UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN G. WEEKS
United States Air Force

ACM S31625

26 July 2010

Sentence adjudged 14 January 2009 by SPCM convened at Hurlburt Field, Florida. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan, Major Shannon A. Bennett, and Major Marla J. Gillman.

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

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for three months, and reduction to the lowest enlisted grade.[1] The appellant assigns as error that the admission

[1] Upon initial review, we returned the case to the convening authority after noting that the personal data sheet and the report of result of trial attached to the staff judge advocate's recommendation did not pertain to the appellant. Affidavits submitted by the convening authority and a paralegal confirm that the convening authority reviewed the correct documents and that the error occurred after action during assembly of the record.

of a drug testing report without testimony from those involved in the testing violated his Sixth Amendment[2] right of confrontation.[3]

Background

The Air Force Drug Testing Laboratory (AFDTL) tested a random urinalysis specimen provided by the appellant. Testing included an initial immunoassay, a second immunoassay, and a gas chromatograph/mass spectrometry test. The testing is documented in a 31-page drug testing report of which 19 pages are computer-generated data printouts from the various machines and 11 pages are chain of custody forms. The remaining page is a cover memorandum summarizing the test result.

To prove the charge of wrongful use of cocaine, the government offered the drug testing report and the testimony of Dr. CS, an expert in forensic toxicology. Trial defense counsel withdrew an initial objection to the report after the government removed a 5-page affidavit from the report, and the military judge then admitted the report without objection. Trial defense counsel had no objection to the qualifications of the expert witness and did not request the presence of any AFDTL personnel involved in the test.

Dr. CS testified that the specimen identified as the appellant's urine showed the presence of a cocaine metabolite at a level above the Department of Defense cut-off for a positive result. Dr. CS used the drug testing report to reach his conclusion, explaining that he reviewed the analytical data in the report to reach an independent, objective determination of the result: "[A]nalytical data is contained within this drug testing report as well, so that independent, objective scientists like myself, can review the data and ensure that it forensically supports the positive finding that was provided for a given sample." Trial defense counsel tested the basis of his opinion by inquiring into possible misconduct of laboratory personnel, possible sample contamination, various discrepancy reports, and scientific studies concerning unknowing ingestion of cocaine.

Discussion

We first determine whether the appellant's withdrawal of his objection to the drug testing report constitutes forfeiture or waiver for purposes of appellate review. Lack of objection based on an oversight forfeits the issue whereas an intentional relinquishment of a known right waives the issue. *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009). We review forfeited issues for plain error, but do not review waived issues because a valid waiver leaves no error to correct. *Id.* When the settled law at the time of trial has clearly changed by the time of appeal, we will consider an error based on the changed law forfeited rather than waived and will review the issue for plain error at the

[2] U.S. CONST. amend. VI.
[3] The appellant addresses waiver, forfeiture, and standard of review as a separate issue; we combine the two issues for purposes of this opinion.

time of appeal. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Further, where the record does not clearly show waiver, the issue should be reviewed for plain error. *Campos*, 67 M.J. at 333 n.4.

Admissibility of laboratory test results in various forms continues to be the subject of much litigation in the wake of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), wherein the Court applied *Crawford v. Washington*, 541 U.S. 36 (2004), to hold that admission of a laboratory official's affidavit summarizing test results violated the right of confrontation. Writing for the majority, Justice Scalia states: "This case involves little more than the application of our holding in *Crawford v. Washington* . . . . The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Melendez-Diaz*, 129 S. Ct. at 2542. Although Justice Scalia expressly limited the majority opinion to an application of existing law, the decision has certainly heightened evidentiary scrutiny of substantive evidence derived from laboratory analysis at both the trial and appellate levels. Thus, the settled law at the time of the appellant's trial is, at a minimum, under further review. Under these circumstances, we decline to find waiver of the issue and will therefore review admission of the drug testing report for plain error.

Plain error exists when, despite the lack of an objection, a plain, clear, or obvious error occurs which materially prejudices a substantial right of the appellant. *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 threshold question under this analysis is whether an error occurred. Under the law as it exists at the time of this appeal, we find that admission of the drug testing report's computer-generated data printouts and chain of custody forms was not error. Admission of the cover memorandum was error, but we find it harmless.

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court applied *Crawford* to drug testing reports to conclude that such reports were non-testimonial:

> [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* 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.

United States v. Magyari, 63 M.J. 123, 126-27 (C.A.A.F. 2006) (internal citations omitted). Like *Melendez-Diaz*, *Magyari* applied *Crawford* to evaluate the admissibility of evidence derived from laboratory analysis. Unlike the summary affidavits at issue in *Melendez-Diaz*, the drug testing reports at issue in *Magyari* did not violate *Crawford's* interpretation of the Confrontation Clause and were thus admissible as a business record pursuant to this firmly rooted hearsay exception. *Id*. at 128; Mil. R. Evid. 803(6). With the exception of the cover memorandum, such is the case here.

Looking at this issue from the perspective of the law as it exists at the time of appeal, *Magyari* remains controlling precedent. Our superior court recently revisited the issue of admissibility of drug testing reports in the wake of *Melendez-Diaz* and has, so far, left *Magyari* intact. *See United States v. Blazier*, 68 M.J. 439, 442 n.6 (C.A.A.F. 2010). While *Magyari* supports admission of the 19 pages of computer-generated data printouts and 11 pages of chain of custody forms in this case, *Melendez-Diaz* and *Blazier* clearly show that admission of the cover memorandum was error. However, we find that this error was harmless because the expert forensic toxicologist testified concerning the entire drug testing report and how the data contained therein supported *his* opinion that the appellant's specimen showed the presence of a cocaine metabolite.

Laboratories generate many types of reports under a variety of circumstances. At one end of the spectrum are detailed reports of raw data generated by various machines which are simply certified by laboratory technicians. Use of such reports of raw data at trial by an expert witness to render independent conclusions does not require the testimony of the technicians who reported the raw data. *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009). Indeed, in such circumstances the technicians could neither affirm nor deny the test results independently but could only defer to the raw data printed out by the machine: "[T]here would be no value in cross-examining the lab technicians on their out-of-court statements . . . because they made no such statements." *Id*. at 230. The raw data generated by machines are the statements of the machines themselves, not their operators, and statements made by machines are not out-of-court statements made by declarants who are subject to the Confrontation Clause. *Id*. at 230-31. The Supreme Court appears to acknowledge this distinction in *Melendez-Diaz* by explaining that not "everyone who laid hands on the [urine sample] must be called" as a witness as 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)).

Like the expert in *Washington*, the expert in this case based his opinion at trial not on the conclusions of others but on machine-generated raw data contained in the drug

testing report. The cover memorandum simply reflects the result of the attached raw data upon which the expert based his opinion. Dr. CS's opinion was elicited through detailed direct examination regarding the raw data contained in the report and was subjected to thorough cross-examination concerning the data as well as what the raw data could and could not show concerning the appellant's culpability. Cross-examination also explored the impact of any errors that may have occurred and highlighted the relatively low nanogram level of the appellant's sample in an effort to support a theory of unknowing ingestion. Under these circumstances, the admission of the cover page was harmless beyond a reasonable doubt.

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, 10 U.S.C. § 886(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

HELGET, Senior Judge, participated in the decision of this Court prior to his reassignment on 01 July 2010.

OFFICIAL

STEVEN LUCAS
Clerk of the Court