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

Before
J.K. CARBERRY, R.Q. WARD, P.H. MCCONNELL
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JASON A. LUNSFORD, JR.
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 201100511
SPECIAL COURT-MARTIAL

Sentence Adjudged: 8 June 2011.
Military Judge: CDR Carrie M. Stephens, JAGC, USN.
Convening Authority: Commanding Officer, 9th Communication Battalion, I Marine Expeditionary Force Headquarters Group, I Marine Expeditionary Force, FMFPac, Camp Pendleton, CA.
Staff Judge Advocate's Recommendation: Col C.W. Miner, USMC.
For Appellant: LT Toren G. Mushovic, JAGC, USN.
For Appellee: Capt Samuel C. Moore, USMC.

16 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.

PER CURIAM:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of a single specification of wrongfully using cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C.

§ 912a. The approved sentence included confinement of 45 days, reduction to pay grade E-1, forfeiture of $979.00 pay per month for two months, and a bad-conduct discharge.[1]

The appellant assigns one error: that the military judge abused her discretion by admitting, over the appellant's objection, testimonial hearsay in violation of his Sixth Amendment right to confrontation. After careful examination of the record of trial, as well as the parties' pleadings, we conclude that testimonial hearsay was erroneously admitted, but that the error was harmless beyond a reasonable doubt. 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 6 December 2010, the appellant participated in an all-hands unit urinalysis. His urine sample was packaged and shipped with the other samples to the Navy Drug Screening Laboratory (NDSL), San Diego, California for testing. The appellant's urine sample was assigned a unique laboratory accessing number (LAN) S10N0483075, screened, rescreened, and was confirmed for the presence of cocaine above the DoD cutoff level. The NDSL subsequently reported the appellant's urine sample as positive.

Prior to trial, the appellant unsuccessfully moved *in limine* to exclude the non-machine generated pages from the "Drug Testing Report" (DTR) and any expert witness testimony related to the same,[2] on the basis that the DTR, or at a minimum the handwritten/stamped portions therein, were testimonial hearsay. At trial, the Government called Mr. Christopher George, a forensic chemist and expert witness from the NDSL who testified regarding the NDSL's mission, the accessioning and testing methodology used, and the contents of the DTR contained in Prosecution Exhibit 2.[3] Trial defense counsel objected to his

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[1] To the extent that the convening authority's action purports to direct that the punitive discharge will be executed after final judgment, it is a legal nullity. *See United States v. Tarniewicz*, 70 M.J. 543 (N.M.Ct.Crim.App. 2011).

[2] Appellate Exhibit IV.

[3] During his testimony, Mr. George explained the contents of the DTR, including pages 7-8, the DD 2624, Specimen Custody Document. He explained that block G on page 7 lists a three letter code for any drug that a sample

testimony and again argued that the DTR contained testimonial hearsay; that the expert's testimony repeated testimonial hearsay contrary to *United States v. Blazier (Blazier II)*, 69 M.J. 218, 224 (C.A.A.F. 2010);[4] and that its admission would violate the appellant's Sixth Amendment right to confrontation. The military judge overruled the defense objection, relying on *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), *United States v. Blazier (Blazier I),* 68 M.J. 439 (C.A.A.F. 2010), and *Blazier II,* [5] and found that the DTR was nontestimonial hearsay. Ultimately, Mr. George opined that the urine sample associated with the appellant's LAN tested positive for cocaine above the DoD cutoff limit.[6]

Thus the issue presented is whether the military judge abused her discretion by admitting, over the appellant's objection, testimonial hearsay in violation of his Sixth Amendment right to confrontation. We find that part of Prosecution Exhibit 2,[7] as well as the corresponding expert testimony, contained testimonial hearsay and the admission was error.

Discussion

We review a military judge's decision to admit or exclude evidence for an abuse of discretion; however, whether the evidence contains testimonial hearsay is a matter of law we review *de novo*. *Blazier I*, 68 M.J. at 441-42.

In a recent decision regarding the admission of DTRs, CAAF directed that we examine the admissibility of particular statements within the DTR report, as opposed to considering the report "in toto." *United States v. Sweeney*, 70 M.J. 296, 305 (C.A.A.F. 2011). Additionally, CAAF refocused attention on the purpose behind each statement within the DTR, instead of a

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tests positive for (i.e. "COC" for cocaine). He also described Column H as including the signature of Camille Sahagun, who was the certifying official that certified that all of the NDSL procedures were followed correctly. Record at 295-96. This testimony and these portions of page 7 were not referenced by the trial counsel during argument.

