UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GARLAND R. STEWART
United States Air Force

ACM S31685

08 June 2010

Sentence adjudged 18 June 2009 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Ronald A. Gregory.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Andrew J. Unsicker.

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

Before

BRAND, HELGET, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

Consistent with his pleas, the appellant was found guilty of one specification of wrongfully possessing marijuana and one specification of wrongfully using marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the appellant was found guilty by a panel of officer members of three specifications of wrongfully using marijuana, in violation of Article 112a, UCMJ. The approved sentence consists of a bad-conduct discharge, confinement for six months, and reduction to E-1.

The appellant asserts three assignments of error before this Court: (1) Whether the military judge abused his discretion by allowing the testimony of the government's expert and admitting the drug testing report without the in-court testimony of the analysts who tested the appellant's sample in violation of the Confrontation Clause of the Sixth Amendment;[1] (2) Whether the military judge erroneously denied the appellant's motion for appropriate relief pursuant to Article 13, UCMJ, 10 U.S.C. § 813; and (3) Whether the appellant's sentence, which includes a bad-conduct discharge and confinement for six months, is inappropriately severe.[2]

Background

The appellant pled guilty to the wrongful use and wrongful possession of marijuana on 26 February 2009. While at his on-base residence at Davis-Monthan Air Force Base (AFB), Arizona, the appellant smoked some of the marijuana he kept in a zip-lock bag. He proceeded to store the remaining amount that he did not use. The appellant subsequently provided a urine sample, which was sent to the Air Force Drug Testing Laboratory (AFDTL) at Brooks City-Base, Texas. The appellant's sample tested positive for tetrahydrocannabinol (THC), the metabolite for marijuana, with a concentration level of 44 nanograms per milliliter (ng/mL). The Department of Defense cut-off is 15 ng/mL.

Concerning the three specifications to which the appellant pled not guilty, sometime in August 2008, Senior Airman (SrA) JB visited the appellant at his on-base residence at Davis-Monthan AFB. Upon entering the appellant's residence, SrA JB smelled what he believed was marijuana. SrA JB also observed that the appellant's eyes were bloodshot, his speech was slurred, and he was not acting normally. At some point in the evening, the appellant was in one of the bedrooms and called for SrA JB. When SrA JB entered the bedroom, he noticed what appeared to be marijuana on a table, and witnessed the appellant place some of the marijuana in a small dresser drawer. Some of the marijuana was open on the table and some of it was in a bag. Also on the table was a coke can that was crushed in the middle and burned on its top and some cigars that were cut open.

On 12 March 2009, the appellant provided a urine sample pursuant to a random urinalysis inspection at Davis-Monthan AFB. The urine sample was properly collected and shipped to AFDTL. The appellant's sample tested positive for THC, with a concentration level of 32 ng/mL. On 31 March 2009, pursuant to a follow-up inspection, the appellant provided another urine sample which tested positive for THC, with a concentration level of 42 ng/mL.

[1] U.S. CONST. amend VI.
[2] Issues 2 and 3 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Discussion

Confrontation Clause of the Sixth Amendment

Prior to trial, the defense submitted a motion in limine to exclude the three drug testing reports (DTRs) for the positive drug tests. At trial, the defense clarified that the motion in limine only applied to the DTR for the 31 March 2009 urinalysis. The 31 March 2009 DTR consists of chain of custody documents signed by analysts, data recordings, results, and chromatographs. The DTR also contains a cover letter addressed to the legal office at Davis-Monthan AFB, signed by the document custodian at AFDTL, that reports the appellant's positive test result for marijuana. The appellant's position is that the admission of the DTR violated his rights under the Confrontation Clause of the Sixth Amendment.

