

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

**Before  
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**JONATHON M. KILARSKI  
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100329  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 15 March 2011.

**Military Judge:** LtCol G.W. Riggs, USMC.

**Convening Authority:** Commanding Officer, Marine Wing  
Communications Squadron 28, Marine Air Control Group 28, 2d  
MAW, U.S. Marine Corps Forces Command, Cherry Point, NC.

**Staff Judge Advocate's Recommendation:** Col Stephen C.  
Newman, USMC.

**For Appellant:** LT Daniel LaPenta, JAGC, USN.

**For Appellee:** Maj Paul Ervasti, USMC.

**29 February 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.**

MAKSYM, Senior Judge:

A panel of members sitting as a special court-martial convicted the appellant, contrary to his pleas, of one specification of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to confinement for two months, reduction to pay grade E-2, forfeiture of \$1096.00

pay per month for two months, and a bad-conduct discharge. The convening authority approved the sentence as adjudged and ordered it executed.<sup>1</sup>

The appellant assigns two errors:

- I. UNDER THE SIXTH AMENDMENT OF THE CONSTITUTION, AN ACCUSED HAS THE RIGHT "TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM." A RECENT SUPREME COURT DECISION, *BULLCOMING V. NEW MEXICO*, RULED THAT SURROGATE TESTIMONY OF A SCIENTIST WHO DID NOT CERTIFY A FORENSIC LABORATORY REPORT INTRODUCED INTO EVIDENCE VIOLATES THE CONFRONTATION CLAUSE. HERE, DESPITE THE DEFENSE'S REQUEST FOR THE CERTIFYING SCIENTIST'S TESTIMONY, THE MILITARY JUDGE PERMITTED A SURROGATE EXPERT TO TESTIFY. DID THE MILITARY JUDGE ERR?
  
- II. AFTER INSPECTING CORPORAL KILARSKI'S URINE SAMPLE, THE LABORATORY ACCESSIONS TECHNICIAN HANDWROTE A DISCREPANCY CODE ON THE SPECIMEN CUSTODY DOCUMENT. BEFORE TRIAL, THE DEFENSE ARGUED THE CONFRONTATION CLAUSE REQUIRED THE ACCESSIONS TECHNICIAN'S TESTIMONY, BUT THE MILITARY JUDGE DENIED THE MOTION. DID THE MILITARY JUDGE ERR?

After careful consideration of the record of trial, the parties' pleadings, and oral argument, we conclude that the military judge erroneously admitted testimonial hearsay but that the error was harmless beyond any reasonable doubt. We note that the appellant did not formally enter a plea at trial.<sup>2</sup> However, as the appellant had adequate notice of the sole charge levied against him and proceeded through the trial without

---

<sup>1</sup> To the extent that the convening authority's action purports to direct that the punitive discharge be executed it constitutes a legal nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

<sup>2</sup> At the arraignment hearing, the military judge stated "[t]he accused will now be arraigned." Record at 7. He then asked the appellant "what is your desire regarding entering pleas today?" *Id.* at 8. Trial defense counsel replied "[s]ir, the defense also reserves pleas in accordance with the trial schedule. *Id.* However, no subsequent plea was entered. Likewise, the transcript fails to illustrate the receipt of forum selection by the court after that decision was initially reserved for later selection. Despite these procedural errors, we find that they were harmless. Charges were served on the appellant on 3 November 2010, trial defense counsel waived the reading of the sole specification at the arraignment hearing, there was extensive litigation relating to the drug laboratory report, which was the primary piece of evidence in the trial, and the appellant was present throughout the trial. *Id.* at 8, 11, 14, 18. These facts support a finding of adequate notice despite no formal plea. See *United States v. Reyes*, 48 C.M.R. 832, 833 (A.C.M.R. 1974).

objection, we deem the error harmless. Furthermore, we conclude that the findings and the sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c) UCMJ.

### **Background**

On 30 September 2010, the appellant checked into his new unit onboard Marine Corps Air Station Cherry Point, NC and, during that process, was ordered to provide a urine sample along with several dozen other Marines. Record at 69. These samples were packaged and delivered to the Navy Drug Screening Laboratory (NDSL) in Jacksonville, Florida. *Id.* at 76-78. At the NDSL, the appellant's sample was assigned a laboratory accession number (LAN) and tested. That test and two subsequent re-tests indicated the presence of marijuana metabolites above the Department of Defense cutoff level. *Id.* at 112-17, 137; Prosecution Exhibits 2 and 4. The NDSL reported the appellant's urine sample as positive. PE2.

