

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
F.D. MITCHELL, J.A. MAKSYM, R.E. BEAL
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NATHAN M. ROBINSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200800827
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 23 July 2008.

Military Judge: Maj Wilbur Lee, USMC.

Convening Authority: Commanding Officer, Center for Naval Aviation Technical Training, Marine Unit Cherry Point, MCAS Cherry Point, NC.

Staff Judge Advocate's Recommendation: Maj P.D. Harward, USMC.

For Appellant: LT Sarah Harris, JAGC, USN.

For Appellee: CDR Christopher L. VanBrackel, JAGC, USN;
Capt Michael Aniton, USMC; Capt Geoffrey Shows, USMC.

28 January 2010

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

MITCHELL, Senior Judge:

A panel of members sitting as a special court-martial convicted the appellant, contrary to his plea, of wrongful use of cocaine, in violation of Article 112a of the Uniform Code of Military Justice, and 10 U.S.C. § 912a. The appellant was sentenced to 60 days restriction, forfeiture of \$500.00 pay per month for six months, reduction to pay grade E-1, and a bad conduct discharge. The convening authority approved the sentence as adjudged.

Background

The appellant was assigned to the Center for Naval Aviation Technical Training Marine Unit, Marine Corps Air Station, Cherry Point, North Carolina. On 17 March 2008, the appellant participated in a unit sweep urinalysis conducted by his command in which over 300 Marines provided urine samples to be tested by the Jacksonville Navy Drug Screening Laboratory. The appellant's sample tested positive for cocaine. After the command was notified of the positive test results, the matter was ultimately referred to trial by special court-martial. The Government's case against the appellant consisted of a laboratory report from the Navy Drug Screening Laboratory in Jacksonville. The Government called two witnesses, the urinalysis coordinator and observer, who were involved in the initial collection of the appellant's urine sample to introduce the evidence contained in the lab report. Mr. Robert Sroka was called from the Navy Drug Screening Laboratory in Jacksonville. Mr. Sroka testified about how urine samples are handled and how results are generated at the Laboratory, but could not testify regarding the handling or testing of the appellant's sample as he played no role in the analysis. The Government did not call any of the lab technicians at the Navy Drug Screening Laboratory whose names appeared on the lab report and chain of custody documents, and who reviewed the appellant's paperwork, tested his urine sample, or prepared the lab report.

The appellant's defense counsel cross-examined Mr. Sroka, but did not call any of the other lab personnel who handled or tested the appellant's urine sample. In fact, the appellant and his defense counsel rested their case at the conclusion of the prosecution's case-in-chief. Significantly, the defense did not object to the introduction of the lab results into evidence.

After having assented to the admission of the laboratory documents confirming the presence of the metabolite for cocaine in his system, the appellant now contends that his constitutional right to confront the witnesses against him was violated and that any statements contained in the lab report that indicated his urine tested positive for the presence of cocaine were inadmissible testimonial hearsay and could not be used against him at trial.¹ He also contends that he was denied effective assistance of counsel.

Sixth Amendment Right to Confront Witnesses

The appellant asserts that the admission of the Navy Drug Screening Laboratory Report and its allied documents violated his Sixth Amendment Right to Confrontation as articulated in *Crawford*

¹ This assignment of error was not raised in the appellant's original brief. On 5 August 2009, this court specified the issue to be considered by the appellant and the Government in light of the Supreme Court ruling in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

v. Washington, 541 U.S. 36 (2004). Relying on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), the appellant suggests that the aforementioned decision dispositively changes the landscape and effectively expands the application of *Crawford*, thereby requiring rejection of the type of laboratory reports which this court and others have previously found to be nontestimonial in nature.²

At trial, the appellant did not object to the introduction into evidence of the Navy Drug Screening Laboratory report pertaining to his urinalysis, which tested positive for the presence of cocaine. As the admission of the laboratory documents has become an issue for the first time on appeal, we test the military judge's decision to admit it for plain error. *United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001). To prevail, the appellant must show: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. *United States v. Tyndale*, 56 M.J. 209, 217 (C.A.A.F. 2001). If plain error is established, the burden of proof shifts to the Government to prove that any constitutional error was harmless beyond a reasonable doubt. *United States v. Brewer*, 61 M.J. 425, 430 (C.A.A.F. 2005).

