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

Before
J.K. CARBERRY, R.Q. WARD, M.D. MODZELEWSKI
Appellate Military Judges

UNITED STATES OF AMERICA

v.

STEPHEN C. ALICEA
STAFF SERGEANT (E-6), U.S. MARINE CORPS

NMCCA 201100366
SPECIAL COURT-MARTIAL

Sentence Adjudged: 15 April 2011.
Military Judge: Maj Robert G. Palmer, USMC.
Convening Authority: Commanding Officer, Sixth Marine Corps District, Marine Corps Recruit Depot/Eastern Recruiting Region, Parris Island, SC.
Staff Judge Advocate's Recommendation: LtCol E.R. Kleis, USMC.
For Appellant: LT Toren G. Mushovic, JAGC, USN.
For Appellee: Capt Samuel C. Moore, USMC.

12 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.

MODZELEWSKI, Judge:

A special court-martial composed of members convicted the appellant, contrary to his pleas, of a single specification of wrongful use of cocaine 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.

The appellant assigns one error: that the military judge abused his discretion by admitting, over defense objection, testimonial hearsay in violation of his Sixth Amendment right to confrontation. After careful examination of the record of trial and the parties' pleadings, we conclude that testimonial hearsay was erroneously admitted. Because we conclude that there is a "reasonable possibility that the evidence complained of might have contributed to the conviction,"[1] we set aside the findings of guilty and the sentence.

Background

The appellant was one of approximately one hundred Marines in his unit who participated in an annual all-hands urinalysis. His urine sample was packaged with the others and shipped to the Navy Drug Screening Laboratory (NDSL), Jacksonville, Florida, where it was assigned a laboratory accessing number (LAN) and tested. The sample screened, rescreened, and confirmed for the presence of cocaine above the DoD cutoff level. The NDSL subsequently reported the appellant's urine sample as positive.

Prior to trial, the appellant unsuccessfully moved *in limine* to exclude Prosecution Exhibit 2, the "Drug Testing Report" (DTR), as testimonial hearsay. The trial counsel argued successfully that the Government had complied with *Blazier II* by removing the cover memorandum from the DTR package and that the remainder of the DTR package was nontestimonial hearsay, citing *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006).

At trial, the Government then called Mr. Robert Sroka, a senior forensic chemist and expert witness from the NDSL, to testify about the contents of the DTR. Trial defense counsel objected to his testimony, again arguing that the DTR contained testimonial hearsay, that Mr. Sroka was not involved in the testing or certifications contained therein, and that Mr. Sroka's testimony was a conduit for this inadmissible hearsay.

The military judge overruled the objection, and Mr. Sroka testified at length as to the NDSL's mission, the accessioning and testing methodology used, and the contents of PE 2. In his testimony concerning PE 2, Mr. Sroka testified specifically about the specimen custody document, DD 2624, the official Department of Defense form used by the NDSL for certifying and

[1] *United States v. Blazier (Blazier II)*, 69 M.J. 218, 227 (C.A.A.F. 2010) (quoting *Chapman v. California,* 386 U.S. 18, 23 (1967)).

reporting urinalysis test results.[2] In addition to reporting the official test result for any positive sample in Block G, Block H certifies "that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated." In the instant case, Block G reflected that the appellant's sample tested positive for "cocaine," and Block H was signed by two Final Certifying Laboratory Officials (FCLOs), LT L.A. Estralla, who was in training, and R. Flowers.[3]

In addition to some more general responses concerning the certification on the specimen custody document, Mr. Sroka testified as follows:

> A: Block H is the certification block. In other words, after a scientist has concluded that a particular drug is present, that scientist will sign that particular area, basically certifying that they are concluding that result. . . . There are actually two signatures here, and I do recognize both of them.
>
> . . . .
>
> Q: And so essentially this particular report has been viewed twice?
>
> A: Well, actually, in effect, it's been reviewed four times, twice by these two individuals at the time of reporting. There was another individual that actually verified all of these results prior to sending this package to the courts,[4] and then, of course, I had to review all of the data myself prior to testifying. So four individuals have actually looked at this data.
>
> Q: Have you all come to the same conclusion?
>
> A: And we have all come to the same conclusion that this particular test result was correctly and accurately reported.[5]

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[2] Record at 125-28.

[3] *Id.* at 127-28; PE 2 at 1.

[4] This appears to be a reference to the certification on the cover memorandum, which had been removed from the DTR in compliance with *Blazier*.

[5] Record at 128.

During the remainder of his lengthy direct examination, Mr. Sroka also testified that, based upon his review of the DTR, the urine sample associated with the appellant's LAN contained the cocaine metabolite above the DoD cutoff limit.

In his closing argument, the trial counsel argued these facts as follows: "The sample that the Naval Drug Screening Laboratory tested came back positive for cocaine not once, not twice, but three times and that sample that the drug laboratory tested was reviewed, analyzed, and certified by four separate individuals for each of the three tests."[6]

Thus the issue presented is whether the military judge abused his discretion in admitting, over defense objection, testimonial hearsay contained within PE 2 and Mr. Sroka's repetition of that testimonial hearsay, and in doing so violated the appellant's Sixth Amendment right to confrontation. In light of the recent holding in *United States v. Sweeney*,[7] we find that the military judge erred in admitting the certifications contained on the specimen custody document, as those certifications contained testimonial hearsay; that he erred in allowing Mr. Sroka to testify about those same certifications; and that, in the context of this case, these errors were not harmless beyond a reasonable doubt.

