

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

**Before  
L.T. BOOKER, J.K. CARBERRY, E.C. PRICE  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**DESMOND J. HORTON  
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 201000481  
SPECIAL COURT-MARTIAL**

**Sentence Adjudged:** 26 May 2010.

**Military Judge:** Maj Stephen F. Keane, USMC.

**Convening Authority:** Commanding Officer, Headquarters and  
Headquarters Squadron, Marine Corps Air Station, Yuma, AZ.

**Staff Judge Advocate's Recommendation:** Maj H.J. Redman,  
USMC.

**For Appellant:** LT James W. Head, JAGC, USN; LT Michael  
Hanzel, JAGC, USN.

**For Appellee:** Maj William C. Kirby, USMC.

**15 March 2011**

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**OPINION OF THE COURT**  
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**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS  
OPINION DOES NOT SERVE AS PRECEDENT.**

PER CURIAM:

A special court-martial composed of members with enlisted representation convicted the appellant, contrary to his pleas, of wrongfully using Methylenedioxymethamphetamine (MDMA), in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912. The approved sentence included confinement for two months, reduction to pay grade E-1, forfeiture of \$964.00 pay per month for two months, and a bad-conduct discharge.

The appellant raises two errors on appeal: (1) that admission of Prosecution Exhibit 3, the entire Navy Drug

Screening Laboratory report, violated his Sixth Amendment right to confrontation; and, (2) that his trial defense counsel was ineffective by failing to object to the admission of PE 3.

After careful examination of the record of trial and the parties' pleadings, 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 occurred. Arts. 59(a) and 66(c), UCMJ.

### **Background**

On 19 February 2010, pursuant to a unit sweep urinalysis, the appellant provided a urine sample that was subsequently tested by the Navy Drug Screening Laboratory, San Diego (NDSL). The urine sample tested on 3 March 2010 and returned positive for the metabolite of MDMA, commonly known as ecstasy. The NDSL prepared a 53-page report that was admitted into evidence, without defense objection. Although the report principally contained, *inter alia*, raw, computer-generated data, chain-of-custody documents, and occasional handwritten annotations, pages two and three of the report contained a summary of the lab results and a certificate of authenticity for the urine sample bottle. The summary and certificate of authenticity were prepared on 31 March 2010. The summary included the lab accession number for the appellant's urine sample bottle, the date and condition of the bottle when it was received, a notation that immunoassay tests were positive and that the GC/MS Confirmation resulted in a nanogram level of 506 ng/ml, and finally, a table of the drug groups and their corresponding immunoassay and GC/MS cutoff levels.

The Government did not call the NDSL lab technicians whose names appeared on the lab report and chain of custody documents, and who reviewed the appellant's paperwork, tested his urine sample, or prepared the lab report; nor did they call the chemist who prepared to summary and certificate of authenticity. Instead, Mr. [P], a chemist and expert witness from NDSL, testified as to urine sample handling procedures, testing reliability and report generation, and the results of the tests on the appellant's urine sample.

### **Analysis**

In the absence of an objection,<sup>1</sup> issues of admissibility of evidence are waived, and we will grant relief only if the admission of such evidence constitutes plain error. *United States v. Gilley*, 56 M.J. 113, 122 (C.A.A.F. 2001). In order to prevail under a plain error analysis, the appellant must demonstrate that: (1) there was an error; (2) it was plain or obvious; and, (3) the error materially prejudiced a substantial

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<sup>1</sup> See record at 110-11, where defense counsel states that he has no objection to PE 3.

right. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). "In the context of a constitutional error, the burden is on the Government to establish that the admission of the evidence was harmless beyond a reasonable doubt." *United States v. Carter*, 61 M.J. 30, 35 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 465 n\* (C.A.A.F. 1998)). The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is "whether, beyond a reasonable doubt, the error did not contribute to the defendant's conviction or sentence." *United States v. Kaiser*, 58 M.J. 146, 149 (C.A.A.F. 2003) (quoting *United States v. Davis*, 26 M.J. 445, 449 n.4 (C.M.A. 1988)).

