UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	**Misc. Dkt. No. 2009-06**
Appellant	)	
	)	
v.	)	
	)	**ORDER**
Senior Airman (E-4)	)	
NICOLE A. ANDERSON,	)	
USAF,	)	
Appellee	)	**Panel No. 1**

HELGET, Senior Judge

On 01 September 2009, counsel for the United States filed an Appeal Under Article 62, UCMJ, 10 U.S.C. § 862, in accordance with this Court's Rules of Practice and Procedure.

This case is before us after the military judge denied the government's motion at trial requesting admission of the appellee's drug testing report, dated 30 March 2009.

The parties have raised two issues on appeal. The first issue is whether this Court has jurisdiction under Article 62(a)(1)(B), UCMJ, to review a military judge's ruling denying a government motion to preadmit an exhibit but establishing criteria under which the exhibit can be admitted into evidence. The second issue is whether the military judge abused his discretion by denying the prosecution's motion to preadmit the appellee's drug testing report, dated 30 March 2009.

Background

On 25 February 2009, the appellee submitted a urine specimen, pursuant to a unit sweep urinalysis inspection. The specimen was sent to the Air Force Drug Testing Lab (AFDTL), Brooks City-Base, Texas, for forensic testing. The specimen tested positive for morphine, with a concentration level of 5033 ng/ml. On 30 March 2009, the appellee was escorted to the 60th Security Forces Office of Investigations (SFOI) at Travis Air Force Base, California. During the interview, the appellee consented to provide another urine specimen, which was likewise sent to AFDTL for drug testing. The specimen tested positive for morphine with a concentration level of 8873 ng/ml. On 3 June 2009, a single charge and specification was preferred against the appellee, alleging that she wrongfully used morphine on divers occasions between 25 February 2009 and 30 March

2009. On 4 June 2009, the charge and specification were referred to a special court-martial.

On 20 July 2009, the government filed a motion for appropriate relief requesting that the military judge preadmit into evidence separate drug testing reports (DTRs) for both of the appellee's morphine drug tests that were prepared by AFDTL. On 22 July 2009, during an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, the military judge granted the government's request to preadmit the DTR from the 25 February 2009 random urinalysis but denied the government's request to preadmit the DTR from the 30 March 2009 consent urinalysis, finding the statements contained in the 30 March 2009 report to be testimonial and not admissible absent confrontation. On 23 July 2009, the government submitted its notice of appeal of the military judge's decision under Article 62(a)(1)(D), UCMJ.

Jurisdiction

The first issue is whether this Court has jurisdiction under Article 62(a)(1)(B), UCMJ, to review a military judge's ruling denying a government motion to preadmit an exhibit but establishing criteria under which the exhibit can be admitted into evidence.

Article 62, UCMJ, entitled "Appeal by the United States" provides:

> (a) (1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> . . .
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.

Article 62(a)(1), UCMJ.

The appellee argues that this Court does not have jurisdiction under Article 62 (a)(1)(B), UCMJ, to hear this case because the military judge did not exclude evidence but rather provided guidelines for the trial counsel to admit the DTR. As the appellee highlights, the military judge said, "I'm not doing away with your ability to admit the evidence. There are just caveats. If you want to admit it, you need to jump through certain hurdles in order to ensure that the Accused is afforded her Sixth Amendment[1] confrontation rights." The appellee also argues that this Court does not have jurisdiction consistent with the general principle that in limine rulings are not final. Since the

[1] U.S. CONST. amend. VI.

government only tried to preadmit, not admit the DTR, the military judge did not issue a final ruling and could change his mind during the course of the trial.

The government argues that this Court has jurisdiction because the military judge denied the government's request to admit its sole evidence concerning the second charged use of morphine. The government asserts that the military judge suggesting an alternative method by which the government might be able to admit the DTR is nothing more than mere dicta or an advisory opinion. Either way, the military judge still excluded the evidence the government was ready to introduce. The government also cites *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), wherein our superior court found jurisdiction under Article 62, UCMJ, where the military judge quashed the government's subpoena that sought video outtakes from an interview the appellant had provided to a major news organization.

We hold that this Court does have jurisdiction. In *Wuterich*, our superior court stated,

> The question before us is not simply the generic question of whether Article 62, UCMJ, permits appeal of a motion quashing a subpoena, but whether the ruling at issue in this case had the direct effect of excluding evidence. In resolving that issue, we consider whether the military judge's ruling directly limited the pool of potential evidence that would be admissible at the court-martial.

Wuterich. 67 M.J. at 75. The Court held that the military judge's decision to quash the subpoena was appealable under Article 62, UCMJ, "because it had a direct effect on whether the outtakes would be excluded from consideration at the court-martial." *Id.* at 77. In *Wuterich*, the Court denied the appellant's argument that the military judge's decision to quash the subpoena was not appealable because the military judge did not foreclose future consideration of the admissibility of the outtakes. The Court concluded that the "contingent possibility" concerning future admissibility would not "diminish the direct effect of the ruling excluding the outtakes." *Id* at 76. This is very similar to the situation in this case. By denying the admissibility of the DTR, the military judge significantly limited the pool of evidence available for that offense. Further, the military judge's suggestion of other possible ways to potentially introduce the evidence does not defeat our jurisdiction.

