

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

**Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, D.R. LUTZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**LESLIE D. PORTER
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100188
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 15 December 2010.

Military Judge: CDR Anthony Johnson, JAGC, USN.

Convening Authority: Commanding Officer, Marine Wing Communications Squadron 28, Marine Air Control Group 28, 2d Marine Aircraft Wing, U.S. Marine Corps Forces Command, Cherry Point, NC.

Staff Judge Advocate's Recommendation: Col S.C. Newman, USMC.

For Appellant: LCDR Michael Torrisi, JAGC, USN; LT Jentso Hwang, JAGC, USN.

For Appellee: CAPT Samuel Moore, USMC.

28 June 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.

MAKSYM, Senior Judge:

The court issued an opinion in this case on 26 April 2012 and issued a corrected opinion on 27 April 2012. On 29 May 2012, the Government filed a Motion for *En Banc* Reconsideration. That Motion was denied on 6 June 2012. To clarify the standard

applied by the court in resolving the assignment of error (plain error or harmless beyond a reasonable doubt) the court has *sua sponte* elected to reconsider its earlier opinion, hereby withdraws that opinion and issues this opinion in its stead.

A military judge sitting as a special court-martial convicted the appellant, contrary to his pleas, of one specification of wrongfully using marijuana and one specification of wrongfully using cocaine in violation of Article 112(a) of the Uniform Code of Military Justice, 10 U.S.C. § 912(a). The approved sentence was confinement for ninety days and a bad-conduct discharge.¹

The appellant raises one assignment of error, that the admission into evidence of portions of the Armed Forces Institute of Pathology's (AFIP) toxicological examination documents violated the appellant's Sixth Amendment right to confrontation in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

We have reviewed the parties' pleadings and the record of trial. We conclude that an error materially prejudicial to the substantial rights of the appellant was committed and will take corrective action in our decretal paragraph. Arts. 59(a) and 66(c), UCMJ.

Factual Background

On 16 September 2010, the appellant was involved in an automobile accident near Marine Corps Air Station Cherry Point that required medical attention at a civilian hospital. Record at 231. The doctors at the civilian hospital performed toxicological tests that indicated the presence of drugs in his system. *Id.* The next day, the appellant was sent for follow-up medical care at a military health care facility where medical personnel reported he appeared dazed and unable to answer simple questions. Record at 210-11.²

¹ To the extent that the convening authority's action purported to execute the bad-conduct discharge, it was a nullity. *United States v. Bailey*, 68 M.J. 409 (C.A.A.F. 2009).

² The treating physician independently ordered a toxicology screen for strictly medical purposes that indicated positive results for marijuana and cocaine. Record at 214.

While the appellant was receiving treatment, his commanding officer authorized a blood and urine sample to search for evidence of drug use. Record at 232-33; Prosecution Exhibit 8 at 2. The blood and urine samples were turned over to the Criminal Investigative Division, which sent the samples to the AFIP lab for testing. Record at 237; Prosecution Exhibit 15 at 6. AFIP performed a battery of tests and concluded that the samples were positive for illegal controlled substances, specifically marijuana and cocaine.³

The AFIP prepared a 169-page report consisting of various documents relating to the testing of the appellant's blood and urine. PE 15. While most of the report consists of computer-generated data, the report also contains several summaries of the test results with signatures by an analyst and a reviewer. Specifically, pages 54 and 154 of PE 15 summarize the results of the confirmation tests and note the following information: sample source, amount tested, concentration of substance tested, diluents amount, dilution factor, and final concentration. Both pages also contain a handwritten positive symbol, indicating the presence of metabolites for marijuana and cocaine. Both pages have plus signs indicating a positive result, and the word "present" appears on page 154. Both pages contain signatures by analysts and a reviewer.

At trial, the Government called Dr. Shippee, an expert witness with the AFIP, to lay the foundation for PE 15. Record at 261. Dr. Shippee, who was qualified as an expert witness in forensic toxicology, stated he had no supervisory role at the AFIP. *Id.* at 262.⁴ Neither the analysts nor the reviewer who signed pages 54 or 154, testified or were determined by the court to be unavailable. While detailed defense counsel objected that the exhibit violated the Confrontation Clause, the trial judge admitted PE 15 into evidence. *Id.* at 292.

Although the military judge stated on the record that he did not consider the first two pages of the report, a cover memorandum that summarized the testing results, he apparently did consider the rest of the exhibit, including pages 54 and 154. *Id.* at 328. He also considered the testimony of Dr. Shippee, who was directed by the trial counsel to testify

³ The report from AFIP was directed to "Security and Emergency Services Directorate Criminal Investigation Division." Prosecution Exhibit 15 at 1.

