

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

**Before
J.R. PERLAK, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**DESMOND J. HORTON
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000481
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 26 May 2010.

Military Judge: Maj Stephen F. Keane, USMC.

Convening Authority: Commanding Officer, Headquarters and
Headquarters Squadron, Marine Corps Air Station, Yuma, AZ.

Staff Judge Advocate's Recommendation: Maj H.J. Redman,
USMC.

For Appellant: Maj Kirk Sripinyo, USMC; LT James W. Head,
JAGC, USN; LT Michael Hanzel, JAGC, USN.

For Appellee: Maj William C. Kirby, USMC.

29 March 2012

OPINION OF THE COURT

**THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS
PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.**

PER CURIAM:

By decision dated 15 March 2011, this court affirmed the findings and the sentence in the appellant's special court-martial, finding the admission of the drug testing report in his urinalysis case was not a violation of his Sixth Amendment right to confrontation and that he suffered no prejudice due to his counsel's failure to object to the admission of Navy Drug

Screening Laboratory report.¹ The appellant subsequently petitioned the Court of Appeals for the Armed Forces (CAAF) for review. On 20 September 2011, CAAF set aside our decision and returned the record of trial to the Judge Advocate General 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), and *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010)," and to determine whether the erroneous admission of testimonial hearsay in the drug testing report was harmless beyond a reasonable doubt.

In light of *Sweeney*, we now conclude that testimonial hearsay contained within the drug testing report was admitted in violation of the appellant's Sixth Amendment right to confrontation. For the reasons set out below, however, we conclude that the error was harmless beyond a reasonable doubt, and again affirm the findings of guilt and the approved sentence.

Background

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using Methylenedioxymethamphetamine (MDMA), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence included confinement for two months, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for two months, and a bad-conduct discharge.

Pursuant to a unit sweep urinalysis, the appellant provided a urine sample that was sent to the Navy Drug Screening Laboratory (NDSL), San Diego, CA. The sample subsequently tested positive for the metabolite of MDMA. The NDSL prepared a 53-page drug testing report that was introduced at trial, without defense objection. That report contained, *inter alia*, computer-generated data sheets, internal NDSL chain-of-custody documents, handwritten annotations, a specimen custody document, and a summary of the testing titled Forensic Laboratory Results. Prosecution Exhibit 3 at 2.

The NDSL technicians and certifying official who tested the sample, annotated the report, and certified the results, did not

¹ In his original appeal, the appellant assigned two errors: (1) that the admission of Prosecution Exhibit 3, the entire Navy Drug Screening Laboratory report, violated his Sixth Amendment right to confrontation; and, (2) that his trial defense counsel was ineffective by failing to object to the admission of PE 3.

testify. Instead, Mr. [P], a chemist and expert witness for the NDSL, testified regarding the lab's intake and testing procedures, the underlying science of the tests, and their reliability. Additionally, Mr. [P] testified at length as to the testing results contained within the 53-page drug testing report and concluded, based upon those tests, that the appellant's urine sample contained the metabolite for MDMA above the DoD cutoff limit.

Discussion

In *Sweeney*, CAAF held that a findings summary certifying the test results and parts of the specimen custody document were testimonial, that their admission was error, and that the error was plain or obvious. *Sweeney*, 70 M.J. at 304. CAAF focused on the certification at the bottom of the specimen custody document (Block H), which presents a formal, affidavit-like statement indicating "that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated." *Id.* (citation and internal quotation marks omitted). In *United States v. Tearman*, __ M.J. __, No. 201100195, 2012 CCA LEXIS 10 (N.M.Ct.Crim.App. 17 Jan 2012), this court determined that the results indicated in Block G of the specimen custody document (i.e., "MDMA") were also testimonial, as the certification was explicitly incorporating those results. Accordingly, we find that blocks G and H of the specimen custody document, as well as the Forensic Laboratory Results, were testimonial hearsay. Admitting those three components of the drug testing report was plain error.