Confrontation Clause

The second issue is whether the military judge abused his discretion by denying the prosecution's motion to admit the appellee's DTR, dated 30 March 2009.

Relying primarily on our superior court's holding in *United States v. Magyari*, 63 M.J. 123, 124 (C.A.A.F. 2006), the military judge held that, the statements contained in

the [a]ccused's 25 February 2009 urinalysis test results are non-testimonial in that they were not made for the purpose of preserving facts for a criminal trial but were made as part of the random urinalysis drug testing program.

Concerning the statements contained in the appellee's 30 March 2009 urinalysis test results, the military judge found these to be testimonial based on the following reasons: (1) the statements were not made as part of a random urinalysis but were made pursuant to a request by law enforcement; (2) the report and the declarant's statements contained therein bear all of the characteristics of an ex parte affidavit; and (3) cross-examination may be appropriate where an individual is accused of a crime and law enforcement conducts and seeks to admit the results of bodily fluid test at trial. The military judge ruled, "if the government wishes to admit statements contained in the [a]ccused's 30 March 2009 urinalysis test results, it must either produce the declarants at trial for confrontation by the [a]ccused or show that the declarants are unavailable ***and*** that the [a]ccused had previously been given the opportunity to confront the declarants on their statements."

Relying on the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the appellee argues that the DTR is not admissible absent confrontation. The appellee asserts that the DTR essentially contains the same type of analysis that was erroneously admitted into evidence in *Melendez-Diaz.* The appellee notes that the first page of the DTR contains a handwritten annotation that indicates a positive result plus a laboratory certifying official's verification of the result with a signature appearing at the bottom of the page. Additionally, the DTR contains a certificate indicating that the sample tested positive for morphine during its initial screening. The appellee claims that she has a Sixth Amendment right to confront the lab analysts who reported the test results on her alleged urine specimen. The appellee also attempts to distinguish this case from our superior court's holding in *Magyari.* Although the Court in *Magyari* held that the statements in the lab report from the Navy Drug Screening Laboratory in San Diego, California were nontestimonial, the appellee asserts that in this case there are no facts in the record concerning how the appellee's second sample was treated or what the declarants who provided information for the DTRs were told about it. Also, as the military judge noted at trial, in *Magyari,* the Court commented, "lab results or other types of routine records may become testimonial where a defendant is already under investigation, and where the testing is initiated by the prosecution to discover incriminating evidence." *Magyari,* 63 M.J. at 127. In this case, the appellee's second sample was obtained after she was escorted to SFOI and consented to provide another sample. The appellee also distinguishes this court's holding in *United States v. Blazier*, 68 M.J. 544 (A.F. Ct. Crim. App. 2008), *pet. granted*, No. 09-0441/AF (C.A.A.F. 2009), where we held that a consent urinalysis following an earlier positive random urinalysis was non-testimonial because the second sample was treated exactly the same by the lab. The appellee argues that this case does not contain any comparable evidence about the testing of the appellee's sample or what the lab technicians were told about the sample.

The government asserts that the military judge abused his discretion by ignoring stare decisis in not following this Court's decision in *Blazier*. As noted above, in *Blazier* this Court found that drug testing results were non-testimonial under the Sixth Amendment as the only difference in the two tests in *Blazier* was that the first test was random and the second test was obtained with the appellant's consent. In both situations, the AFDTL followed the same procedures in testing the samples.

At trial, the government attempted to argue that *Blazier* was binding precedent on the court. In response, the military judge commented that he believed the Supreme Court's decision in *Melendez-Diaz* had changed the landscape. The government disagrees that either *Blazie*r or *Magyari* have been overruled by *Melendez-Diaz*. Unlike *Melendez-Diaz*, there are no affidavits included in the DTR which the government tried to introduce at trial. As the Supreme Court noted in *Melendez-Diaz*, calling the lab analysts is not the only way to prove that the substance is contraband. *Melendez-Diaz*, 129 S.Ct. at 2542 n.14. In this case, the appellee would have been afforded her Sixth Amendment right of confrontation when Dr. T testified as an expert forensic toxicologist about the results of the DTR.