Analysis and Discussion

The Confrontation Clause of the Sixth Amendment states that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. CONST. amend. VI. In *Crawford*, the Supreme Court held that in order for the prosecution to introduce "testimonial" out-of-court statements into evidence, the Confrontation Clause requires that the witness who made the statement be unavailable, and that the accused have had a prior opportunity to cross-examine the witness. 541 U.S. at 53-54. Where statements are non-testimonial in nature, they do not fall within the scope of *Crawford* and may be exempted from the Confrontation clause altogether. *Id.* at 68.

While the Supreme Court in *Crawford* did not provide an all-inclusive definition of what constitutes testimonial hearsay, the Court identified three "core" forms of testimonial evidence, one of which is "statements that 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." *Id.* at

² The appellant further contends that the testimony of Mr. Sroka, the expert called to testify on the reliability of the tests and the results of the appellant's urine testing, does not satisfy the Confrontation Clause because he was not the person who conducted the tests or created the paperwork promulgated therefrom. Appellant's Brief at 7. Because we conclude the Drug Lab Package and allied documents are not testimonial in nature, this point raised by the appellant is moot. We specifically did not address this aspect of the appellant's argument.

51-52. The *Crawford* court further noted that the Confrontation Clause of the Sixth Amendment is to protect criminal defendants from prosecutorial abuse and the involvement of Government officials in the production of testimony with an eye towards trial. *Id.* at 56. We, therefore, must not only look at the content of the statement itself, but the context and circumstances under which it was generated.

The Supreme Court recently applied the *Crawford* analysis in the case of *Melendez-Diaz*. In *Melendez-Diaz*, the defendant was prosecuted for cocaine distribution and trafficking based upon a law enforcement undercover operation. The seized evidence was sent to the state laboratory responsible under state law for conducting chemical analysis on evidence at the request of the police. The evidence tested positive for cocaine. During the trial, the prosecution submitted three "certificates of analysis" that reported the results of the forensic analysis performed on the substances. "The certificates reported the weight of the seized bags and stated that the bags '[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.' . . . The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law." *Melendez-Diaz* 129 S. Ct. at 2531 (internal citations omitted) (alterations in original). The certificates were admitted into evidence, over the appellant's objection, without any live testimony. The Supreme Court held that the affidavits used to convict the defendant were "testimonial" making the affiants "witnesses" subject to the defendant's right to confrontation under the Sixth Amendment.

Prior to the Supreme Court's decision in *Melendez-Diaz*, the Court of Criminal Appeals for the Armed Forces (CAAF) addressed this very issue, that is, whether random urinalysis test results and lab reports were testimonial under *Crawford*. In *United States v. Magyar*, 63 M.J. 123 (C.A.A.F. 2006), the appellant was convicted of wrongful use of methamphetamine. In *Magyar*, the Government's case-in-chief consisted of the testimony of four witnesses--three of which were called to establish the chain of custody and the fourth was an expert witness from the San Diego Navy Drug Screening Laboratory. The expert described the handling and testing procedures at the lab and stated he signed off on the test results but was not personally involved in handling or testing the appellant's sample. None of the lab technicians listed on the lab report were called as witnesses. The appellant contended the data in the lab reports were statements because the lab technicians would have anticipated the lab report would be used against him at trial. CAAF found these documents to be non-testimonial in nature and, in applying the indicia of reliability analysis set forth in *Ohio v. Roberts*, 448 U.S. 56 (1980), concluded that the lab report was a record of a regularly conducted activity of the Navy Drug Screening Laboratory that qualifies as a business record under MILITARY RULE

OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) a firmly rooted hearsay exception.