During the motion hearing, Dr. ES, a forensic toxicologist assigned to the Armed Forces Institute of Pathology (AFIP), which provides oversight of AFDTL, was called as a witness. Dr. ES testified about his familiarity with AFDTL, noting that he has been a member of an inspection team that reviews the processes at AFDTL. He informed the military judge that he could explain how the appellant's urine sample was processed as far as labeling and the steps it went through for testing. He was also familiar with how the DTRs are prepared and he could explain how the sample was processed based on the DTR. The military judge concluded that Dr. ES "knows the lab, he's inspected the lab, he's intimately familiar with the Operating Instructions and he knows how to read a drug testing report." During his testimony, Dr. ES testified that there is no difference in the way AFDTL tested the 31 March 2009 sample as compared with the samples taken on 26 February 2009 and 12 March 2009. He then explained that, although there can be different codes on the bottles, such as IO or IR, these codes are not seen by the analysts conducting the tests. The analysts only see the unique Lab Accession Number AFDTL assigns to each sample. In this case, the code used was IO, which stands for inspection testing.

The military judge made the following findings:

> The drug testing report is based on the Davis-Monthan [AFB] policy of having members who test positive provide additional urine samples pursuant to *U.S. v. Bickel*[3] and the defense counsel does not contest this aspect of the test at issue.
>
> This sample was collected and identified on the bottle as "IO" which means, according to the AFI, an inspection which could be for any number of purposes. The bottle ID in no way indicates that the sample is from a

[3] *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990).

> particular member who previously tested positive or is in any way a suspect. The sample was processed at the lab in the same way as other random samples, had no reference whatsoever to law enforcement or prosecution. Therefore unlike *Harcrow*,[4] this sample is more analogous to those at issue in *Magyari*[5] and *Blazier*[6] where lab personnel do not equate a specific sample to a particular individual or outcome and the sample is not tested with a view towards law enforcement investigation or prosecution.
>
> Indeed, as in *Blazier*, this drug testing report is "nothing more than a routine and objective cataloging of unambiguous factual matters."[7] Therefore, the statements in this drug testing report are non-testimonial as described in *Crawford*,[8] *Magyari* and *Blazier* and are therefore admissible.

During the findings portion of the trial, Dr. ES further testified about the information contained in the DTR for the 31 March 2009 sample and the results of the testing.

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). "Whether evidence constitutes testimonial hearsay is a question of law reviewed de novo." *Id.*

On appeal, the appellant asserts that the military judge abused his discretion when he allowed the government's expert to present testimonial hearsay without affording an opportunity to confront the ultimate declarants—the analysts—as required by the Confrontation Clause of the Sixth Amendment. The appellant asserts that under *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the analysts' statements in the DTR relied upon by Dr. ES constituted testimonial hearsay. The appellant claims that his 31 March 2009 sample indicates that he was under investigation and suspected of drug use. Specifically, on the DD Form 2624, block 9 of the 31 March 2009 DTR, the code IO appears, which would indicate to the analysts that this was something other than a random urinalysis. The code IO is also placed on the specimen bottle.

The appellant also claims that the analysts' statements within the DTR were testimonial under *Melendez-Diaz* because they were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford v.*

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[4] *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008).
[5] *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).
[6] *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 2009).
[7] *Id.* at 545.
[8] *Crawford v. Washington*, 541 U.S. 36 (2004).

Washington, 541 U.S. 36, 52 (2004)). The appellant further asserts that the analysts' statements within the DTR are functionally similar to in-court testimony.

The appellant is essentially arguing that the Supreme Court's decision in *Melendez-Diaz* has overruled our superior court's decision in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). We disagree. Similar to the factual scenario in *Magyari*,[9] several different people at AFDTL conducted tests, made clerical notations in the DTR, or at one time had physical custody of the appellant's urine sample. However, despite the appellant's assertion, there is no indication that any of these individuals were engaging in a law enforcement function or searching for evidence in anticipation of prosecution. The appellant's claim that the code IO that appears only on the specimen bottle and the DD Form 2624, which would indicate to the analysts that this was something other than a random urinalysis, is contrary to the military judge's finding that according to Air Force Instruction 44-120, *Drug Abuse Testing Program*, ¶ 6.2.2.9 (1 Jul 2000), the IO coding means an inspection which could be for any number of purposes and in no way indicates that the sample is from a particular member who is under investigation or suspected of wrongdoing. The AFDTL in this case followed the same urinalysis testing procedures as the Navy drug testing lab did in *Magyari* and as it commonly does in almost every other inspection. Therefore, under *Melendez-Diaz*, any "statements"[10] made by the analysts would not lead an objective witness to reasonably believe that the statements were given under circumstances which would be available for use at a later trial.