The government relies on the holding in *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), where the Fourth Circuit approved the prosecution's use of drug testing reports. The Fourth Circuit held (1) that the toxicology data generated by the lab machines were not out-of-court statements of the lab technicians; (2) the data did not constitute hearsay evidence; and (3) the data was not testimonial. In *Washington*, the appellant was convicted of driving while under the influence of alcohol or drugs. The appellant was pulled over after being seen driving at 30 miles per hour over the posted speed limit. When the officer approached the appellant's car, the appellant was staring disaffectedly ahead and was unresponsive to the officer's commands. When the officer opened the appellant's door, he smelled a strong odor of phencyclidine (PCP). The officer took the appellant to a hospital where the appellant consented to give a blood sample for testing. The blood sample was sent for analyses to the Armed Forces Institute of Pathology which performs alcohol and drug testing for both military and civilian court cases. After the lab technicians subjected the blood sample to testing, the instruments printed out some 20 pages of data and graphs. The sample tested positive for ethanol and PCP.

At trial, the government offered, over the appellant's objection, the expert testimony of Dr. BL, the Director of Forensic Toxicology Laboratory of the Armed Forces Institute of Pathology. While Dr. BL did not see the blood sample and did not conduct any of the tests, the tests were conducted by lab technicians under his supervision. In his testimony, Dr. BL relied on the raw data. The appellant objected to Dr. BL's testimony arguing that his reliance upon the raw data obtained by the lab technicians violated the appellant's rights under the Confrontation Clause of the Sixth Amendment as he was entitled to confront the lab technicians. The Fourth Circuit noted that, "the inculpating 'statement'-that Washington's blood sample contained PCP and

alcohol-was made by the machine on printed sheets, which were given to Dr. [BL]. The technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by the machine." *Washington*, 498 F.3d at 230. Further, there would be no value in cross-examining the lab technicians about the data because the role of the technicians was only to operate the machine. Therefore, there was no violation of the confrontation clause because the statements to which Dr. BL testified did not come from the lab technicians. *Id*. The raw data generated by the machines were not hearsay statements. Pursuant to Fed. R. Evid. 801(a), a statement is one made by a person; therefore, the raw data generated by the machines were not the statements of technicians. Further, the reports generated by the machines were not testimonial in that they did not relate to past events but rather related to the present condition of the blood. Accordingly, the court concluded that the raw data printed by the machines are not testimonial hearsay statements; therefore, Dr. BL's testimony did not violate the confrontation clause, or the hearsay rule. *Id*. at 232.

In this case, the government also points out that the appellee's drug tests were positive for morphine, which is a controlled substance that can be lawfully prescribed by a medical provider. At the time of her tests, the lab technicians would have had no basis to know if the appellee had a valid prescription for morphine at the time she used the substance. The lab technicians had no expectation that appellee's urine specimens would result in positive outcomes that would require them to testify against the appellee at her court-martial. *Magyari*, 63 M.J. at 126.

Considering our opinion in *Blazier*, our superior court's decision in *Magyari*, and the Fourth Circuit's decision in *Washington*, we find that the military judge abused his discretion by denying the government's motion to preadmit the appellee's second DTR. The testing conducted at AFDTL was essentially the same for both the random and the consensual tests. We do not find that *Melendez-Diaz* applies in this situation because the raw data contained in the DTR are not statements made by the lab technicians and the government intended to call an expert, who is also an employee of AFDTL and would be subject to cross-examination by the appellee. Accordingly, under these circumstances, the DTR is non-testimonial.[2]

[2] We note that, although not binding upon this Court, other jurisdictions have reached similar results. In *United States v. Darden*, 2009 WL 3049886 (D. Md. Sep. 24, 2009), the district court judge held the Confrontation Clause was not violated when two lab technicians who conducted the tests the expert relied upon were not called as witnesses. The court noted the lab technicians produced raw data which the expert used to reach his own conclusions and findings. In fact, the judge found the technicians did not generate their own conclusions, but simply ran the tests which generated the data. Further, the district judge noted that the lab report was not offered in evidence in lieu of the expert's opinion, but was offered to supplement his opinion. *Id*. at *3. The judge concluded any concerns regarding reliability of the machine-generated information is addressed through authentication, not by hearsay or Confrontation Clause analysis. *Id*. at *4; *see also Pendergrass v. State of Indiana*, 913 N.E.2d 703 (Ind. 2009). In *Pendergrass*, two witnesses testified about the lab procedures and the conclusions drawn after review of the data. The prosecutor did not call the technician who did the tests. The trial judge reviewed *Melendez-Diaz* and found no Confrontation Clause violation. Unlike *Melendez-Diaz*, in *Pendergrass* live witnesses were called and the trial judge concluded there was no need to call the host of witnesses involved in the testing. The Supreme Court of

On consideration of the United States Appeal Under Article 62, UCMJ, it is by the Court on this 23rd day of November, 2009,

ORDERED:

That the United States Appeal Under Article 62, UCMJ is hereby **GRANTED**. The ruling of the military judge is vacated and the record is remanded for further proceedings.

(BRAND, Chief Judge and THOMPSON, Judge participating)

FOR THE COURT

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

Indiana held the reliability of the tests could be challenged by cross-examination of the witness from the lab. *Pendergrass*, 913 N.E.2d. at 708. Additionally, they held the expert witness may rely on testing by others to reach his conclusion. *Id*. at 708-09.