As in *Tearman*, the remainder of the drug testing report for the appellant's sample was composed of machine-generated data sheets, NDSL chain of custody forms, review worksheets for each of the three tests, and the specimen custody document itself. For the reasons set forth in *Tearman*, we find the remainder of the drug testing report to be nontestimonial. *Tearman*, 2012 CCA LEXIS 10 at 4-11.

Prejudice

Having found that blocks G and H and the findings summary were testimonial hearsay, we review the entire record to determine "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). The testimonial hearsay did not contribute to the

conviction if it was "unimportant in relation to everything else the jury considered on the issue in question" *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007) (quoting *Yates v. Evatt*, 500 U.S. 391, 403 (1991), overruled on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72, n.4 (1991)).

To determine the significance of erroneously admitted evidence we utilize the balancing test established by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and adopted by CAAF. *Sweeney*, 70 M.J. at 306; *Gardinier*, 67 M.J. at 306-07; *United States v. Crudup*, 67 M.J. 92, 94-95 (C.A.A.F. 2008); *Othuru*, 65 M.J. at 378. This test examines the importance of the testimonial hearsay in the prosecution's case, whether it was cumulative with other evidence, the presence of corroborating evidence, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. After a careful review of the entire record and applying these criteria, we find the error in admitting this evidence was harmless beyond a reasonable doubt.

Here, the appellant never disputed that his urine sample tested positive for MDMA. Instead, the defense strategy focused on the fact that the appellant's urine sample was only marginally above the DoD cutoff level and that the appellant's ingestion of ecstasy could have been unknowing. Second, the information contained in the Forensic Laboratory Results summary (PE 3 at 2) and Block G was contained in subsequent pages of the report. Third, the Government's case relied principally on the actual lab test results and the appellant's sworn statement admitting that, "I suspect I unknowingly consumed illegal substances due to my inebriation." PE 2. Trial counsel did not make reference to the erroneously admitted evidence in his opening or closing argument. Record at 70-73, 217-26. Fourth, the expert witness made only a brief reference to the Forensic Laboratory Results and Blocks G and H during his direct examination. Record at 112, 114. The vast majority of the expert's testimony focused on his detailed review and explanation of the underlying laboratory data. This review led the expert to independently conclude and ultimately testify that the appellant's urine contained the metabolite for MDMA above the DoD cutoff. Fifth, Mr. [P], was subject to extensive cross-examination regarding his opinion. Record at 133-54. Finally, the Forensic Laboratory Results and Blocks G and H of the specimen custody document were cumulative with the Mr. [P's] opinion and the information contained in the actual lab report.

Having reviewed the entire record and balanced the factors articulated in *Van Arsdall*, we are convinced that the error in

admitting the summary of findings and the testimonial portions of the specimen custody document was harmless beyond a reasonable doubt. This evidence played a *de minimis* role in the Government's case. Furthermore, it was cumulative with, and corroborated by, the testimony and independent opinion of the Government's expert witness. On the whole, we find these factors demonstrate that the erroneously admitted evidence did not contribute to the conviction and was "unimportant in relation to everything else the jury considered on the issue". *Othuru*, 65 M.J. at 377 (citation omitted).

Ineffective Assistance of Counsel

The appellant also maintains that his trial defense counsel was ineffective by failing to object to the admission of PE 3.

In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that his counsel's performance was so deficient that: (1) he was not functioning as counsel within the meaning of the Sixth Amendment; and, (2) that his counsel's deficient performance rendered the results of the trial unreliable or fundamentally unfair. See *Strickland v. Washington*, 466 U.S. 668 (1984). Although a successful ineffectiveness claim requires a finding of both deficient performance and prejudice, there is no requirement that we address "both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. In light of our conclusion that the admission of the testimonial hearsay contained in the drug testing report was harmless beyond a reasonable doubt, we find that the appellant fails to establish any prejudice from his counsel's failure to object to PE 3. As such, we resolve this assignment of error adversely to the appellant.

Conclusion

Accordingly, the findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court