

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

**Before
C.L. REISMEIER, J.K. CARBERRY, M.D. MODZELEWSKI
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANTHONY J. SANDERS
STAFF SERGEANT (E-6), U.S. MARINE CORPS**

**NMCCA 201000522
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 3 June 2010.

Military Judge: LtCol Robert Q. Ward, USMC.

Convening Authority: Commanding Officer, 3d Battalion, 8th
Marine Regiment, 2d Marine Division, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: LtCol J.W. Hitesman,
USMC.

For Appellant: LCDR Michael Torrasi, JAGC, USN.

For Appellee: Maj William Kirby, USMC.

31 January 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 19 April 2011, this court affirmed the findings and sentence in the appellant's court-martial, finding no error in the admission of the drug lab report in his urinalysis case and no violation of his Sixth Amendment right to confrontation. The appellant subsequently petitioned the Court of Appeals for the Armed Forces (CAAF) for review, and on 20 September 2011 that court set aside this court's 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 lab report was erroneously admitted against the appellant in violation of his 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.

Background

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The approved sentence included reduction to pay grade E-1 and a bad-conduct discharge.

Pursuant to a random urinalysis, the appellant provided a urine sample that was sent to the Navy Drug Screening Laboratory (NDSL), Jacksonville, Florida. The sample tested positive for THC, the metabolite found in marijuana. The NDSL prepared a 33-page report that was introduced at trial, over defense objection, as Prosecution Exhibit 3. That report contained, *inter alia*, computer-generated data sheets, internal NDSL chain-of-custody documents, handwritten annotations, and the specimen custody document, which certified that the appellant's sample tested positive for THC. Of note, Prosecution Exhibit 3 did not contain a cover memorandum summarizing the findings of the lab report.

The NDSL laboratory technicians and certifying official who tested the sample annotated the report and certified the results, but did not testify. Instead, Dr. Bateh, a chemist and expert witness for the NDSL, testified regarding the lab's procedures, the testing methodology, the underlying science of the tests, and their reliability. Additionally, Dr. Bateh testified at length as to the testing results contained within the 33-page drug lab report and concluded, based upon those contents, that the appellant's urine sample contained the marijuana metabolite THC above the DoD cutoff limit.

Discussion

In *Sweeney*, the CAAF recently held that the specimen custody document of the drug lab report was testimonial.¹ The CAAF focused on the certification at the bottom of the specimen custody document (Block H), which presents a formal, affidavit-like statement of evidence indicating "that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated."² 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. Their admittance, over defense objection, was in error.

As in *Tearman*, the remainder of the drug lab 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 lab report to be nontestimonial.³ As the Government laid a proper foundation for a business record under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), a firmly rooted hearsay exception, we find no abuse of discretion in the admission of the remainder of Prosecution Exhibit 3.⁴

Prejudice

In assessing prejudice from the erroneous admission of 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."⁵ In

¹ *Sweeney*, 70 M.J. at 304.

² *Id.* (citation and internal quotation marks omitted).

³ *Tearman*, 2012 CCA LEXIS 10 at 4-11.

⁴ *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2539-40 (2009); *Crawford v. Washington*, 541 U.S. 36, 68 (2004); *United States v. Magyari*, 63 M.J.123, 128 (C.A.A.F. 2006).

⁵ *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)).

our review, we apply the balancing test established by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and adopted by the CAAF.⁶ This test includes the importance of the uncontroverted testimony 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.⁷ Applying these criteria and after a careful review of the entire record, we find that any error in admitting this testimonial hearsay was harmless beyond a reasonable doubt.

Turning first to the importance of the testimonial hearsay to the Government's case, we determine it to be *de minimis*. The Government's critical witness was Dr. Bateh, who testified about the NDSL's testing procedures, the science underlying the tests, and the meaning of the metabolite in the appellant's sample. Drawing upon his expertise in chemistry and toxicology, Dr. Bateh interpreted the data in the drug lab report and rendered his own independent assessment for the members that the appellant's urine sample contained THC. Of particular note, Dr. Bateh never mentioned or repeated the hearsay certification on the specimen custody document. Moreover, the trial counsel clearly did not perceive the certification to be important to his case. He never inquired into the hearsay portions of the specimen custody document on direct examination of Dr. Bateh and did not even mention the certification in his closing statement. In short, the annotation of "THC" and the certification by "R. Flowers" on the specimen custody document in Blocks G and H appear to have had no bearing on the presentation of the Government's case. Therefore, we find that the testimonial hearsay was "unimportant in relation to everything else the [members] considered on the issue in question," namely did the appellant's urine contain the metabolite for marijuana.⁸

