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

Before
B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JAMES W. ROSE
OPERATIONS SPECIALIST FIRST CLASS (E-6), U.S. NAVY

NMCCA 201100584
SPECIAL COURT-MARTIAL

Sentence Adjudged: 12 March 2010.
Military Judge: CAPT John Waits, JAGC, USN.
Convening Authority: Commander, Joint Interagency Task Force South, Naval Air Staion, Key West, FL.
For Appellant: William E. Cassara, Esq.; LT David Dziengowski, JAGC, USN.
For Appellee: LT Ian MacLean, JAGC, USN.

30 April 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 panel of members with enlisted representation, sitting as a special court-martial, convicted the appellant, contrary to his plea, of one specification of wrongful use of a controlled substance in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to 90 days confinement, reduction to pay grade E-5, and forfeiture of $1,949.00 pay per month for three months. The

convening authority approved the sentence as adjudged and ordered it executed.[1]

The appellant's sole assignment of error is that the admission of a drug laboratory report, and a surrogate witness testifying to the contents of the report, constituted testimonial hearsay in violation of the Confrontation Clause.

After considering the record of trial and the pleadings of the parties, we conclude that the admission of testimonial hearsay contained within the drug testing report materially prejudiced the substantial rights of the appellant.

Factual Background

The appellant participated in a command-wide random urinalysis test at Joint Interagency Task Force South. The urine samples from this test were sent to the Forensic Toxicology Drug Testing Laboratory at Fort Meade, Maryland for testing. Laboratory workers screened, rescreened, and confirmed that the appellant's sample contained cocaine metabolite above the Department of Defense cutoff level. The appellant's command was then notified that his sample tested positive for cocaine.

The admission of Prosecution Exhibit 3, referred to as the laboratory documentation packet, is at issue in this case. The Fort Meade laboratory created this 36-page document because of the appellant's positive drug test. The document is composed of a one-page cover memorandum, a two-page Department of Defense (DD) Form 2624, 12 pages of internal chain of custody and review documents, and 21 pages of computer generated print-outs.

The appellant moved *in limine* to exclude PE 3, arguing that its admission would violate his right to confront his accusers under the Sixth Amendment. In the alternative, he moved for the Government to produce the individuals named in the report who were involved in testing or handling the appellant's urine sample. The military judge denied the appellant's motion at an Article 39(a), UCMJ, session, holding that the contents of PE 3 were not testimonial and that the document was admissible as a business record. The military judge's determination was based, in large part, upon his determination that *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006) (drug testing report

[1] We have jurisdiction over this case because the Judge Advocate General (JAG) sent it to this court for review under Article 69(d), UCMJ. To facilitate our review, we ordered a verbatim record of the trial proceedings from arraignment through findings.

resulting from a unit sweep was not testimonial because law enforcement did not initiate the original sample collection), was issue dispositive while Supreme Court of the United States and the Court of Appeals for the Armed Forces (CAAF) jurisprudence was evolving.

During trial, the trial counsel used a PowerPoint presentation for his opening statement that included a slide of the cover memorandum and another slide of the first page of the DD Form 2624. Verbatim Record at 309-16; AE XXVII. No other pages from PE 3 were used in the presentation. AE XXVII. Trial counsel directed the members' attention to the abbreviation of "C-O-C" in Block G, the "Result" block on DD Form 2624, and informed the members that "C-O-C" stood for "cocaine." Verbatim Record at 331.

During its case in chief, the Government called Mr. Fuller, a certifying official who works at the Fort Meade laboratory, as a forensic drug testing expert witness. Mr. Fuller did not participate in the testing of the appellant's sample and his signature was not included anywhere in PE 3. *Id.* at 390. Mr. Fuller testified to the reliability of the lab's tests, the chain of custody within the lab, how the lab generates the test results, and the results of the tests performed on the appellant's urine sample. Mr. Fuller utilized certain pages of PE 3 while testifying, including DD Form 2624, which trial counsel presented on the members' monitors for part of Mr. Fuller's direct testimony. Mr. Fuller stated three different times that someone from the lab signs the form to certify the results. *Id.* at 362, 366, 367. Mr. Fuller also stated that he knew that the appellant's specimen was positive for cocaine metabolite because of "[t]hat C-O-C annotate [sic] in the results column." *Id*. at 368.

Later, during his direct testimony, Mr. Fuller gave a detailed review and explanation of the underlying laboratory data in the computer print-outs, which were also included in PE 3 and displayed to the members. Based upon his expert experience, Mr. Fuller concluded from his review of the computer print-outs that the sample contained the metabolite for cocaine above the Department of Defense cutoff level.

The Government also called the urinalysis observer and the command urinalysis coordinator, who both testified that the urinalysis was free from error other than a small amount of urine on the outside of the sample container. No witnesses testified that they had seen the appellant use cocaine. The

only evidence that the appellant wrongfully used a controlled substance was his positive urine sample.

The appellant took the stand in his own defense and denied ever having knowingly used cocaine, though he did speculate that he may have inadvertently come into contact with cocaine at several bars the prior weekend. The appellant also presented the testimony of an expert witness who questioned the quality control methods used in the laboratory, as well as the validity and accuracy of the testing conducted on the appellant's sample.

Testimonial Hearsay

We review a military judge's decision to admit evidence for an abuse of discretion; however, we review *de novo* whether the evidence contains testimonial hearsay. *United States v. Blazier (Blazier I)*, 68 M.J. 439, 441-42 (C.A.A.F. 2010).