At a motions hearing on 3 March 2011, trial defense counsel moved to exclude portions of the drug testing report (DTR) on the grounds that it was testimonial hearsay and that, absent an opportunity to confront the laboratory technicians who tested the urine sample, admission of the report would violate the Confrontation Clause. *Id.* at 11-13. Trial defense counsel also argued that, if the report was admitted, those technicians who performed the tests should be produced at trial. *Id.* at 11. On the day of trial, defense counsel moved to exclude the testimony of the Government's expert, Mr. Robert Sroka, arguing that his testimony would be irrelevant and unfairly prejudicial. *Id.* at 14-15. Additionally, trial defense counsel objected to the admission of the DTR, which included the DD 2624 upon which were several signatures and notations. PE 2, 4; Record at 17-21.

Citing *Blazier I*<sup>3</sup> and *II*<sup>4</sup>, the military judge ruled that the DTR, including the DD 2624, was admissible save the cover memorandum. Record at 12. He also ruled that Mr. Sroka could testify and did not compel the production of any other NDSL personnel connected with the testing of the appellant's urine sample, including the final laboratory certifying official (FLCO) who signed the DD 2624, Dr. Ricky P. Bateh. *Id.* at 17, 20. At trial, the DTR and DD 2624 were admitted as evidence.

---

<sup>3</sup> *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010).

<sup>4</sup> *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).

*Id.* at 107, 112. Additionally, Mr. Sroka testified as an expert on both the testing process and the results. Record at 112-18. At the conclusion of the evidence, the members found the appellant guilty. *Id.* at 160.

### Discussion

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. In order to ensure the protections afforded an accused by the Confrontation Clause, "testimonial hearsay may not come into evidence without cross-examination of the declarant unless (1) the declarant is unavailable, and (2) the declarant was subject to prior cross-examination on the hearsay." *United States v. Sweeney*, 70 M.J. 296, 300-01 (C.A.A.F. 2011) (citing *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011) and *Blazier II*, 69 M.J. at 222). Whether evidence is inadmissible hearsay under the Sixth Amendment is a question of law that we review *de novo*. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009) (citing *United States v. Foerster*, 65 M.J. 120, 123 (C.A.A.F. 2007)). Relief is granted for Confrontation Clause errors "only where they are not harmless beyond a reasonable doubt." *Sweeney*, 70 M.J. at 305 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). Thus we must resolve what, if any, testimonial hearsay was admitted at trial, whether the Government's expert inappropriately referenced or otherwise "smuggled" testimonial hearsay into evidence, and whether any error is harmless beyond a reasonable doubt.

The two pieces of evidence that formed the basis for trial defense counsel's testimonial hearsay objections are Prosecution Exhibits 2 and 4, the DD 2624 and DTR, respectively. The DD 2624 consists of the specimen custody document and a chain of custody form. The specimen custody document contains a discrepancy code column with a handwritten "LX" (Block E), a results column with a "THC" stamp (Block G), and a certification with the signature of Dr. Bateh (Block H). PE 2 at 1.

In *Sweeney*, the CAAF held that the DD2624 contained testimonial hearsay, specifically the certification block in Block H. 70 M.J. at 304. In two recent cases, we held that the drug annotation reflected in Block G, in conjunction with the certification in Block H, were both testimonial hearsay. See *United States v. Tearman*, No. 201100195, 2012 CCA LEXIS 10, unpublished op. (N.M.Ct.Crim.App. 17 Jan 2012); *United States v. Alicea*, No. 201100366, 2012 CCA LEXIS 5, unpublished op.

(N.M.Ct.Crim.App. 12 Jan 2012). Because the DD 2624 was certified by the FLCO, it is a "formal, affidavit-like statement of evidence" that is testimonial. *Id.* at \*6. As such, the FLCO should have testified in order to properly admit the DD 2624 into evidence. *Id.* at \*6-7. In this case, the FLCO was Dr. Bateh. PE 2 at 1. However, he did not testify at trial despite trial defense counsel's *in limine* motion requesting his production. Record at 15; Appellate Exhibit II. In his place, Mr. Sroka testified for the Government, laying the foundation for the DD 2624 and DTR as well as testifying as an NDSL expert. Record at 100-40. It is clear, in light of *Sweeney*, that the admission of the DD 2624 without the testimony of Dr. Bateh constituted error.<sup>5</sup> 70 M.J. at 304.

Although parts of the DD 2624 are testimonial hearsay, the handwritten "LX" contained in Block E is not. One of the defining characteristics of testimonial hearsay is that such statements 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." *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004) (internal quotation marks and citation omitted). While "analysts must reasonably understand themselves to be assisting in the production of evidence when they perform re-screens and confirmation tests and subsequently make formal certifications on official forms attesting to the presence of illegal substances, to the proper conducting of the tests, and to other relevant information," the same cannot be said prior to any testing of the sample. *Sweeney*, 70 M.J. at 302-03 (footnotes omitted). In this case, the discrepancy code was placed on the DD 2624 prior to any testing. Record at 104-05. Moreover, the discrepancy code is an internal notation lacking the formality inherent in testimonial hearsay. Record at 105. It would not have been "reasonably foreseeable to an objective person" that the purpose of the "LX" notation was evidentiary. *Sweeney*, 70 M.J. at 302. Given that the "LX" is not testimonial hearsay, the laboratory accessions technician who made the notation, Ms. Ester Hammonds, was not required to testify.