⁴ Dr. S testified that he is one of six AFIP expert witnesses. *Id.*

directly from pages 54 and 154.⁵ Record at 283-84. Dr. Shippee responded, "This confirmation summary page tells me that they didn't dilute the blood, they ran it straight" *Id.* at 283. He testified on cross-examination that he did not perform analysis of and was not present for any of the tests. *Id.* at 295-96. His signature does not appear on either page. PE 15 at 54, 154.

Discussion

A. Applicable Law

Whether or not evidence contains testimonial hearsay is a matter of law we review *de novo*. *United States v. Blazier (Blazier I)*, 68 M.J. 439, 441-42 (C.A.A.F. 2010). If the hearsay is testimonial, the Sixth Amendment requires otherwise admissible hearsay to satisfy the Confrontation Clause. *Id.* at 441.⁶ This requires both an unavailable witness and a prior opportunity for cross-examination. *Id.*

Although the Supreme Court has not articulated a precise definition of what constitutes testimonial hearsay,⁷ a statement is testimonial if "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *Blazier I*, 68 M.J. at 442 (quoting *Crawford*, 541 U.S. at 51-52)). In the context of drug laboratory reports, the Court of Appeals for the Armed Forces (CAAF) has recently re-focused attention to the purpose behind each statement in the report, rather than the purpose for the original collection of evidence. "[M]ore recent case law demonstrates that the focus has to be 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." *Sweeney*, 70 M.J. at 302. In other words, "would it be reasonably foreseeable to an objective person that the purpose of any individual statement in a drug testing report is evidentiary?" *Id.*

⁵ Trial counsel referred to page 52 but it is clear from the testimony he was reading from page 54. Record at 283.

⁶ The Sixth Amendment of the Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. amend. VI.

⁷ The Court of Appeals for the Armed Forces has observed that "reasonable minds may disagree about what constitutes testimonial hearsay" *United States v. Blazier (Blazier II)*, 69 M.J. 218, 222 (C.A.A.F. 2010).

We therefore must consider each portion of the laboratory report being admitted into evidence and determine whether it individually satisfies the Confrontation Clause. *Id.* CAAF has held that machine-generated data and printouts are not statements and thus not hearsay because machines cannot be considered declarants. *Id.* at 301; *Blazier II*, 69 M.J. at 224. However, a formalized certification of results does constitute testimonial hearsay. *Sweeney*, 70 M.J. at 301; *Blazier I*, 68 M.J. at 443. As CAAF observed in *Sweeney*, once a sample initially tests positive, "analysts must reasonably understand themselves to be assisting in the production of evidence when they perform re-screens and confirmation tests and subsequently make formal certifications. . . ." 70 M.J. at 302-03.

We must also consider how each portion of a report is admitted into evidence. In *Bullcoming v. New Mexico*, the Supreme Court held that the Confrontation Clause does not allow the Government to present a laboratory report containing testimonial hearsay through in-court testimony by an analyst who did not sign the certification or personally perform or observe the performance of the tests. 131 S. Ct. 2705, 2716 (2011); see also *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Blazier II*, 69 M.J. at 226 (holding inadmissible under Confrontation Clause and MILITARY RULE OF EVIDENCE 703, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) expert testimony about statements in cover memoranda concerning what tests were conducted, substances detected, and levels detected).

B. Analysis

The initial question that must be answered is what, if any, portions of PE 15 are in fact statements, vice admissible computer-generated information. *Sweeney*, 70 M.J. at 301. The military judge did not consider the first two pages of PE 15 because he deemed them to be testimonial hearsay. Record at 328. However, he did consider the rest of the drug report packet, including pages 54 and 154. These pages are summaries of tests that indicate the presence of cocaine metabolites and tetrahydrocannabinol (THC) metabolites. PE 15 at 54, 154; Record at 277.

