UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic SEAN C. BOGDONAS
United States Air Force

ACM 37725

15 April 2013

Sentence adjudged 8 July 2010 by GCM convened at Travis Air Force Base, California. Military Judge: Vance H. Spath (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 127 days, and forfeiture of $800.00 pay per month for 8 months.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Scott C. Jansen; Major Naomi N. Porterfield; Captain Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was found guilty at a general court-martial comprised of a military judge of one specification of wrongfully using heroin, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consisted of a bad-conduct discharge, confinement for 127 days, and forfeiture of $800 pay per month for eight months. The convening authority approved the sentence as adjudged.

On appeal, the appellant raises three issues for our consideration: (1) whether two drug testing reports (DTRs) were erroneously admitted into evidence, despite being

testimonial hearsay; (2) whether statements within those DTRs that identified the urine sample as the appellant's were also improperly-admitted testimonial hearsay; and (3) whether the military judge erred in finding an expert to be an adequate substitute for confrontation purposes, despite that expert having no involvement in the testing of the appellant's urine samples.

Background

On the night of 26 February 2010, Senior Airman (SrA) JB was showering in the dormitory on Travis Air Force Base when he heard something fall in the appellant's adjoining room. He then heard the appellant repeatedly say "Chris, get up", and words to that effect. Concerned, SrA JB left the shower and knocked on the door of the kitchen he shared with the appellant. The appellant responded that he could not answer the door at that time as he was busy, so SrA JB returned to his room. A few minutes later, the appellant came to his door saying "Call 911, Chris is passed out." The appellant appeared sweaty and out of breath, his eyes were watery and bloodshot, and he looked nervous and panicky.

SrA JB grabbed his cell phone and went into the appellant's dormitory room, where he found Airman Basic (AB) CR passed out on the floor, blue, pale and with his eyes rolled back in his head. The appellant gave him rescue breaths, but he would occasionally stop and look around his room for something. While SrA JB was on the phone with 911, the appellant went into SrA JB's room, carrying a black travel case. When SrA JB asked what happened, the appellant said he and AB CR were doing something wrong and they were probably going to get in trouble. SrA JB did not know what happened to the travel bag.

When the paramedics arrived, they were able to get AB CR breathing again and took him to the hospital, where he remained for three days. While in the hospital, AB CR told a friend he had overdosed on heroin in the appellant's room.

AB CR survived and testified at the appellant's trial. Several days prior to this incident, he and the appellant had discussed heroin use after seeing it in a movie. Neither man had tried it before, but they decided to do so since the appellant was getting discharged from the Air Force. On the night of 26 February, the appellant told AB CR he had procured some heroin for them to use and showed him a brown item smaller than a piece of rice. The appellant placed it in a spoon and the two used lighters to melt it. AB CR injected some of the liquid into his arm and passed out within 30-60 seconds. He had little memory of what happened between then and when he woke up in the hospital. AB CR never saw the appellant use heroin during this incident. One of the paramedics who responded to the dormitory testified he did not observe any signs of heroin use by the appellant during their brief interaction that evening.

Based on the appellant's statements to SrA JB, his suspicious behavior with the travel bag, and AB CR's admission he had overdosed on heroin in the appellant's room, security forces received probable cause authorization from the designated search authority to search and seize a urine sample from the appellant. The appellant provided that sample on 2 March 2010, as well as a second sample for inspection upon processing into pretrial confinement on 3 March 2010. Both samples tested positive for the metabolite of heroin, resulting in the appellant being charged with divers uses of heroin between 26 February and 2 March 2010. The issues on appeal relate to the admission of the drug testing evidence at the appellant's trial.

Dr. DT testified for the Government as an expert in forensic toxicology. Dr. DT was employed by the Air Force Drug Testing Laboratory (AFDTL) as a forensic toxicologist and laboratory certifying official (LCO), but he was not personally involved in any of the tests associated with the appellant's urine sample. He testified about drug testing procedures in general and his knowledge of the AFDTL's procedures for testing the urine of military members, including quality control and security procedures. Dr. DT also described the format and content of the DTRs prepared by the AFDTL, noting they included a compilation of raw data generated during the testing. He stated that each tested sample was identified by the identification number, the military member's social security number, and the laboratory accession number assigned by the AFDTL when the sample arrived at the facility.