Secondly, we find these two portions of the specimen custody document to be cumulative with Dr. Bateh's testimony, in which he offered his own conclusions to the panel as to the accuracy, reliability and ultimate result of the tests performed. The certification restates what is contained in the non-testimonial portions of the drug lab report and Dr. Bateh's

⁶ *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); *United States v. Othuru*, 65 M.J. 375, 378 (C.A.A.F. 2007).

⁷ *Sweeney*, 70 M.J. at 306.

⁸ *Othuru*, 65 M.J. at 377 (internal quotation marks and citation omitted).

testimony as to the procedures at the lab and the testing results: it offers no additional evidence against the appellant.

Thirdly, we note that the testimonial hearsay was corroborated by Dr. Bateh, an expert and a certifying official in his own right, who arrived at the same conclusion expressed by Ms. Flowers in her certification in Block H of specimen custody document.

We turn next to the extent of cross-examination otherwise permitted. Ms. Flowers was not present for cross-examination as to the reliability of the testing procedures that she attested to in her certification. However, Dr. Bateh testified, subject to cross-examination, about those same testing procedures and their reliability. Trial defense counsel cross-examined him concerning several issues: potential irregularities in chain of custody procedures at the NDSL; the fact that as a certifying official Dr. Bateh did not observe any of the tests performed on the sample; and the fact that Dr. Bateh had no knowledge as to how the THC metabolite came to be in the appellant's sample.⁹ The trial defense counsel was in no way precluded from inquiring into the reliability of the NDSL's tests or its procedures for handling samples.¹⁰ Although deprived of his right to confront Ms. Flowers, the appellant nevertheless had an opportunity to conduct a meaningful inquiry into any irregularities in the testing process that would call its reliability into question.¹¹

Finally, we turn to the overall strength of the Government's case. The prosecution's case against the appellant was similar to many urinalysis cases: the Government introduced into evidence the sample bottle, the urinalysis register, and the drug lab report, and called as witnesses the three Marines who administered the urinalysis and Dr. Bateh. The testimony from the Marine witnesses revealed a typical random urinalysis, with details of collection, packaging and shipment of samples. The command's Substance Abuse Control Specialist testified to one discrepancy in filling out the chain of custody document, which was detected upon arrival at NDSL.¹² Trial defense counsel exhaustively explored that discrepancy on cross-examination of

⁹ Record at 322-32.

¹⁰ *Cf. United States v. Israel*, 60 M.J. 485 (C.A.A.F. 2005).

¹¹ *Id.* at 491.

¹² PE 3 at 1-2; Record at 262-64.

that witness and the drug lab expert,¹³ but never established that it was more than a relatively minor error in documentation. As detailed above, Dr. Bateh explained the documents contained in Prosecution Exhibit 3, testified to the reliability of the tests, the results of the tests performed on the appellant's urine sample, how the NDSL handles urine samples within the laboratory, and how NDSL generates the test results. Dr. Bateh could not testify as to the actual handling and testing of the appellant's urine sample as he was not actually present for the testing. He offered his expert opinion that the appellant's urine contained in the appellant's urine sample contained the marijuana metabolite THC above the DoD established cutoff level.

Overall, the Government's case was strong. There were no significant defects in the collection or chain of custody offered at trial, and no significant questions raised about the reliability of the testing methodology or the results. These facts, coupled with the permissive inference instruction from the military judge, convince us that there was no reasonable possibility that this testimonial evidence contributed to the verdict.

Conclusion

In summary, this testimonial, unopposed evidence played no apparent role in the presentation of the Government's case. Furthermore, it was cumulative with, and ultimately corroborated by, the testimony and independent opinion of the Government's expert witness. 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 specimen custody document was harmless beyond a reasonable doubt, that the erroneously admitted evidence did not contribute to the conviction, and that it was "unimportant in relation to everything else the jury considered on the issue". *Othuru*, 65 M.J. at 377 (citation omitted).

¹³ Record at 278-88, 326-32.

Consequently, we again conclude that the findings and the sentence are correct in law and fact and affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court