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

Before
L.T. BOOKER, F.D. MITCHELL, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOSEPH A. SWEENEY
CHIEF LEGALMAN (E-7), U.S. NAVY

NMCCA 200900468
SPECIAL COURT-MARTIAL

Sentence Adjudged: 06 May 2009.
Military Judge: CAPT David Bailey, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Reserve Component Command, Norfolk, VA.
Staff Judge Advocate's Recommendation: CAPT R.J. Parsons, JAGC, USN.
For Appellant: LT Michael Maffei, JAGC, USN.
For Appellee: LCDR Sergio Sarkany, JAGC, USN.

29 April 2010

OPINION OF THE COURT

IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS OPINION DOES NOT SERVE AS PRECEDENT.

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of failure to go to his appointed place of duty, unauthorized absence, making a false official statement, and wrongful use of cocaine, in violation of Articles 86, 107 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 907, and 912a. The appellant was sentenced to 30 days confinement and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant now alleges the following two errors: (1). that the admission into evidence of drug screening laboratory documents violated his Sixth Amendment right to confront the witnesses against him 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; and, (2) that the court-martial order fails to reflect that the appellant pled "not guilty" to Specification 1 of Charge II and Specification 2 of Charge III and that the convening authority withdrew and dismissed those specifications.

After carefully considering the parties' briefs and examining the record of trial, we are convinced that the findings and the sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant occurred. We do, however, find error in the court-martial order and will order correction in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Background

Immediately following a six-month deployment to Iraq, the appellant was ordered to report in December 2007 to the Navy Mobilization Processing Site, Norfolk, Virginia (NMPS) to be demobilized. The appellant failed to report and in February 2008 the Navy Personnel Command inquired as to his whereabouts. On 28 February 2008, NMPS personnel advised the appellant that he was in an unauthorized absence status and directed to report. The appellant reported the following day and submitted a urine sample upon his return.

The appellant's sample tested positive for cocaine and the matter was referred to trial by special court-martial. As to the drug offense, the Government's case against the appellant consisted of the urinalysis results report (Prosecution Exhibit 13), laboratory report from the Navy Drug Screening Laboratory. (PE 17), and the testimony of three witnesses. The Government called the urinalysis coordinator and observer to testify to the manner in which appellant's urine sample was collected and shipped to the Navy Drug Screening Laboratory in Jacksonville, Florida, and an employee of the drug laboratory to lay the requisite evidentiary foundation to introduce the lab reports into evidence. Mr. Albert Marinari, who was recognized as an expert in Forensic Chemistry Urinalysis Testing and Interpretation, testified as to the reliability of the tests, the results of the appellant's urine testing, 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. Marinari, but did not call any of the other lab personnel who handled or tested the appellant's urine sample. Moreover, the defense did not object to the introduction of the lab results into evidence. This constitutes waiver. *See* RULE FOR COURTS-MARTIAL 905(e), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

Analysis and Discussion

Citing the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the appellant argues that the laboratory reports contain testimonial statements and as such, the Confrontation Clause requires that the witnesses who made the statements be unavailable, and that the accused have had a prior opportunity to cross-examine the witnesses, before the reports may be admitted into evidence. See *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). We disagree and adhere to the precedent established in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), in which the Court of Criminal Appeals for the Armed Forces found drug laboratory 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.[1]

Accordingly, we do not find that admission of the drug lab reports and the allied documents submitted by the prosecution in the appellant's case was error. This assignment of error is without merit.

Incorrect Court-Martial Order

The appellant notes that the court-martial order fails to reflect that he pled not guilty to Specification 1 of Charge II and Specification 2 of Charge III and that the convening authority withdrew and dismissed those specifications. We find that this error is harmless, but that the appellant is entitled to a corrected court-martial order. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

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[1] We are mindful of the Court of Appeals for the Armed Forces holding in *United States v. Blazier*, __ M.J. __, No. 09-0441, 2010 CAAF LEXIS 246 (C.A.A.F. Mar. 23, 2010), in which the court found that testing report cover memoranda generated "for court-martial use" were testimonial. In this instance there is nothing to suggest that the lab report was generated for court-martial use and we adhere to the precedent established in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).

Conclusion

Accordingly, we direct that the supplemental court-martial order correctly reflect the charges, specifications, pleas, and findings. The findings and sentence, as approved by the convening authority, are affirmed.

For the Court

R.H. TROIDL
Clerk of Court