UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GARLAND R. STEWART
United States Air Force

ACM S31685 (f rev)

17 April 2013

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; Major Andrew J. Unsicker; and Captain Shane A. McCammon.

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 John M. Simms; Major Joseph Kubler; and Gerald R. Bruce, Esquire.

Before

ORR, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT
UPON REMAND

ORR, 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 additional specifications of

wrongfully using marijuana, in violation of Article 112a, UCMJ. The approved sentence consisted of a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

This case is before this Court for further review. Initially, the appellant asserted three assignments of error before this Court: (1) His conviction for using marijuana between 13 and 31 March 2009 should be set aside because: (a) the military judge abused his discretion in allowing the Government's expert to testify in reliance upon hearsay, in violation of the Confrontation Clause of the Sixth Amendment,[1] and (b) because the admission of a drug testing report (DTR) as proof of this use, without the in-court testimony of the analysts who tested the appellant's sample, violated the Confrontation Clause of the Sixth Amendment; (2) The military judge erroneously denied the appellant's motion for appropriate relief pursuant to Article 13, UCMJ, 10 U.S.C. § 813; and (3) The appellant's sentence, which includes a bad-conduct discharge and confinement for six months, is inappropriately severe.[2] In an unpublished decision, issued 8 June 2010, this Court affirmed the findings and sentence as adjudged. *United States v. Stewart*, ACM S31685 (A.F. Ct. Crim. App. 8 June 2010) (unpub. op.), *set aside by* 70 M.J. 358 (C.A.A.F. 2011) (mem.).

On 19 October 2010, the Court of Appeals for the Armed Forces (CAAF) granted review on Issue (1). In a summary disposition issued 22 September 2011, CAAF set aside our decision and remanded the case to us for consideration of the granted issue 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) [hereinafter *Blazier II*], and *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010) [hereinafter *Blazier I*], and to determine whether the erroneous admission of the cover memorandum and specimen custody document of the 24 April 2009 drug testing report was harmless beyond a reasonable doubt.[3] *United States v. Stewart*, 70 M.J. 358 (C.A.A.F. 2011) (mem.).

Background

The appellant was the subject of three separate urinalysis tests, which led to him being charged with three specifications of using marijuana.[4] The first urine sample was voluntarily provided by the appellant on 26 February 2009 at the request of law enforcement. This sample was sent to the Air Force Drug Testing Laboratory (AFDTL) at Brooks City-Base, Texas, and tested positive for tetrahydrocannabinol (THC), the

[1] U.S. CONST. amend. VI.
[2] Issues 2 and 3 were raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] *Williams v. Illinois*, 132 S. Ct. 2221 (2012), does not appear to substantively impact our superior court's decisions in *Blazier I and II* and *Sweeney*. We had awaited release of this decision before proceeding with our review on remand.
[4] The appellant was also charged with using marijuana on a fourth occasion (in August 2008) and was convicted of this offense by the members based on the testimony of another military member who observed marijuana in his residence and saw him behaving in a manner consistent with someone who has ingested the illegal substance. At the appellant's request, the court-martial panel was informed of this guilty plea at the outset of the litigated trial.

metabolite for marijuana, with a concentration level of 44 nanograms per milliliter (ng/mL), which is above the Department of Defense cutoff of 15 ng/mL. The appellant subsequently pled guilty to wrongfully using and possessing marijuana on the day he provided the urine sample.

Before the results of his first urinalysis were known, the appellant was randomly selected on 12 March 2009 to provide a urine sample. Testing by the AFDTL found his urine sample positive for THC, with a concentration level of 32 ng/mL. Based on this test, the appellant was charged with and convicted of using marijuana between on or about 27 February and on or about 12 March 2009 (Specification 3).

Consistent with the policy at Davis-Monthan AFB requiring members who test positive to provide additional samples pursuant to *United States v. Bickel*, 30 M.J. 277 (C.M.A. 1990), the appellant was ordered to provide another urine sample on 31 March 2009.[5] Testing by the AFDTL found it to be positive for THC, with a concentration level of 42 ng/mL. Based on this test, the appellant was charged with and convicted of using marijuana between on or about 13 March and on or about 31 March 2009 (Specification 4).

Specification 4

The primary evidence against the appellant for Specification 4 was the 24 April 2009 DTR (documenting that THC was found in the appellant's 31 March 2009 sample) and the testimony of Dr. ES, an expert in forensic toxicology assigned to the Armed Forces Institute of Pathology who was not involved in or present during the testing of the appellant's sample. The DTR was a 56-page document prepared by the AFDTL, dated 24 April 2009.

Page 1 of the DTR is a cover memorandum which certifies that the subject specimen, as identified by the appellant's Social Security Account Number (SSAN), was "confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS)" with a 11-nor-delta-9 tetrhydrocannabinol-9-carboxylic acid concentration of 42 ng/mL. The memorandum was certified by Ms. AL, an employee at the AFDTL. A two-page Specimen Custody Document (DD Form 2624) follows the cover memorandum. It shows that the specimen linked to the appellant's SSAN was positive for the same drug named in the cover memorandum and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." Mr. JD signed the certification as a Laboratory Certifying Official (LCO). Neither Ms. AL or Mr. JD testified at the trial.