At the time of the appellant's trial, *Magyari* was the leading case applying *Crawford* to the admission of drug testing reports within the military justice system. However, we analyze whether a statement is testimonial by focusing "on the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing." *United States v. Sweeney*, 70 M.J. 296, 302 (C.A.A.F. 2011). Under these principles, the CAAF has held that a cover memorandum that certified drug test results, and Block H, the certification line, on DD Form 2624 were testimonial hearsay. *Sweeney*, 70 M.J. at 302-03. At the same time, the CAAF has also held that "machine-generated data and printouts are not statements and thus not hearsay," because, "machines are not declarants." *United States v. Blazier* (*Blazier II*), 69 M.J. 218, 224 (C.A.A.F. 2010). Therefore, only some sections of a drug testing report may be testimonial, and we must review each section individually.

We completed such an inquiry in *United States v. Tearman*, 70 M.J. 640 (N.M.Ct.Crim.App. 2012), and the CAAF recently affirmed our decision, *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013), so we apply the same reasoning in this case. Here, the Government concedes that the cover memorandum is testimonial hearsay under the holding in *Blazier I*, 69 M.J. at 221 n.1. The Government also concedes that Block G, the "Result" block, and Block H, the "Certification" line, on DD Form 2624 are both testimonial hearsay under *Sweeney*, 70 M.J. at 302. We agree. At the same time, we find that the 12 pages of internal chain of custody and review documents are not

testimonial, because they "were made under circumstances, which, taken as a whole, establish that they were made for an administrative rather than an evidentiary purpose." *Tearman*, 2013 CAAF LEXIS 296, at *18 (citing *Sweeney*, 70 M.J. at 302). Lastly, the 21 pages of computer generated print-outs are not hearsay because they were generated by a machine. *Blazier I*, 69 M.J. at 224.

Accordingly, the military judge's admission of the cover memorandum, and the "Results" and "Certification" blocks of DD Form 2624, over the appellant's objection, was error. The remainder of PE 3 was not testimonial hearsay, and therefore the military judge did not abuse his discretion by admitting that evidence.

Prejudice Analysis

We must determine whether the appellant was prejudiced by the erroneous admission of the testimonial hearsay. We review *de novo* whether a constitutional error was harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

To determine whether the testimonial hearsay was harmless beyond a reasonable doubt, we review the entire record to establish, "'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)). The test is not whether "the evidence is legally sufficient to uphold [the appellant's] conviction without the erroneously admitted evidence." *Id.* (citing *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963)). Rather, the Government has the burden and 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)).

As we review the record, 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. *See Sweeney*, 70 M.J. at 306. This test includes the following factors: 1) the importance of the testimonial hearsay in the prosecution's case; 2) whether it was cumulative with other evidence; 3) the presence of corroborating evidence; 4) the extent of cross-

examination otherwise permitted, and; 5) the overall strength of the prosecution's case. *Van Arsdall*, 475 U.S. at 684. This is not an exhaustive list, and we must make our determination "on the basis of the entire record." *Sweeney*, 70 M.J. at 306 (quoting *Blazier I*, 69 M.J. at 227).

Having applied the *Van Arsdall* factors in this case, we find that the first and fifth factors weigh heavily in favor of the appellant, and therefore we are not convinced beyond a reasonable doubt that the testimonial hearsay did not contribute to the appellant's conviction.

The appellant had been on active duty for nearly 19 years at the time of the alleged offense, and had no prior disciplinary issues. Throughout his career, the appellant had been randomly drug tested approximately 3-4 times a year and there was no evidence that any other test was problematic. At the time of this urinalysis, the appellant had worked at a counter-drug operations command since 2005. The defense's strategy at trial was that the appellant may have unknowingly ingested cocaine while at a bar, and the appellant took the stand and testified that he did not use cocaine. Three different witnesses, a Navy commander (0-5), a former Navy lieutenant (0-3), and a chief operations specialist (E-7), testified that they believed the appellant had good military character and that he was truthful. No witnesses testified that the appellant used drugs, the appellant did not make any admissions to illicit use, and the Government did not present any paraphernalia or physical evidence of drug use. Thus the only evidence presented against the appellant was the positive drug test. This set the case up as a battle of the experts, and made the improper testimonial hearsay very important to the Government's case.

The appellant's expert raised concerns about quality control methods used in the laboratory (as evidenced by an unreported date discrepancy in the chain of custody documents), and questioned the validity and accuracy of the testing conducted on the appellant's sample (due to significant differences in the values reported during the screen and confirmatory tests, and an apparent voltage surge that occurred during testing). Weighing against that evidence was testimony presented by the Government's expert, Mr. Fuller, who testified that he had reviewed the drug tests and concluded that the appellant's urine contained the metabolite for cocaine above the Department of Defense cutoff level, and that no significant problems affected the validity of those results. Had that been

the totality of Mr. Fuller's testimony, there would not be a problem in this case. However, Mr. Fuller used the improper testimonial hearsay to bolster his own expert opinion. Mr. Fuller stated three separate times that the results on DD Form 2624 were "certified," and thus indirectly asserted (since he was not the certifying official) that another expert also reviewed and approved the positive cocaine result. Verbatim Record at 362, 366. This testimony significantly assisted the Government's case by showing that two experts, not just one, believed that the specimen was properly tested and positive for cocaine.

Conclusion

Having viewed the entire record, we are convinced that it was prejudicial error to admit the testimonial portions of PE 3. Accordingly, the findings and sentence are set aside. Arts. 59(a) and 66(c), UCMJ. A rehearing is authorized. Art. 66(d), UCMJ.

For the Court

R.H. TROIDL
Clerk of Court