[4] Record at 292.

[5] Appellate Exhibit XXIV.

[6] Record at 306.

[7] Specifically that portion of the DD 2624 form that includes the certification statement and signature, as well as the comment in block G (i.e., "COC").

blanket rule based on the purpose behind the urinalysis collection and testing. *Id.* at 302 ("Asked another way, would it be reasonably foreseeable to an objective person that the purpose of any individual statement in a drug testing report is evidentiary?"). Under the facts of that case, CAAF held that a cover memorandum to the DTR certifying the test results and parts of the specimen custody document certification (DD 2624) were both testimonial, that their admission was error, and that the error was plain or obvious. CAAF then remanded the case for a determination of prejudice while leaving for another day any conclusions regarding other parts of the DTR. *Id.*

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., "THC") were also testimonial, as the certification was explicitly incorporating those results. Consequently, we find that these two portions of the specimen custody document in the appellant's case were testimonial hearsay, and that their admittance, over defense objection, was in error. We additionally find that the corresponding expert witness testimony, describing the two portions,[8] was likewise admitted in error.

As in *Tearman*, the remainder of the DTR 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 DTR to be nontestimonial.[9] Thus, we find no abuse of discretion in the admission of the remainder of Prosecution Exhibit 2.[10]

Prejudice

In assessing prejudice from the erroneous admission of testimonial hearsay, we must 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)). This poses a significant burden, as the Government

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[8] Record at 295-96.

[9] *Tearman*, 2012 CCA LEXIS 10, at *6-11.

[10] *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527, 2539-40 (2009); *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *Magyari*, 63 M.J. at 128.

must show that the testimonial hearsay was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *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)). The question of 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).

As we review the record in making this determination, we apply the balancing test established by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and adopted by CAAF.[11] This includes 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. *Id*. at 684. Applying these criteria and after a careful review of the entire record, we find that any error in admitting this evidence was harmless beyond a reasonable doubt.

Mr. George testified based on the supporting documentation from the NDSL and offered his own independent assessment based on the underlying test data contained therein. He made no reference to any notations on the DD 2624 form, or to Ms. Sahagun's certification, when explaining the basis for his opinion that the appellant's urine sample tested positive for cocaine. As in *Tearman*, the expert's testimony to the panel focused on the testing methodology and his independent analysis of the supporting documentation.[12] Therefore, we find that this testimonial hearsay was "unimportant in relation to everything else the [members] considered on the issue in question" – that is, whether the appellant wrongfully used cocaine. *Othuru*, 65 M.J. at 377 (internal quotation marks and citation omitted). Moreover, in considering this testimonial hearsay in light of all the evidence introduced at trial, we find these two portions of the DDD 2624 to be cumulative with Mr. George's testimony. Mr. George made no other reference to this notation "COC," other than one brief reference described above. He offered his own

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[11] *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 377.

[12] We are mindful that in offering an opinion an expert witness may rely on inadmissible hearsay, but cannot repeat it. *Blazier II*, 69 M.J. at 225. Viewing Mr. George's testimony on the whole, we find that he presented his own independent conclusions to the panel without relying upon or bolstering them with this testimonial hearsay.

conclusions to the panel as to the accuracy, reliability, and ultimate result of the tests performed. Mr. George's testimony was corroborated in part by the other nontestimonial parts of the DTR. At most, these two inadmissible portions of the DD 2624 were repetitive with his testimony as he reached and offered his own independent opinion based on his own analysis, and in reliance upon his own training, education, and experience.[13] In sum, the administrative notation "COC" and certification by Ms. Sahagun on the DD 2624, and the short corresponding testimony by Mr. George, was *de minimis* when compared to the entire record, which in this case also included the testimony of the appellant.

Conclusion

Having viewed the entire record and balanced the factors articulated in *Van Arsdall*, we are convinced that the error in admitting the testimonial portions of the DD 2624 was harmless beyond a reasonable doubt.

Accordingly, the findings and the sentence as approved are affirmed.

For the Court

R.H. TROIDL
Clerk of Court

[13] Record at 306.