[5] In response to questions from the military judge, the defense agreed it was not contesting the legitimacy or legality of this re-test policy. Given the record in this case, we find no reason to believe the 31 March 2009 sample was collected for any purpose other than conducting an inspection pursuant to Mil. R. Evid. 313(a). *See United States v. Bickel*, 30 M.J. 277, 279 (C.M.A. 1990); *United States v. Ayala*, 69 M.J. 63, 67 (C.A.A.F. 2010).

Trial defense counsel challenged the admission of the entire DTR as a violation of the appellant's rights under the Confrontation Clause, but made no objection to the qualifications of the expert witness. Specifically, the defense asserted that that DTR was testimonial hearsay because it resulted from a law enforcement investigation and therefore the testimony of the laboratory personnel involved in the testing of the appellant's sample was required prior to the admission of the DTR.

The military judge overruled the defense objection, finding the DTR was non-testimonial. Trial counsel then provided each court member a copy of the DTR to review as the expert testified. Dr. ES testified about the layered review process performed by a forensic testing laboratory, including quality assurance review and certification by a laboratory official. Dr. ES referred to the cover memorandum at the outset of his testimony concerning the DTR. Then, relying on his review of the DTR and his knowledge of forensic drug testing, he provided a detailed explanation of the tests performed by the AFDTL on the 31 March 2009 sample as well as his own expert opinion that the test results followed applicable standards and indicated the appellant's urine sample tested positive for THC metabolites at a level above the DoD cutoff.

In our first opinion, we found the military judge did not abuse his discretion in allowing the Government's expert to testify about the analysts' statements within the DTR without affording the appellant the opportunity to confront those analysts who performed the actual testing. Similarly, we found no error in allowing Dr. ES to testify about the information contained in the DTR. Regarding the admission of the DTR itself, we found error in the admission of the cover memorandum as that constituted testimonial hearsay in light of our superior court's *Blazier I* opinion. However, we found the error was "harmless," considering that the government provided extensive expert testimony about the DTR and the test results. *Stewart*, unpub. op. at 4-5.

We have now been directed to consider this case in light of our superior court's decision in *Sweeny* and its *Blazier II* decision, both of which were issued after we completed our first review of the case. The remand also directs us to determine whether the erroneous admission of the 24 April 2009 DTR's cover memorandum and the DD Form 2624 was harmless beyond a reasonable doubt.

In *Sweeney*, our superior court determined that it was plain and obvious error to admit the cover memorandum for the drug testing report because it was an "affidavit-like certification of results resembl[ing] those [the Court had] found testimonial in *Blazier I*, and the declarant [the person who prepared the cover memorandum] . . . was not subject to cross-examination." 70 M.J. at 304 (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2715-17 (C.A.A.F. 2011); *Blazier II*, 69 M.J. at 223-24). The Court further held that it was plain error to admit a DD Form 2624 because it was an "affidavit-like statement" that "indicated 'that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated.'" *Id*. (omission in

original) (quoting *Bullcoming*, 131 S. Ct. at 2715). However, the Court held admission of other portions of the drug testing reports, including among other things, a data review sheet and a results report summary, was not plain error. It reasoned that these documents were not plainly and obviously testimonial because they were not "formalized, affidavit-like statements." *Id.* at 305 (citing *Bullcoming*, 131 S. Ct. at 2717; *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Blazier I*, 68 M.J. at 443).

In this case, the DTR cover memorandum and the DD Form 2624 that identified the tests that were conducted, the substance that was detected, and the nanogram levels constitute testimonial hearsay. *Sweeny*, 70 M.J. at 304. Similarly, Dr. ES's testimony concerning the contents of the DTR cover memorandum and the DD Form 2624 improperly allowed him to act as a "conduit for repeating testimonial hearsay." *Blazier II*, 69 M.J. at 225-26 (citing *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008)). In light of *Blazier* and *Sweeny*, we find that admission of the certification on the cover memorandum, the LCO's certifications and handwritten annotations on the DD Form 2624, and Dr. ES's testimony concerning these specific documents violated the Confrontation Clause. Admission of the other DTR pages, which contained only non-testimonial testing data, was not error.

Having found that testimonial hearsay was erroneously admitted, we must evaluate its impact on the case. We review de novo whether evidence admitted in violation of the constitution is harmless beyond a reasonable doubt. *Blazier II*, 69 M.J. at 226; *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In assessing harmlessness in the constitutional context, the question is not whether the admissible evidence is sufficient by itself to uphold the conviction, but "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (citation omitted), *as quoted in Blazier II*, 69 M.J. at 227.