---

<sup>5</sup> On the day of trial, the military judge denied trial defense counsel's oral motion to exclude Mr. Sroka's testimony. In issuing his ruling, the military judge made reference to the untimely nature of the motion, where the issue was known to defense for several weeks. Were timeliness the only basis for the ruling, an issue of constitutional significance such as confrontation would clearly override the untimely nature of the motion. However, there were other significant bases for denial of the motion articulated by the military judge, regarding the relevance of the testimony and the qualifications of the witness, which assure us that ruling was sound and within the military judge's discretion.

Consequently, the appellant's second assignment of error fails to mandate remedial action.

Having determined that the DD 2624 contained, in part, testimonial hearsay, we now turn to the admission of the DTR into evidence and the interrelated issue of Mr. Sroka's expert testimony. Once the cover memorandum and the DD 2624 are removed, the DTR contains three remaining types of documents: machine generated annotations; internal chain of custody forms (excluding the DD 2624); and review worksheets. None of these documents have the "attendant formalities" required of testimonial statements. See *Tearman*, 2012 CCA LEXIS 10.

The machine-generated annotations are well-established as nontestimonial. *Blazier II*, 69 M.J. at 224. The internal chain of custody documents, save the DD 2624, consist of date, name and LAN stamps combined with signatures and brief descriptions of each testing step. PE 4 *passim*. What are not included in these documents are formal certifications or other *indicia* that these documents are "'incontrovertibly . . . affirmation[s] made for the purpose of establishing or proving some fact' in a criminal proceeding." *Bullcoming*, 131 S. Ct. at 2716 (quoting *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2540 (2009)); see also *Melendez-Diaz*, 129 S. Ct. at 2532 n.1.' ("we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case"). Finally, the internal review worksheets similarly contain only names, dates, and signatures. PE 4 *passim*. Although there are spaces for comments on the worksheets, no comments are listed and they do not have any certification or attestation blocks, in contrast to documents like the cover memorandum and DD 2624. This lack of formality, while not dispositive, has been the crux of caselaw establishing documents as testimonial.<sup>6</sup> These documents contain only names, dates, and signatures and, without more, cannot be considered testimonial.

Having determined which portions of the DD 2624 and the DTR are testimonial, we now examine the testimony of Mr. Sroka. As the Government's expert witness, a status to which trial defense counsel did not object, Mr. Sroka offered his opinion regarding

---

<sup>6</sup> *Bullcoming*, 131 S. Ct. at 2717 (holding attendant formalities "more than adequate" to qualify analyst's certificate as testimonial); *Sweeney* 70 M.J. at 302-03 (holding that analysts making formal certifications on official forms should reasonably understand them to be supporting prosecution at trial).

the reliability of the NDSL procedures generally, the reliability of the appellant's urine screening specifically, and the results of the screening. Record at 100, 112-16. During Mr. Sroka's testimony, the Government introduced PE 2, 3, and 4, the DD 2624, bottle photos, and the DTR, respectively. Record at 106-11. Trial defense counsel only objected to the DTR. *Id.* at 111. This objection was overruled and all three exhibits were admitted into evidence. *Id.* at 107, 111.

An expert may not circumvent the Confrontation Clause through "repetition of otherwise inadmissible testimonial hearsay of another." *Blazier II*, 69 M.J. at 222 (citation omitted). However, "an expert may, consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and nonhearsay machine-generated printouts of machine-generated data, . . . and/or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own." *Id.* (internal citations omitted). Although the DD 2624 contained testimonial hearsay and should not have been admitted into evidence, at no point during his testimony did Mr. Sroka refer to, rely upon, or repeat portions of the DD 2624, save to correlate the physical bottle with the accession number. Record at 108. Mr. Sroka relied on portions of the DTR to evaluate the urine screening and draw his conclusion that the appellant's sample was correctly tested and contained marijuana metabolites. *Id.* at 112-16, 123; PE 4 at 17. As explained above, the DTR in this case does not contain testimonial hearsay and was properly admitted as evidence. Per *Blazier II*, Mr. Sroka, as an expert witness, was free to rely upon otherwise admissible evidence to form his expert opinion.<sup>7</sup> As Mr. Sroka was properly qualified as an expert witness and did not repeat or otherwise introduce testimonial hearsay during his expert testimony, the appellant's first assignment of error is also without merit.

