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

Before
C.L. REISMEIER, J.K. CARBERRY, R.E. BEAL
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: 6 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: Maj Kirk Sripinyo, USMC; LT Michael Maffei, JAGC, USN.
For Appellee: LT Ritesh Srivastava, JAGC, USN; LCDR Sergio Sarkeny, JAGC, USN.

23 February 2012

OPINION OF THE COURT

PER CURIAM:

We previously affirmed the findings and the sentence in the appellant's court-martial and found no error was committed by admitting the drug lab report in the Government's case-in-chief for cocaine use. *United States v. Sweeney*, No. 200900468, unpublished op. (N.M.Ct.Crim.App. 29 Apr 2010). The Court of

Appeals for the Armed Forces (CAAF) granted review and set aside this court's decision, concluding that two documents in the report contained testimonial hearsay that violated the appellant's Sixth Amendment right to confront the witnesses against him and were erroneously admitted into evidence. *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). The CAAF remanded the case for our consideration of whether the error was harmless beyond a reasonable doubt. *Id*. at 306. After careful consideration of the record of trial, we conclude the error was harmless beyond a reasonable doubt and we once again affirm the findings and the sentence.

Background

The two documents that contained testimonial hearsay were the cover memorandum and the specimen custody document certification (DD Form 2624). The cover memorandum summarized the test results for the appellant's urine sample. It indicated that the initial screening test, the rescreen test, and the confirmation test all indicated the appellant's urine contained cocaine metabolites and the presence of codeine. It also indicated that the cocaine metabolites measured at a level of 379 ng/mL which exceeded the DoD cut-off level of 100 ng/mL. The DD Form 2624 linked the appellant's social security number to the Lab Accession Number (LAN) assigned to his specimen bottle, indicated the test result "COCAINE," and certified the results were correctly determined by proper laboratory procedures. The cover memorandum was signed by Mr. Robert Sroka and the DD Form 2624 was signed by R. Flowers; neither individual testified at the defendant's trial.

Discussion

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.'" *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 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.[1] 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.

A. Importance to the Government's Case

During its case-in-chief, the Government called Mr. Marinari, a senior chemist employed by the Navy Drug Screening Laboratory (NDSL), Naval Air Station, Jacksonville, Florida who was recognized by the military judge as an expert witness in the field of "Forensic Chemistry Urinalysis Testing and Interpretation."[2] The bulk of Mr. Marinari's testimony addressed the general procedures followed in the screening, re-screening, and confirmation testing of urine samples submitted to the NDSL and the interpretation of the documentation generated with testing of the appellant's urine sample. Mr. Marinari offered his own independent assessment based on the underlying test data contained therein that the testing was conducted properly and properly detected the metabolites for cocaine in the appellant's urine at a concentration exceeding the DoD cut-off level. Although he briefly referenced the notation "Cocaine" when explaining the information on the cover memorandum and the DD 2624, he made no reference to either notation when explaining the basis for his own opinion.

Also, the fact that the trial counsel did not refer to either hearsay statement during his opening statement or closing argument is noteworthy. In short, the administrative notation in the cover memorandum and certification provided on the DD 2624 had little bearing on the Government's case. Therefore, we find that this testimonial hearsay was "unimportant in relation to everything else the [members] considered on the issue in

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[1] *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.

[2] Record at 806.

question," namely did the appellant's urine contain the metabolite for cocaine. *Othuru*, 65 M.J. at 377 (internal quotation marks and citation omitted).

B. Cumulativeness

In considering this testimonial hearsay in light of all the evidence introduced at trial, we find these two portions of the DD 2624 to be cumulative with Mr. Marinari's testimony. Mr. Marinari made no other reference to this notation "Cocaine," other than one brief reference described above, and he made no reference at all to the certification in block H. He offered his own conclusions to the panel as to the accuracy, reliability, and ultimate result of the tests performed.

C. Corroboration

Mr. Marinari arrived at the same conclusion expressed by the certifying official in Block H of the DD 2624.

D. Extent of Confrontation Permitted

Mr. Sroka, the author of the cover memorandum and the NDSL employee who stamped "Cocaine" on the DD 2624, did not testify so there was no opportunity for cross-examination. Mr. Marinari was subjected to extensive cross examination, including questions highlighting the limited extent of his personal knowledge of the appellant's alleged use of cocaine and the testing of the appellant's particular sample.

E. Overall Strength of the Government's Case

In regard to the cocaine use charge, the Government's case consisted mainly of the drug testing register,[3] the drug testing report,[4] the urine bottle,[5] and the testimony of several witnesses. The first two witnesses, the urinalysis coordinator and the observer, established that the appellant's urine sample was properly collected and shipped to the NDSL.

Mr. Marinari testified to explain the NDSL's procedures for receiving and testing urine samples, and how NDSL generates the

[3] Prosecution Exhibit 16.

[4] Prosecution Exhibit 13.

[5] Prosecution Exhibit 14.

test results. He explained the documents contained in Prosecution Exhibit 13, the results of the tests performed on the appellant's urine sample, and opined on the reliability of the tests. He 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, although he was the final certifying official for the data review of the confirmation test. He offered his expert opinion that the appellant's urine sample contained the cocaine metabolite, BZE, above the DoD established cutoff level.

LT Anderson, the investigating officer who conducted the preliminary inquiry into the appellant's alleged misconduct,[6] testified that the appellant made certain voluntary admissions; most importantly, that the appellant explained that the reason for his unauthorized absence was that he was afraid that his urinalysis would test positive.

Petty Officer Second Class Santos testified that when he referred the appellant to the urinalysis coordinator for a urinalysis, the appellant attempted to avoid the test by intimidating him. Chief Petty Officer Crosson testified that the appellant tried to avoid the urinalysis by asking him if they couldn't "handle this chief-to-chief."

Overall, the Government's case was strong, and significantly stronger than the typical urinalysis "paper" case. The appellant's admissions coupled with the test results were compelling evidence of his guilt. The trial counsel effectively argued the appellant's admission to the investigating officer as circumstantial evidence of knowing use. There were no defects in the collection of the appellant's urine sample. Although there were some minor administrative errors in the chain of custody during the testing of the appellant's sample, even the defense expert witness testified that the results of the test were valid. Those factors, plus the permissive inference instruction from the military judge, convince us that there was no reasonable possibility that this testimonial hearsay evidence contributed to the verdict.

Conclusion

[6] The appellant was also convicted, contrary to his pleas, of failing to go to his appointed place of duty on 17 December 2007, being an unauthorized absentee from 6 April to 6 May 2008, and making a false official statement on 28 February 2008. The date of the urinalysis was 28 February 2008.

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. The findings and sentence approved by the convening authority are affirmed. The supplemental court-martial order will reflect that the appellant pled not guilty to Specification 1 of Charge II and Specification 2 of Charge III, and that those specifications were withdrawn and dismissed.

For the Court

R.H. TROIDL
Clerk of Court