While the holding in *Melendez-Diaz* is substantively distinguishable from CAAF's determination in *Magyari* in that the military's urinalysis program does not send "suspected" samples to drug screening laboratories for evaluation but rather sends all samples for testing, we are mindful of dicta within *Melendez-Diaz* which would suggest that the Court is concerned with both biased and incompetently tested evidence. "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. . . . Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination. *Melendez-Diaz*, 129 S. Ct. at 2537. However, in sharp contrast with the facts of *Melendez-Diaz*, the appellant did not question the competence of those testing his sample at the Navy Drug Screening Laboratory. Indeed, having been given the opportunity to call technicians from the lab so as to challenge their conclusions, he failed to do so. Based on the facts of this case, and the forfeiture by the defense of the issue at this trial, we need not visit this concern addressed by way of dicta in *Melendez-Diaz*.

Finally, we note that the *Melendez-Diaz* decision seems to validate the CAAF decision in *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008). In *Harcrow*, CAAF differentiated the judicial treatment of evidence post-*Crawford* in which the appellant was suspected of criminal conduct prior to laboratory analysis. The court concluded that laboratory evidence identifying the existence of a narcotic under those circumstances was testimonial in nature. Accordingly, we conclude that military case law is already in conformity with now existing Supreme Court precedent.

Aside from the premise under which the urine was collected, a unit sweep vice random sample, the facts and issues in the case at bar are almost identical to those decided by CAAF in *Magyari*. Prior to the *Melendez-Diaz* case, the decision of the CAAF Court in *Magyari* was controlling precedent. The question before this court, therefore, is whether the decision in *Melendez-Diaz* effectively overrules the CAAF decision in *Magyari* or otherwise expands the landscape of *Crawford*. We find that it does not and we distinguish the *Melendez-Diaz* case from *Magyari* and the case at bar.

In *Melendez-Diaz*, we reasonably presume that the contraband seized from the appellant and his co-defendants was sent to the state laboratory testing facility to determine if it was indeed cocaine and if so, to use that as evidence against the appellant at trial. In the majority opinion, Justice Scalia writes:

Here, moreover, not only were the affidavits "'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, supra*, at 52, . . . but under Massachusetts law the *sole purpose* of the affidavits was to provide "prima facie evidence of the composition, quality, and the net weight" of the analyzed substance. . . . We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state-law provision -- was reprinted on the affidavits themselves.

129 S. Ct. at 2532. In *Melendez-Diaz*, the Supreme Court concluded that "[t]here is little doubt that the documents at issue in this case fall within the core class of testimonial statements [described in *Crawford*]. *Id.*

By contrast, in *Magyari*, the laboratory reports at issue concerned a specimen submitted pursuant to random selection. The laboratory technicians worked with batches of urine samples that each contained multiple individual samples. *Magyari*, 63 M.J. at 126. The laboratory technicians could not equate a particular sample with a particular person, the vast majority of samples would not test positive for illegal drugs, and not all positive results would end in prosecution. *Id.* Laboratory personnel had no reason to anticipate that any particular sample would test positive and be used at trial and therefore were "not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial." *Id.* Applying *Crawford*, CAAF reasoned that "[b]ecause the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would 'bear testimony' against [the] [a]ppellant at his court-martial." *Id.* at 127.

We disagree with the appellant's suggestion that *Magyari* has been overruled by *Melendez-Diaz*. As stated above, based on the facts of this case and the waiver at trial of the issue by appellant, we need not address whether the holding in *Melendez-Diaz* expands the holding or changes the landscape of *Crawford*. We find the CAAF decision in *Magyari*, taken in context with its holding in *Harcrow*, to be dispositive in this case. Accordingly, we do not find that admission of the drug lab report and allied documents submitted by the prosecution in the appellant's case is error. We find this assignment of error to be without merit.

Ineffective Assistance of Counsel

In his final assignment of error, the appellant claims that his trial defense counsel was ineffective because she (1) failed to present favorable evidence on his behalf; (2) failed to communicate with the appellant prior to trial; (3) failed to

investigate matters prior to trial; and, (4) frightened the appellant out of exercising his right to testify.

We review ineffective assistance of counsel claims *de novo*. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005). In doing so, we analyze such claims under the framework established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under this framework, the appellant has the burden of demonstrating that his counsel was deficient. *Id.* at 687. To meet the deficiency prong, the appellant must show his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In doing so, the appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998) (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)). This is because it is strongly presumed that counsel are competent in the performance of their representational duties. *United States v. Alves*, 53 M.J. 286, 289 (C.A.A.F. 2000).