Although both assignments of error are resolved against the appellant, the admission of the testimonial hearsay components of the DD 2624 was still error. When error of this type occurs, we must review the entire record and ask "whether there is a

---

<sup>7</sup> Although Mr. Sroka undoubtedly reviewed the DD 2624, he did not cite it as foundational information for his expert opinion. His references to the DD 2624 were limited to custodial and intake procedures. He specifically spoke about the meaning of the discrepancy code "LX". However, we have determined that such a notation on the DD 2624, even handwritten, is not testimonial. The testimonial portions of the DD 2624, Blocks G and H, were not mentioned by Mr. Sroka.

reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). In other words, "[w]e grant relief for Confrontation Clause errors only where they are not harmless beyond a reasonable doubt." *Sweeney*, 70 M.J. at 306 (citing *Van Arsdall*, 475 U.S. at 684). The Court of Appeals for the Armed Forces in *Sweeney* outlined five factors used to determine the level of harm caused by the error: (1) the importance of the unopposed testimony in the prosecution's case; (2) whether that testimony was cumulative; (3) the existence of corroborating evidence; (4) the extent of confrontation permitted; and (5) the strength of the prosecution's case. 70 M.J. at 306. Whether a constitutional error was harmless beyond a reasonable doubt is a question of law we review *de novo*. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

In this case, the unopposed testimony took the form of the "THC" stamp in Block G and Dr. Bateh's certification in Block H, both located on the DD 2624. Although the entire DD 2624 was admitted into evidence, Blocks G and H were not specifically mentioned by either trial counsel or the Government's expert, Mr. Sroka. He based his opinions regarding the outcome and accuracy of the urine screenings upon Prosecution Exhibit 4, the DTR. Record at 112-16. The DD 2624 was only cited as the basis for matching LAN numbers among Prosecution Exhibits 2, 3, and 4. Record at 107-08. Consequently, we find that they were of virtually no importance to the prosecution's case.

Similarly, the testimonial hearsay portions of the DD 2624 were, at best, cumulative to the Government's case. While the "THC" stamp found in Block G was testimonial, the "THC" printed multiple times on the machine-generated DTR was not. PE 4 at 11, 17. The DTR was the primary source upon which Mr. Sroka based his opinion and upon which the Government rested its case. Record at 112-16, 146-47. Likewise, Block H was not mentioned during the trial and was, at most, cumulative to the independent analysis and opinions offered by Mr. Sroka.

Both Block G and H were corroborated by other evidence. The "THC" stamp in Block G was, as explained above, mirrored by the machine generated "THC" stamp found of the DTR. Mr. Sroka came to his own, independent conclusion regarding the accuracy of the urine screenings. *Id.* at 120.

Because neither Dr. Bateh nor the person who stamped "THC" on the DD 2624 testified, there was no opportunity for confrontation.

The strength of the Government's case is the decisive factor in our determination that the admission of testimonial hearsay was harmless beyond a reasonable doubt. The Government presented the command urinalysis testing register, the DD 2624, photos of the urine specimen bottle and the DTR as exhibits. PE 1, 2, 3, 4. The urinalysis observer, command urinalysis coordinator, and NDSL expert all testified for the Government. These exhibits and witnesses established a urine screening process that was reliable and free from error save the "LX" discrepancy code written on the DD 2624 by the accessions technician, Ms. Esther Hammond. PE 2. As explained by Mr. Sroka, this code indicated some anomaly on the label affixed to the urine sample bottle. Record at 105. Having numerous pictures of the bottle and label, it is clear that the discrepancy was a smudge on the label. PE 3. Although trial defense counsel raised the possibility of negative impact on the actual urine screens from this smudge, there was no evidence supporting this assertion. The DTR package indicated the presence of marijuana metabolites above the Department of Defense cutoff level. PE 4. Mr. Sroka, an expert in forensic chemistry and the NDSL urine screening process, reviewed in detail the DTR data and offered his opinion that the procedures and results were accurate and reliable. Record at 112-16. Collectively, the above evidence represents a strong Government case.

Upon review, the five *Van Arsdall* factors convince us that there was no reasonable possibility that the testimonial hearsay in Blocks G and H of the DD 2624 contributed to the verdict. The contents of Blocks G and H were of *deminimus* value to the Government's case, were cumulative to other evidence, and were corroborated by other evidence. Although there was no confrontation permitted, the first three factors, combined with the overall strength of the Government's case, indicate that any error in admitting the testimonial hearsay was harmless beyond any reasonable doubt.

### **Conclusion**

Having determined that the appellant's two assignments of error are without merit and that any other error was harmless beyond a reasonable doubt, the findings and sentence as approved by the convening authority are affirmed.

Senior Judge PERLAK and Judge PAYTON O'BRIEN concur.

For the Court

R.H. Troidl  
Clerk of Court