While the information contained on pages 54 and 154 is largely technical and is buttressed by pages of technical data, there are also two signature blocks on both pages, one preceded by the words "ANALYZED BY:", the other "REVIEWED BY:." PE 15 at 54, 154. The former has a typed name in the signature block, the latter an actual signature. *Id.* Immediately above these

signature blocks are the test results and then the words "CONTROL(S) AND STANDARD(S) WITH TOXNO: 10-4748." *Id.* This information seems to indicate that the analyst and reviewer were ensuring quality control by checking the "CONTROL(S)" and "STANDARD(S)" of the tests performed on the appellant's blood and urine. Although there is no formal statement of certification, these pages effectively serve the same purpose as the cover memorandum the military judge explicitly refused to consider. See *Sweeney*, 70 M.J. at 304 (military judge erred in admitting specimen custody document certification because it contained not just machine-generated results, but also indicated quality of testing procedures). The typed and printed signatures following the "ANALYZED BY:" and "REVIEWED BY:" can serve no other purpose in our view than to certify that the "CONTROL(S) and STANDARD(S)" in the appellant's tests were met, particularly as the test results, the "CONTROL(S) AND STANDARD(S)" language, and the signature blocks follow in direct sequence. PE 15 at 54, 154. As certifications, pages 54 and 154 are properly considered statements rather than mere technical data.

Having determined that pages 54 and 154 are statements, we must now determine whether they were testimonial in nature. It is clear that they were. The appellant's blood and urine were tested for alcohol and drugs at the specific request of his commanding officer, who suspected the appellant of being under the influence of alcohol or drugs. Record at 232-33. PE 8 at 2. The samples were sent to the AFIP by criminal investigators, as opposed to the command urinalysis coordinator. Record at 237. Most importantly, the AFIP expert, Dr. Shippee, testified that the technicians knew the purpose of each test based on the nature of the sample. *Id.* at 268. According to Dr. Shippee, upon receiving a package:

They then log it into a book, and they open up the specimen and they determine what it is. If it is postmortem, you are probably going to (sic) tissue that you have the (sic) process. So that would have to be laid out. If it is a criminal investigation, it will be urine and blood.

Id. at 267-68. The AFIP technicians, according to the AFIP expert, know at the start of the testing process which samples are destined for use as evidence in criminal investigations. In other words, it would have been "reasonably foreseeable to an objective person that the purpose of any individual statement in a drug testing report is evidentiary." *Sweeney*, 70 M.J. at 302.

As such, these statements, memorialized on pages 54 and 154 of PE 15, must be considered testimonial in nature.

As testimonial hearsay, the appellant had the right to confront the analysts and reviewers who made the statements found in PE 15, pages 54 and 154. *Crawford v. Washington*, 541 U.S. 36, 51 (2004). This right of confrontation was not satisfied with the testimony of the prosecution's expert witness from the AFIP, Dr. Shippee, because he did not participate in any phase of the testing process. Record at 261-96. Regardless of the expert witness' specialized knowledge, the appellant had the right to confront the actual declarants, absent a finding of unavailability or prior opportunity to cross-examine them. *Sweeney*, 70 M.J. at 304. Because no finding of unavailability was made and the appellant did not have a chance to cross-examine the declarants, the admission of their testimonial hearsay violated his right to confrontation pursuant to the Sixth Amendment of the Constitution. *Id.*; see also *Crawford*, 541 U.S. at 61.

Whether a constitutional error is 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). "Where . . . the alleged error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt." *Sweeney*, 70 M.J. at 304. We ask whether there is a "reasonable possibility" that the challenged evidence contributed to the conviction. *Chapman v. California*, 386 U.S. 18, 23 (1967). To meet this burden, the Government must demonstrate that there is no reasonable possibility that the testimonial hearsay contributed to the contested findings of guilty. *United States v. Othuru*, 65 M.J. 375, 377 (C.A.A.F. 2007)

In order to determine whether the constitutional error was harmless beyond a reasonable doubt or whether the appellant suffered prejudice, we apply the balancing test established by the Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) and adopted by CAAF.⁸ We examine: (1) the importance of testimonial hearsay in the prosecution's case, (2) whether it

⁸ The question is not whether the evidence without the erroneously admitted portions was otherwise legally sufficient to uphold a conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86, 84 S. Ct. 229 (1963). The determination of prejudice "is made on the basis of the entire record, and its resolution will vary depending on the facts and particulars of the individual case." *Blazier II*, 69 M.J. at 227.

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. *Id.* at 684; see also *Sweeney*, 70 M.J. at 306.

With respect to the first factor, pages 54 and 154 of PE 15 were heavily relied upon by the Government. Although the AFIP report contained many other pages documenting the drug tests performed on the appellant's blood and urine, the Government focused largely on pages 54 and 154. Record at 283-87. Trial counsel specifically directed Dr. Shippee to these pages when reviewing PE 15. Dr. Shippee referred to them as "confirmation summary page[s]" and read directly from them when offering his opinion regarding the results. Trial counsel stressed the test results from PE 15 and the conclusions Dr. Shippee drew from those results in his closing argument. Record at 318-19. As such, these results were the most important evidence in the Government's case.

Aside from PE 15, there was little evidence supporting the reliability and accuracy of the standards and controls used during the appellant's drug test at the AFIP facility. Within PE 15, however, there is a great deal of cumulative and corroborative information, namely the charts, graphs, and technical data that form the basis for the summaries found on pages 54 and 154. The real issue in this case is the usefulness of this information. It is instructive to consider the Government's focus on pages 54 and 154 during the trial, rather than on the other pages of PE 15. Record at 284-87. This tells us that the underlying technical data in PE 15 requires interpretation, reinforcing the importance of Dr. Shippee's testimony.

The witnesses required to satisfy the confrontation clause with respect to pages 54 and 154 of PE 15 and their testimonial implications were the analysts and reviewers whose names appear on the documents. Because none of these AFIP personnel testified at trial, there was no confrontation of these individuals or their personal attestations as to the testing. The defense counsel was, however, free to cross-examine Dr. Shippee on the validity and safeguards in the procedures used.

Overall, the Government had a strong case and was not wholly dependent upon pages 54 and 154 of PE 15. The Government presented evidence that a drug test performed on 17 September 2010 in the emergency room indicated the presence of both

cocaine and marijuana chemicals in the appellant's blood.⁹ PE 7. This test was initiated by LT Johnson, the treating physician at the Naval medical clinic who observed the appellant and was immediately concerned that he had an injury or was under the influence of narcotics, alcohol, or both. Record at 210-12. Additionally, the non-testimonial portions of PE 15, while not nearly as clear and succinct as pages 54 and 154 of the exhibit, do convey a large amount of information regarding the blood and urine results as well as the accuracy of those results.

However, considering the Government's reliance on pages 54 and 154 of PE 15, we cannot say that the erroneous admission of these testimonial statements was harmless beyond a reasonable doubt. This standard requires us to be convinced not just of the appellant's guilt, but that it is not reasonably possible that these pages contributed to the conviction. *Chapman*, 386 U.S. at 23. Although the record contains other evidence indicating that the appellant used drugs, the key role played by pages 54 and 154 of PE 15 convinces us that these pages did contribute to the conviction and that their admission was not harmless beyond a reasonable doubt.

Conclusion

The findings and sentence are set aside. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who may order a rehearing.

Senior Judge PAYTON-O'BRIEN concurs.

LUTZ, Judge (dissenting):

I concur with the majority that pages 54 and 154 of Prosecution Exhibit 15 a report from the Armed Forces Institute of Pathology (the AFIP report) was testimonial hearsay and, therefore, it was error to overrule the appellant's objection and allow those pages, and Dr. Shippee's testimony regarding those pages, into evidence. However, I dissent from the majority's opinion that the error was not harmless beyond a reasonable doubt. While the introduction into evidence of pages 54 and 154 of PE 15, and the testimony by Dr. Shippee regarding those pages, was objected to by the appellant, page 44 of PE 15 (which is page 42 of the AFIP report) and Dr. Shippee's testimony regarding that page, was not objected to by the appellant. Record at 276-78. Dr. Shippee testified that the

⁹ The blood and urine used in the AFIP tests were also collected from the appellant on 17 September 2010. PE 15.

summary of the initial screening of the appellant's sample showed the presence of the metabolites for cocaine, marijuana and opiates at a sufficient level to run an expensive confirmation test, which is not done unless the lab techs are confident confirmation will occur. Record at 276-78. Additionally, Lieutenant Johnson, the appellant's treating physician at the Naval Medical Clinic, was permitted to testify without objection that she ordered her own toxicology exam on the appellant because of her knowledge of the presence of drugs from his emergency room screening the day before. She was further permitted to testify without objection regarding the results of this independent toxicology exam which is PE 7, which was also introduced and admitted into evidence without objection. Record at 212-16. Lieutenant Johnson's testimony and PE 7 both confirmed the presence of the metabolites of marijuana and cocaine (among other illicit drugs) the day after the appellant's emergency room drug screening. This evidence, combined with all the other evidence of the Government's case (including Dr. Shippee's expert opinion that the appellant's sample was positive for the presence of the metabolites of cocaine and marijuana, Record at 287), causes me to conclude that there is not a reasonable possibility that pages 54 and 154 of PE 15, and Dr. Shippee's testimony regarding those specific pages, contributed to the conviction of the appellant. Therefore, the error of admitting that evidence was harmless beyond a reasonable doubt.

For the Court

R.H. TROIDL
Clerk of Court