Having reviewed the record and the affidavits of the appellant and his trial defense counsel (TDC), we conclude, consistent with the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), that we can resolve the appellant's claim without directing a *DuBay* hearing.³

The first three points of contention by the appellant are related. He claims that he gave his counsel names of people who would attest to his intoxicated state the weekend prior to taking the urinalysis and speculates that either his counsel did not interview them, or she did so and did not keep him informed of what they told her.⁴ He also claims that he did not understand why these persons were not called as witnesses on his behalf.

The appellant claims that the weekend before he gave the urinalysis, specifically on the evening of 15 March 2008, he went to two different bars, consumed huge amounts of alcohol, and became extremely intoxicated. He further contends that he awakened the next day at approximately 1000 on the floor of a house in a nearby neighborhood and had no recollection as to how he got there. Appellant's Affidavit of 30 Jan 2009 at 1. The trial defense counsel avers that she interviewed the bartenders at each of the bars the appellant patronized that evening: The Roadhouse Pub located on base at MCAS Cherry Point, and Shakey's, located in Havelock, NC. According to the trial defense counsel, while both bartenders remembered the appellant drinking in their respective bars on the night of 15 March 2008, neither could state that they thought the appellant was intoxicated. The bartender at Shakey's, however, added that the appellant on that

³ *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁴ According to the appellant's affidavit, the defense strategy at trial was to create reasonable doubt as to the appellant's knowing ingestion of cocaine by alleging that he was intoxicated and therefore might not have knowingly ingested the controlled substance.

night "was drinking with a 'shady bunch' that had a reputation for using and distributing illegal drugs". Trial Defense Counsel Affidavit of 5 Jun 2009 at 2. The bartender went on to say that the appellant left with this "shady bunch" when he exited the bar that night. *Id.*

We recognize counsel's reservation in calling these two witnesses as legitimate and conclude that declining to call them during the appellant's case-in-chief falls within the bounds of reasonable tactical judgment in this case. As a general matter, appellate courts "'will not second-guess the strategic or tactical decisions made at trial by defense counsel.'" *United States vs. Anderson*, 55 M.J. 198, 202 (C.A.A.F. 2001) (quoting *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)). Where, as here, an appellant attacks the trial strategy or tactics of the defense counsel, the appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006) (citation and internal quotation marks omitted). The appellant has failed to do so.

Concerning the allegation that the defense counsel did not adequately investigate the appellant's case and/or failed to keep the appellant informed of her findings, we note the appellant twice affirmatively assured the military judge that he wanted his detailed trial defense counsel to represent him and did not want any other attorney, either civilian or military representing him. Record at 5 and 12-13. On appeal, the appellant has not explained or otherwise reconciled his statements made to the military judge with his current complaint. The record of trial, along with the affidavits of the trial defense counsel and the appellant, demonstrate the improbability that the appellant was dissatisfied with his attorney's pretrial preparation and pretrial communication with him. We find the appellant's argument unpersuasive.

Finally, the appellant states in his affidavit that he wanted to testify, but his counsel told him that if he took the stand to testify in his own behalf, he would be "torn apart by the prosecution" on cross-examination. He does not allege that the trial defense counsel prevented him from testifying. The affidavit submitted by the trial defense counsel unequivocally states that the appellant was advised of the Government's burden of proof and that he had an absolute right to testify. That affidavit also clearly indicates that the pros and cons of testimony were discussed and that the appellant was told it would be unwise to take the stand, especially in light of the fact that he had committed further misconduct just days prior to trial. After considering this advice, the appellant elected not to testify. We reject the appellant's second-guessing on this point. See *Davis*, 60 M.J. at 473.

We conclude that the appellant has failed to overcome the presumption that his trial defense counsel provided competent

assistance and, further, has failed to show there is a reasonable probability that, absent the alleged errors, "there would have been a different result." *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). As such, we decline to grant relief.

Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Judge MAKSYM and Judge BEAL concur.

For the Court

R.H. TROIDL
Clerk of Court