We further disagree with the appellant that the military judge erred in allowing the government's expert witness, Dr. ES, to testify about the information contained in the DTR. As is done in many drug urinalysis cases, the government provided the testimony of an expert forensic toxicologist to explain the contents of the DTR. Although Dr. ES was not assigned to the AFDTL and did not personally conduct any of the tests of the appellant's urine sample, Dr. ES was assigned to AFIP, which provides oversight of AFDTL, and was qualified by the military judge as someone who is intimately familiar with AFDTL and could testify about a DTR. As the Fourth Circuit noted in *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), the statements Dr. ES testified about did not come from the lab analysts but from non-testimonial data generated by machines. Further, Dr. ES, who was subjected to extensive cross-examination by the appellant's trial defense counsel, is better qualified to explain the science involved with the testing and to explain the test results than the analysts who operate the machines that generate the raw data. The Confrontation Clause of the Sixth Amendment requires that an accused be confronted with the witnesses against him. In this case, the primary witness against the appellant was Dr ES, who testified in court and was subjected to cross-examination. Although the appellant points to some data entries

[9] *United States v. Magyari* involved a drug testing report from the Navy Drug Screening Laboratory.

[10] In our opinion, the alleged statements made in the drug testing report by the analysts can best be described as data entries which are part of "a routine, objective cataloging of an unambiguous factual matter." *Magyari*, 63 M.J. at 126-27 (quoting *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005)).

made in the DTR by the analysts, the interpretation of the raw data which provided the positive result is the primary evidence against the appellant. Further, even if the data entries made by the analysts were considered testimonial statements,[11] as the Supreme Court noted in *Melendez-Diaz*, not "everyone who laid hands on the [urine sample] must be called" as a witness because any "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (second alteration in original) (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)). Accordingly, the testimony of Dr. ES satisfied the appellant's rights under the Confrontation Clause of the Sixth Amendment.[12]

We likewise disagree with the appellant that our superior court's decision in *Harcrow* applies to the facts of this case. *Harcrow* was not a drug urinalysis case but instead involved a civilian crime lab, the Virginia Division of Forensic Science. *Harcrow*, 66 M.J. at 155. The Virginia lab tested drug paraphernalia seized from Harcrow's residence pursuant to a request from the local sheriff's department. *Id.* Our superior court held that the laboratory reports documenting the presence of cocaine and heroin constituted testimonial statements under the Confrontation Clause of the Sixth Amendment and it was error for the military judge to admit them at trial. *Id.* at 159. However, our superior court specifically distinguished the facts of *Harcrow* with the facts from *Magyari* primarily because the lab technicians at the Navy drug testing lab were not "engaged in a law enforcement function." *Id.* (quoting *Magyari*, 63 M.J. at 126). We concur with the military judge that the facts of this case are similar with the facts of *Magyari* and our superior court's holding in *Harcrow* does not apply.

We conclude that the appellant's rights under the Confrontation Clause of the Sixth Amendment were satisfied in this case as he was afforded the opportunity to cross-examine the government's expert witness, Dr. ES, who was qualified by the military judge as someone who had inspected the lab, was intimately familiar with the lab's Operating Instructions and could explain the contents of a DTR. Accordingly, the military judge did not err in either allowing the testimony of Dr. ES or in admitting the DTR in this case. We further note that since our superior court held in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010), that the cover page of a DTR is testimonial, the military judge erred by admitting the cover page of the DTR in this case. However, we find that this error was harmless considering that the government provided the testimony

[11] We note that our superior court held in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010), that the cover page of a drug testing report (DTR) is testimonial, primarily because the cover page is not generated at the time of testing but rather in response to a request for use at a later court-martial. *Blazier*, 68 M.J. at 442-43. However, the data entries in the appellant's DTR were made at the time of testing and as part of its normal course of business.

