found the appellant guilty, contrary to his pleas, of divers use of marijuana and divers distribution of marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. On appeal, the appellant asserts that the military judge's decision to admit evidence of a positive drug urinalysis violated the Sixth Amendment's Confrontation Clause,[1] and was therefore erroneous. We find the assignment of error to be without merit and affirm.

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

At trial, the appellant objected to the admission of a laboratory report from the Air Force Institute for Operational Health that indicated the appellant's urine had tested positive for a metabolite of marijuana. Citing *Crawford v. Washington*, 541 U.S. 36 (2004), the appellant argued that the report constituted testimonial hearsay evidence that could not be admitted without allowing him to cross-examine the individuals who prepared it. The military judge overruled the appellant's objection and admitted the report into evidence as a "business record" pursuant to Mil. R. Evid. 803(6). On appeal, the appellant again relies on *Crawford* in urging us to find that the laboratory report was testimonial hearsay and therefore inadmissible, absent "confrontation."

Our superior court has recently ruled on this issue. In *United States v. Magyari*, 63 M.J. 123, 125-26 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces applied *Crawford* in considering the admissibility of a laboratory urinalysis report that had been prepared and submitted in substantially the same manner as the report at issue before us today. The Court found that the laboratory report was non-testimonial and therefore admissible, subject to the requirements of *Ohio v. Roberts*, 448 U.S. 56 (1980).[2] Since the laboratory report qualified as a business record -- a "firmly rooted hearsay exception" -- the court concluded that it had properly been admitted as evidence at trial. *Magyari*, 63 M.J. at 128 (citing *Roberts*, 448 U.S. at 66 n.8).

After carefully considering the record of trial, we find that the facts and circumstances surrounding the creation of the laboratory report are essentially the same as those of the laboratory report analyzed by our superior court in *Magyari*. We therefore hold that the holding in that case directly controls the issue in the case sub judice. The laboratory report admitted as evidence at trial is non-testimonial hearsay that was properly admitted by the military judge as a business record under Mil. R. Evid. 803(6). The appellant's assertion of error is therefore without merit.

Even if the laboratory report had been erroneously admitted, we would find that the error was harmless. No less than five witnesses at trial testified that they directly observed the appellant smoke marijuana. Several of these witnesses observed the appellant smoke marijuana on more than one occasion, and several testified that they knew the substance was marijuana because the appellant either told them what it was or because they were smoking it with him and felt the effects. Thus, the members had ample evidence to convict the appellant of divers

[2] *Roberts* held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

use of marijuana even absent the laboratory report, and we ourselves would have been convinced beyond a reasonable doubt of the appellant's guilt.

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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator