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

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

UNITED STATES OF AMERICA

v.

NATHAN M. ROBINSON
LANCE CORPORAL (E-3), U.S. MARINE CORPS

NMCCA 200800827
SPECIAL COURT-MARTIAL

Sentence Adjudged: 23 July 2008.
Military Judge: Maj Wilbur Lee, USMC.
Convening Authority: Commanding Officer, Center for Naval Aviation Technical Training, Marine Unit Cherry Point, MCAS Cherry Point, NC.
Staff Judge Advocate's Recommendation: Maj P.D. Hayward, USMC.
For Appellant: Maj Kirk Sripinyo, USMC.
For Appellee: Capt David N. Roberts, USMC.

30 March 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.

PER CURIAM:

A panel of members sitting as a special court-martial convicted the appellant, contrary to his plea, of one specification of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The members sentenced the appellant to a reduction to pay grade E-1, to forfeit $500.00 of pay per month for six months,

sixty days restriction, and a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

In an opinion dated 28 January 2010, this court affirmed the findings and sentence, finding no error in the admission of the drug lab report indicating the presence of cocaine metabolites in the appellant's urine. The appellant subsequently petitioned the Court of Appeals for the Armed Forces (CAAF) for review. On 20 September 2011, CAAF set aside this court's decision and returned the record to the Judge Advocate General for remand to this court "for consideration of the granted issue in light of *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011), *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010), and *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010), and to determine whether the erroneous admission of testimonial hearsay in the drug testing report was harmless beyond a reasonable doubt."

In light of the above cases, we now conclude that testimonial hearsay contained within the drug lab report was erroneously admitted against the appellant in violation of his Sixth Amendment right to confrontation. However, we conclude that the error was harmless beyond a reasonable doubt and again affirm the findings and the sentence as approved by the CA.

Background

The appellant was assigned to the Center for Naval Aviation Technical Training Marine Unit, Marine Corps Air Station, Cherry Point, North Carolina. On 17 March 2008, the appellant participated in a unit sweep urinalysis conducted by his command in which over 300 Marines provided urine samples to be tested by the Jacksonville Navy Drug Screening Laboratory (NDSL). The appellant's sample tested positive for cocaine metabolites. After the command was notified of the positive test results, the matter was referred to trial by special court-martial. The Government's case against the appellant consisted of the Drug Testing Report (DTR) from the NDSL and three witnesses. The urinalysis coordinator and observer were called to lay a foundation regarding the initial collection of the appellant's urine sample. Mr. Robert Sroka, a forensic chemist at the NDSL, testified about how urine samples are handled and how results are generated at the NDSL. He was unable to testify about the specific handling or testing of the appellant's sample as he played no role in the analysis. The Government did not call any

of the laboratory technicians at the NDSL whose names appeared on the DTR and chain of custody documents, nor did they call any person who reviewed the appellant's paperwork, who tested his urine, or who prepared the DTR.

Trial defense counsel cross-examined Mr. Sroka, but did not call any other laboratory personnel who handled or tested the appellant's urine sample. In fact, the appellant and his counsel rested their case at the conclusion of the prosecution's case-in-chief, having presented no evidence. The defense did not object to the introduction of the laboratory results into evidence.

Discussion

According to CAAF in its Order setting aside this court's decision, the testimonial hearsay at issue in this case was the "specimen custody document of the drug testing report," otherwise known as the DD 2624. In *United States v. Sweeney*,[1] CAAF held that:

> [I]t was also plain and obvious error to admit the specimen custody document certification. This certification is 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.

Pursuant to *Sweeney* and CAAF's Order in this case, we deem the DD 2624 testimonial in nature. As such, it was only admissible at trial as evidence if the declarant, one R. Flowers, was subject to cross-examination. *Id*. Given that Ms. Flowers was replaced by Mr. Sroka and did not testify, the admission of the DD 2624 "plainly and obviously violated the Confrontation Clause."[2] *Id*.

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[1] 70 M.J. 296, 304 (C.A.A.F. 2011).

[2] In order to ensure full compliance with CAAF's remand order, we have approached this review with the assumption that the DD 2624 constitutes testimonial hearsay in its entirety. However, we note that there are aspects of the DD 2624 which, if parsed from the document, are unlikely to be deemed testimonial hearsay. This may beget a narrower analysis in other cases. *See, e.g., United States v. Kilarski*, No. 201100329, 2012 CCA LEXIS 73, unpublished op. (N.M.Ct.Crim.App. 29 Feb 2012).

Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. *See United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008). In cases such as this where the error is constitutional in nature, the prejudice prong is met unless the government can show that the error was harmless beyond a reasonable doubt. *Id*. at 160. When testing for harmlessness, the "'question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)). CAAF outlined five factors to determine the level of harm caused by the error: (1) the importance of the unconfronted testimony in the prosecution's case; (2) whether that testimony was cumulative; (3) the existence of corroborating evidence; (4) the extent of confrontation permitted; and, (5) the strength of the prosecution's case. *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

Turning to the first factor, the DD 2624 was ultimately of little importance to the Government's case. Government counsel did not mention the DD 2624 during the trial, nor did the NDSL expert, Mr. Sroka. The Government focused on Prosecution Exhibits 5, 6, and 7, which are the reports of the three tests done on the appellant's urine. These reports, which were admitted without objection, indicate the presence of cocaine metabolites in the appellant's urine and, in part, record the accuracy of the procedures and chain of custody. Record at 129, 130, 136. Along with the testing reports, the Government called Mr. Sroka, who reviewed the data and testified that, in his expert opinion, they were accurate and reliable results that indicated the presence of cocaine metabolites. *Id.* at 139-40. Thus, the Government presented evidence on the two important questions in this case, cocaine use and testing reliability, without ever discussing the DD 2624. Although this form was admitted into evidence, it was of minimal importance to the Government's case.

Similarly, the DD 2624 was, on the whole, cumulative evidence. As discussed above, this document primarily serves two evidentiary purposes: First, it indicates the quality of the testing procedure; Second, it indicates the presence of drug metabolites in urine, in this case cocaine metabolites. Record at 139. Here, there was some evidence that supported the quality control aspect of the testing procedures, namely the other data as interpreted by Mr. Sroka, the chain of custody

documentation, and the testimony of the urinalysis personnel. *Id.* at 76, 90, 126; PE 5, 6, and 7. The presence of cocaine metabolites in the appellant's urine was supported by the actual testing documents, in particular the testing reports from the three tests performed on the appellant's urine.[3] PE5 and 6. This data provides information about both the testing process and the test results. Considering the other sources of evidence in this case as a whole, the DD 2624 can be considered cumulative evidence.

The portions of the DD 2624 that are properly considered testimonial hearsay were sufficiently corroborated by other evidence. Specifically, the "cocaine" stamp found in Block G was clearly based upon the results from the three tests performed on the appellant's urine. While not wholly derivate of other evidence like the "cocaine" stamp, the certification in Block H was corroborated by Mr. Sroka's testimony as well as the chain of custody documents found in Prosecution Exhibits 5, 6, and 7. The certification on the DD 2624 was, in essence, a testament of reliability. Mr. Sroka's testimony was likewise focused on accuracy, as he reviewed the data for error and opined as to its accuracy. While it may have been preferable for the defense to have the original certifier of the DD 2624, (Ms. Flowers), Mr. Sroka was also able to give a similar, corroborating, expert opinion as to the testing procedures.

The witness required to satisfy the confrontation clause as to these specific entries and their testimonial implications was Ms. Flowers, who did not testify at trial. As such, there was no confrontation of Ms. Flowers or her personal attestations as to the testing. The defense counsel was free to cross-examine Mr. Sroka on the validity and safeguards in the procedures used.

The Government's case was, in the context of a drug prosecution, strong. Leaving aside the DD 2624, the Government presented compelling evidence of the appellant's guilt to satisfy the burden of proof in this case. The three test reports establish that the appellant used cocaine. The accuracy of these reports was sufficiently established by Mr. Sroka and the chain of custody documents contained in the reports. Although trial defense thoroughly cross-examined Mr. Sroka, there was little indication that these tests were inaccurate. Taken as a whole, the Government presented a strong case, with the DD 2624 playing a relatively minimal and unimportant role.

[3] These tests were: 1) the initial immunoassay test, 2) a second immunoassay test, and 3) a gas chromatography-mass spectrometry test.

The testimonial hearsay found in the DD 2624 was of little importance to the Government's case, was cumulative with other evidence, and was corroborated by other evidence. Although the appellant was unable to confront Ms. Flowers, the overall strength of the Government's case, along with the first three factors, convinces us that the erroneous admission of the DD 2624 was harmless beyond a reasonable doubt.

Conclusion

Having determined that any error identified was harmless beyond a reasonable doubt, we again affirm the findings and the sentence as approved by the convening authority.

For the Court

R.H. TROIDL
Clerk of Court