[12] In *Pendergrass v. State*, 913 N.E.2d 703 (Ind. 2009), the Supreme Court of Indiana held that documents pertaining to DNA evidence were admissible as material on which a DNA expert could testify and the expert satisfied the Confrontation Clause because he could testify to the accuracy of the tests and the standard operating procedures at the laboratory and could state whether the tests diverged from those procedures. *Pendergrass*, 913 N.E.2d at 707-08.

of Dr. ES who again testified under direct and extensive cross-examination about the entire DTR and the results thereof.

Illegal Pretrial Punishment

The appellant asserts that the military judge erroneously denied his motion for appropriate relief pursuant to Article 13, UCMJ. On 13 April 2009, after learning of the appellant's positive urinalysis for marijuana, his commander, Lieutenant Colonel (Lt Col) CP issued him a no contact order. Specifically, it prevented the appellant from communicating with any E-6 and below assigned to the 355th Civil Engineer Squadron Fire Department. The appellant asserts that the no contact order served no legitimate governmental purpose and he should be awarded administrative credit for the 65-day period he was subjected to the no contact order.

Lt Col CP testified that the reason he issued the order was to maintain the good order and discipline of the unit. He emphasized the close working relationship in the Fire Department and stated that he wanted to remove the appellant to ensure the mission would be accomplished and that there would be no adverse impact either on the appellant or any other member of the Fire Department. In denying the motion, the military judge found that the appellant's commander had no punitive intent in the issuance of the no contact order. He further found that the commander's desire to protect the mission capability of the small, close knit group of firefighters, and to protect the integrity of an on-going investigation, constituted a legitimate non-punitive objective in issuing the order.

Whether the appellant is entitled to confinement credit for illegal pretrial punishment is a mixed question of fact and law. *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). A military judge's findings of fact, "including a finding of no intent to punish," will not be overturned unless they are clearly erroneous. *Id*. "We will review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ]." *Id.* The appellant has the burden of showing his entitlement to relief under Article 13, UCMJ. *Id.*

Article 13, UCMJ, provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Article 13, UCMJ. "Thus, Article 13, UCMJ, prohibits: (1) intentional imposition of punishment on an accused before his or her guilt is established at trial; and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial." *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006). "[F]or a military member to be 'held for trial,' he must, at a minimum, be pending trial and have his freedom of movement 'substantially burdened.'" *United States v. Starr*, 51 M.J. 528, 533 (A.F. Ct. Crim. App. 1999) (quoting *United States v. Combs*, 47 M.J. 330, 334 (C.A.A.F. 1997)), *aff'd*, 53 M.J. 380 (C.A.A.F. 2000).

After reviewing the record before us, and considering the nature and scope of the appellant's pretrial restriction and the conditions imposed upon him, the military judge's findings of fact are not clearly erroneous. Lt Col CP's issuance of the no contact order was for a legitimate military purpose—protecting the mission capability of the small, close knit group of firefighters and the integrity of an on-going investigation. Also, the order was not issued with any punitive intent. Accordingly, this issue is without merit.

Inappropriately Severe Sentence

The appellant asserts that the portion of his sentence which includes a bad-conduct discharge and confinement for six months is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months of confinement and a bad-conduct discharge. The appellant's approved sentence was a bad-conduct discharge, confinement for six months, and reduction to E-1. The appellant used marijuana essentially in front of another airman in August 2008. From 30 August 2008 to 3 January 2009, the appellant was deployed to Al Udeid Air Base, Qatar. Upon return, he resumed smoking marijuana on several occasions. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and

all other matters in the record of trial, we hold that the approved sentence, which includes a bad-conduct discharge and confinement for six months, is not inappropriately severe.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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