

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

**Before
F.D. MITCHELL, E.C. PRICE, T.P. BELSKY
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**NATHON C. PROCTOR
SERGEANT (E-5), U.S. MARINE CORPS**

**NMCCA 201300265
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 7 March 2013.

Military Judge: LtCol Gregory Simmons, USMC.

Convening Authority: Commanding Officer, MALS-11 MAG-11 3d
MAW, MCAS Miramar, San Diego, CA.

Staff Judge Advocate's Recommendation: LtCol K.C. Harris,
USMC.

For Appellant: CAPT Tierney M. Carlos, JAGC, USN.

For Appellee: Capt Matthew M. Harris, USMC.

30 December 2013

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 consisting of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The appellant was sentenced to reduction to pay grade E-2, confinement for 30 days and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged.

The appellant argues that the military judge erred in admitting into evidence, over defense objection, laboratory chain of custody documents and machine generated documents with handwritten notations.

After careful consideration of the record and the briefs of the parties, 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

Based upon the results of a random urinalysis, the appellant was charged with one specification of wrongful use of cocaine. In a pretrial motion, the appellant moved to suppress the entire 42-page Navy Drug Lab Screening Laboratory Report (Lab Report) related to the testing of his urine sample; in the alternative he moved to compel production of all witnesses who offered testimonial statements in the Lab Report. Appellate Exhibit II at 1.

The military judge¹ granted the defense motion with respect to some pages of the Lab Report, but denied the defense motion with respect to other pages. AE XX at 4-6. She ruled that the Government could introduce a redacted version of the Lab Report, but that specified pages of the Lab Report "will only be admissible if the declarants testify and a proper foundation for a hearsay exception is laid." *Id.* at 6. She also ruled that the "machine-generated pages without any other notations may be offered subject to nonhearsay-related rules of evidence . . . [and that] [t]he remaining documents containing nontestimonial hearsay may be admitted upon the laying of the foundation for a hearsay exception." *Id.* Finally, the military judge concluded that "the screen, re-screen, and confirmation review worksheets [were] testimonial in nature and may not be admitted at trial unless the declarant is subject to cross-examination[.]" *Id.* at 5.

Ms. Andrea Kaminski, a chemist in the Navy Drug Screening Laboratory (NDSL San Diego) in San Diego, CA, testified that her lab examined the appellant's specimen and produced the Lab Report. Record at 225-26. She was recognized, without defense objection, as an expert in the field of forensic urinalysis and drug testing. *Id.* at 227. She also testified regarding NDSL

¹ Major E.A. Harvey, USMC, was the presiding military judge who heard and ruled on the motion.

San Diego's manning, operating and testing procedures, inspection and certification regimes, and regarding a recent false-positive result for amphetamine and associated corrective measures. *Id.* at 225-36. Ms. Kaminski's testimony provided foundation for admission of a 29-page redacted version of the Lab Report which included "the results for the screening test, the rescreen test, as well as the confirmation test" associated with the appellant's laboratory accession number. *Id.* at 236; Prosecution Exhibit 6. There being no defense objection, the military judge subsequently admitted the redacted version of the Lab Report into evidence. Record at 246-47.

Discussion

The appellant acknowledges that our precedent and that of the U.S. Court of Appeals for the Armed Forces, recognizes that "admission of chain-of-custody documents and machine generated data with individual notations from Navy Drug Screening Laboratory reports d[oes] not violate confrontation because those documents [a]re non-testimonial, and [a]re admissible under M.R.E. 803(6)." Appellant's Brief of 6 Sep 2013 at 4. The appellant also notes that he alleged this error in order "to preserve the issue," as the petition for writ of certiorari in *Tearman*² was pending before the Supreme Court when the appellant filed his brief.³ *Id.*

We review "a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009) (citation omitted). We agree that *Tearman* is controlling and conclude that the military judge did not abuse his discretion in admitting the redacted version of the Lab Report into evidence.⁴ PE 6. The military judge cited and properly applied binding precedent in determining the admissibility of each page of the Lab Report, ultimately admitting only 29 pages of a 42-page report into evidence. *Id.*; AE XX at 2-6 (citing *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010), *United States v. Sweeney*, 70 M.J. 296, 302 (C.A.A.F. 2011), and *Tearman*).

² *United States v. Tearman*, 70 M.J. 640, 642-43 (N.M.Ct.Crim.App. 2012), *aff'd*, 72 M.J. 54 (C.A.A.F. 2013), *cert. denied sub nom, Tearman v. United States*, 134 S. Ct. 268 (2013)).

³ We decline the appellant's invitation to "consider this brief a merit submission" in the event that the Supreme Court denied the petition for writ of certiorari in *Tearman*. Appellant's Brief at 5.

⁴ LtCol Gregory Simmons, USMC, was the presiding judge when the exhibit was admitted into evidence.

Conclusion

Accordingly, we affirm the findings and the sentence, as approved by the CA.

For the Court

R.H. TROIDL
Clerk of Court