This determination is made on the basis of the entire record and 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)). Where the prosecution has only a laboratory report to prove its case, testimonial hearsay that validates the laboratory results increases in importance and, depending on the posture of the case, may have a reasonable possibility of influencing the verdict. Such is the case here.

As previously stated, the DTR dated 24 April 2009 (and the expert's testimony about it) was the only evidence of the appellant's drug use as alleged in Specification 4. There was no corroborating evidence, as the appellant made no admissions and no witnesses testified about observing any drug use during the relevant time frame.

Therefore, the testimonial hearsay in the DTR was important to the Government's case. Dr. ES did testify that the appellant's urine tested positive for the marijuana metabolite based on his expert opinion and independent review of the properly-admitted DTR pages and such testimony is not prohibited. *See Blazier II*, 69 M.J. at 224 ("Because machine generated printouts of machine-generated data are not hearsay, expert witnesses may rely on them, subject only to the rules of evidence generally, and [Mil. R. Evid.] 702 and [Mil. R. Evid.] 703 in particular.").

Under the facts of this case, however, Dr. ES's opinion was bolstered and validated by the improperly-admitted testimonial hearsay found in the cover memorandum and in the LCO certification on the DD Form 2624. There was evidence presented about an anomaly with the testing of the appellant's sample. Because of a "Modular line movement error," the sample was re-tested to confirm its accuracy. In the context of this "naked urinalysis" case, Dr. ES's validation was important to rebut the laboratory issues 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.

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 there is a reasonable probability the members used it to satisfy concerns raised about personnel and procedures at the AFDTL relative to the appellant's sample. Under these circumstances, we conclude there is a reasonable possibility that the evidence complained of might have contributed to the appellant's conviction on Specification 4. Therefore, the error is not harmless beyond a reasonable doubt. We set aside and dismiss this Specification and reassess the sentence in our decretal paragraph.

Specification 3

In his brief on remand, the appellant argued that both Specifications 3 and 4 should be set aside due to Confrontation Clause issues. According to the remand order, our superior court did not intend that order "to limit the scope of [our] review on remand," which we interpret as authorizing us to consider specifications other than the one referenced in the granted issue.

Accordingly, we also considered whether the erroneous admission of the testimonial hearsay in the cover memorandum and DD Form 2624 for the appellant's 12 March 2009 urine sample, as well as Dr. ES's reference to that testimonial hearsay, was harmless beyond a reasonable doubt relative to the appellant's conviction in Specification 3. We find that it was.

Unlike with Specification 4, we find there is not a reasonable possibility that the testimonial hearsay admitted in support of Specification 3 might have contributed to the appellant's conviction. Although the DTR for the 12 March 2009 sample was the foundation of the Government's case concerning Specification 3 and the testimonial hearsay tended to validate those results, the record shows that this testimonial hearsay did not have the same importance as it did with Specification 4.

In many urinalysis cases, trial defense counsel choose to attack laboratory personnel and procedures, and, under some circumstances, testimonial hearsay which blunts those attacks will be prejudicial. Here, however, although the appellant pled not guilty to this specification, he essentially did not contest the test results for his 12 March 2009 test and instead focused on the problems documented in the 24 April 2009 DTR. In fact, the trial defense counsel argued that the two positive results from 12 and 31 March 2009 "could be the result of one big use, prior to those two tests" because marijuana can remain in a person's system for up to 60 days. Notably, the appellant did not object to the admission of this DTR on constitutional or other grounds.

Having reviewed the entire record and balanced the *Van Arsdall* factors, we are convinced the error in admitting the testimonial hearsay in conjunction with the DTR for the 12 March 2009 urine sample was harmless beyond a reasonable doubt.

Sentence Reassessment

Because we set aside Specification 4, we must next determine whether reassessment of sentence or rehearing is required. Before reassessing a sentence, we must be confident "that, absent any 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'" lessens 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). If we cannot determine that the sentence would have been at least of a certain magnitude, we must order a rehearing.

We are confident that we can reassess the sentence in accordance with the above authority. Setting aside Specification 4 does not change the maximum punishment the appellant faced, which is the jurisdictional limit of the special court-martial. Thus, the penalty landscape is not substantially changed by the dismissal of this Specification. Nevertheless, the dismissal of one of the use specifications could have some impact on the severity of the sentence adjudged.

Applying the criteria set forth in *Sales*, we are confident that, in the absence of Specification 4, the panel would have imposed at least a bad-conduct discharge, five

months of confinement, and reduction to the grade of E-1. *See Sales*, 22 M.J. at 308. We reassess the sentence accordingly. We also find, after considering the appellant's character, the nature and seriousness of the offenses, and the entire record, that the reassessed sentence is appropriate. Article 66 (c), UCMJ, 10 U.S.C. § 866(c); *Sales*, 22 M.J. 307-08.

Conclusion

The finding of guilty of Specification 4 of the Charge is set aside and the Specification is dismissed. The remaining findings and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings as modified, and the sentence as reassessed, are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court