Discussion

In *Sweeney*, the Court of Appeals for the Armed Forces (CAAF) held that the specimen custody document of the DTR was testimonial.[8] The court determined that the certification on the document was a formal, affidavit-like statement of evidence that not only presented the machine generated results, but also indicated "that the laboratory results . . . were correctly determined by proper laboratory procedures, and that they are correctly annotated."[9] Although a forensic chemist from the NDSL testified in *Sweeney*, the FCLO who signed the specimen custody document was not called as a witness. Because the declarant of the certificate, the FCLO, was not subject to cross-examination,

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[6] *Id.* at 201.

[7] 70 M.J. 296, 302 (C.A.A.F. 2011).

[8] *Id*. at 304. Because this case went to trial four months prior to the decision in *Sweeny,* counsel and the military judge did not have the benefit of the decision in *Sweeney* or the lengthy overview and analysis provided therein.

[9] *Id.* (citation and internal quotation marks omitted).

the CAAF found that admission of the specimen custody document violated the Confrontation Clause. *Blazier II,* which preceded *Sweeney,* held that, where testimonial hearsay is admitted, the Confrontation Clause is satisfied only through confrontation of the actual declarant, not a surrogate or substitute expert witness, even when that witness is equally or more qualified.[10]

In the instant case, Blocks G and H of the specimen custody document, present a formalized, conclusory affirmation that is identical to the certification in *Sweeney*. Consequently, we find these two portions of the specimen custody document to be testimonial hearsay and their admission, over defense objection, to be in error: the FCLOs who signed the attestation were not subject to cross-examination, and the testimony of Mr. Sroka as a substitute or surrogate witness did not satisfy the Confrontation Clause. Moreover, the testimony of Mr. Sroka concerning the certification was also admitted in error, as an expert may not act as a conduit for repeating the inadmissible testimonial hearsay of another.[11]

Prejudice

We turn next to a determination of prejudice. Evidence admitted in violation of the Confrontation Clause is subject to the harmless error test set forth in *Chapman* to determine "whether the error is harmless beyond a reasonable doubt."[12]

Mr. Sroka could have arrived at an expert opinion based on his training, education, experience, and admissible evidence alone. In arriving at his independent expert opinion, he is allowed to consider, but not repeat, the inadmissible testimonial hearsay evidence.[13] That expert opinion, coupled with other admissible evidence, may have been legally sufficient to establish the presence of cocaine metabolite in the appellant's urine sample.[14] But in assessing harmlessness in the constitutional context, the question is not whether the evidence is legally sufficient to uphold a conviction without the

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[10] 69 M.J. at 223.

[11] *Id.* at 225.

[12] *United States v. Upham*, 66 M.J. 83, 86 (C.A.A.F. 2008).

[13] *Blazier II*, 69 M.J. at 226.

[14] *See United States v. Barrow*, 45 M.J. 478, 479 (C.A.A.F. 1997).

erroneously admitted evidence.[15] Instead, "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[16] This determination is made on the basis of the entire record, and its resolution will vary depending on the facts and particulars of the individual case.[17]

In making this determination, we apply the balancing test established by the Supreme Court in *Delaware v. Van Arsdall*,[18] and adopted by the CAAF.[19] This test considers 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.[20] Applying these criteria and after a careful review of the entire record, we cannot find that the error in admitting this evidence was harmless beyond a reasonable doubt.

The dispositive factor in our analysis is the importance of this testimonial evidence to the Government's case. Mr. Sroka testified exhaustively under direct examination from trial counsel and the military judge about the procedures at NDSL and the science behind the testing methods. He offered his own independent assessment based on the underlying test data contained in the specimen custody document. However, trial counsel sought to bolster Mr. Sroka's testimony with the hearsay certifications by two other FCLOs, directing Mr. Sroka in the line of questioning quoted above, and highlighting that his conclusions had been confirmed by others. When Mr. Sroka refers to four individuals who reviewed the material and came to the same conclusion (himself, the two FCLOs and "another individual that actually verified all of these results prior to sending this package to the courts"), the other three are truly "absent witnesses."

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[15] *Blazier II*, 69 M.J. at 227 (citing *Fahy v. Connecticut*, 375 U.S. 85, 86 (1963)).

[16] *Chapman*, 386 U.S. at 23 (citations and internal quotation marks omitted).

[17] *Blazier II*, 69 M.J. at 227.

[18] 475 U.S. 673, 684 (1986).

[19] *Sweeney*, 70 M.J. at 306; *United States v. Gardinier*, 67 M.J. 304, 306-07 (C.A.A.F. 2009); *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).

[20] *See Sweeney*, 70 M.J. at 306.

Additionally, the Government clearly believed this testimony and the hearsay certifications themselves to be important, as trial counsel highlighted them in his closing argument, arguing "that sample that the drug laboratory tested was reviewed, analyzed, and certified by four separate individuals for each of the three tests." In drawing out Mr. Sroka's testimony about the other certifications and referencing the testimonial hearsay in his argument, trial counsel demonstrated the importance of the multiple certifications to his case.

Because the testimonial hearsay was admitted in error, repeated by Mr. Sroka, and relied upon by trial counsel in argument, we are convinced that there is a reasonable possibility that the testimonial evidence contributed to the conviction.

Conclusion

After reviewing the entire record and balancing the factors articulated in *Van Arsdall*, we are not convinced that the admission of the testimonial hearsay was harmless beyond a reasonable doubt. Accordingly, the findings and the sentence are set aside. The record of trial is returned to the Judge Advocate General for remand to an appropriate convening authority with a rehearing authorized.

Senior Judge CARBERRY and Judge WARD concur.

For the Court

R.H. TROIDL
Clerk of Court