The appellant was tried on 26 May 2010, approximately two months after the decision in *United States v. Blazier*, 68 M.J. 439, 443 (C.A.A.F. 2010), in which the court held that a drug testing report cover memorandum that summarized the lab results and confirmed the presence of certain substances in the appellant's urine at concentrations above the DOD cutoff level was testimonial and thus implicated the Confrontation Clause. The court, however, reiterated its holding in *United States v. Magyari*, 63 M.J. 123, 126 (C.A.A.F. 2006) that the data entries of lab technicians were non-testimonial hearsay where the urine sample was taken pursuant to a random inspection, the urine sample was not equated to particular individual, lab technicians were merely cataloging the results of routine tests and not serving in a law enforcement capacity.

In light of the circumstances surrounding the collection and testing of the appellant's urine, i.e., collected pursuant to a unit sweep, the sample was not identified by his name, it was tested with a batch of 100 other anonymous samples, and there is no evidence that the technicians who tested the urine equated specific samples with particular individuals or were serving in a law enforcement capacity, and consistent with both *Blazier* and *Magyari*, we find that the laboratory report, less the summary and certificate of authenticity, was non-testimonial. Accordingly, it was not error to admit that portion of the lab report as a record of regularly conducted activity of the NDSL that qualifies as a business record under MILITARY RULE OF EVIDENCE 803(6), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.), a firmly rooted hearsay exception. See *Magyari*, 63 M.J. at 126-27.

As to the report summary and Certificate of Authenticity for Empty Urine Bottle, we find those portions of PE 3 were testimonial. See *Blazier*, 68 M.J. at 443. Notwithstanding the lack of an objection by defense counsel, we will assume without deciding that the military judge erred in admitting the summary and authentication pages contained in PE 3 and that the error was plain and obvious.

We now review the record to determine whether the error contributed to the appellant's conviction or sentence. After carefully considering the entire record we are convinced beyond a

reasonable doubt that the error did not contribute to the appellant's conviction or sentence.

First, the appellant never disputed that his urine sample tested positive for MDMA. Instead, the defense strategy focused on the fact that the appellant's urine sample was only marginally above, 6 nanograms, the DoD cutoff and that at such a low level the appellant's ingestion of ecstasy could have been unknowing. Second, all of the information contained in the summary and urine bottle authenticity pages was contained in subsequent pages of the report. Third, the Government's case relied principally on the actual laboratory testing results and the appellant's sworn statement admitting that during a long weekend, ". . . I suspect I unknowingly consumed illegal substance due to my inebriation." PE 2. Fourth, the expert witness made only a very brief reference to the summary and authenticity pages during his direct examination and did not refer to them substantively. Record at 114. Instead, the vast majority of the expert's testimony focused on a detailed review and explanation of the actual lab report which contained all the information in the summary and urine sample authenticity pages. Fifth, the appellant cross-examined the expert witness regarding the nanogram level reflected on the summary page. *Id.* at 135-36. Finally, the summary page and urine bottle authentication were cumulative with the information contained in the actual lab report.

Accordingly, we are convinced beyond a reasonable doubt that the error in admitting the summary and urine sample bottle authentication pages did not contribute to the appellant's conviction or sentence.

#### **Ineffective Assistance of Counsel**

The appellant maintains that his trial defense counsel was ineffective by failing to object to PE 3.

In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that his counsel's performance was so deficient that (1) he was not functioning as counsel within the meaning of the Sixth Amendment, and (2) that his counsel's deficient performance rendered the results of the trial unreliable or fundamentally unfair. See *Strickland v. Washington*, 466 U.S. 668 (1984). Although a successful ineffectiveness claim requires a finding of both deficient performance and prejudice, there is no requirement that we address "both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. In this instance, the appellant fails to establish any prejudice stemming from the admission of the report summary or urine bottle authentication.

As discussed earlier, the information contained in these two documents was simply a more concise synopsis of the information contained in the non-testimonial portions of PE 3 which was properly admitted into evidence as a record of regularly

conducted activity of the NDSL that qualifies as a business record under MIL. R. EVID. 803(6), a firmly rooted hearsay exception. See *Magyari*, 63 M.J. at 126-27. Secondly, the expert witness' opinion that the appellant's urine contained the drug MDMA was based on a review of entire documentation package and not merely the summary. See Record at 111-31. Finally, the appellant's defense did not focus on whether MDMA was present in his urine. Rather, the appellant contended that his ingestion of MDMA was unknowing and that the low nanogram level indicated that he could have ingested the drug without having felt its effects. Under these circumstances, we find that the appellant suffered no prejudice as a result of admitting the summary report and the urine bottle authentication.

### **Conclusion**

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL  
Clerk of Court