The Government provided Dr. DT with a copy of the DTRs for the appellant's 2 and 3 March 2010 urine samples, both of which had been certified by another LCO. Before doing so, the trial counsel redacted the DTR cover memoranda's statements about the results of the drug test and the LCO's certification that proper procedure had been followed in testing the samples, in response to our superior court's decision in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010) [hereinafter *Blazier I*]. The defense objected to the admission of the DTRs on hearsay and foundation grounds, contending the entire DTR was testimonial, as it was created at the behest of law enforcement and there was no foundation for how the laboratory accession number was associated with the appellant.

The military judge admitted both DTRs as offered by the Government, except the handwritten annotation listing the substance found in the appellant's urine (located on the Department of Defense (DD) Forms 2624, *Specimen Custody Document – Drug Testing* (February 1993), in the DTR). The military judge found Dr. DT, as an LCO for the AFDTL, could testify about the actions of the technicians and the LCO involved in the testing of the appellant's urine, based on his personal knowledge, and he could use his expertise and knowledge to interpret the raw data found in the DTR. Also, based on the current case law, the military judge found the computer-generated (raw data) documents within the DTR to be non-hearsay and therefore admissible. He also admitted the chain of custody documents (where laboratory employees annotate their role in handing the

samples). To the extent he found some of those chain-of-custody documents contained hearsay affirmations by laboratory personnel, the military judge found the accused's right to confrontation was satisfied by the production of an AFDTL expert, Dr. DT, and the non-hearsay nature of the documents included in the DTRs. He also found the appellant's failure to ask for the production of the laboratory personnel to be relevant to his analysis.

In findings, Dr. DT identified the DTRs as documents prepared by his laboratory and stored within its record-keeping system. He then described the contents of the DD Forms 2624 contained in the DTR, and how those documents identified the path of the appellant's samples through the testing process. The expert testified about the significance of the multiple machine-generated printouts that were produced during the testing of the appellant's urine and stated the appellant's urine samples tested presumptively positive for opiates, and was confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS) at a level of 48154 nanograms per milliliter (ng/mL) and 13933 ng/ml respectively, both of which were above the 4000 ng/mL cutoff level. Dr. DT also testified that the chain of custody and other DTR documents indicated no discrepancies in the handling and testing of the samples. He also described the length of time during which the metabolite for heroin will remain detectible in a user's urine.

The military judge convicted the appellant of a single use of heroin. In announcing his findings, the military judge stated the Government had not proven the appellant used heroin on 26 February 2010, the day AB CR overdosed. Instead, based on the testimony of the expert witness, the military judge found the appellant wrongfully used heroin between 28 February and 2 March 2010 (the date of his first urinalysis). He also said he had considered evidence from 26 February 2010 only "for its limited purpose, if any, of assisting me with intent, knowledge, and access to an illicit substance."

Testimonial Hearsay

Whether admitted evidence constitutes testimonial hearsay is a question of law reviewed de novo. *Blazier I*, 68 M.J. at 441-42. "[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) (internal quotation marks omitted) (citation omitted). "Asked another way, would it be reasonably foreseeable to an objective person that the purpose of any individual statement in a drug testing report is evidentiary?" *Id*. at 302 (citation omitted).

The case law on the intersection between testimonial hearsay and the military drug testing system was evolving at the time of the appellant's trial. Our superior court has

now concluded the following parts of a DTR are testimonial hearsay: (1) the portion of the DTR cover memorandum which states certain drug metabolites were found in the member's urine at amounts over the Department of Defense cutoff and certifies those results as correct, *id*. at 304; *United States v. Blazier*, 69 M.J. 218, 225-26 (C.A.A.F. 2010) [hereinafter *Blazier II*], and (2) the portions of the DD Form 2624 indicating the member's sample tested positive for a certain drug and certifying that the test results were correct, *Sweeney*, 70 M.J. at 299, 304. The holdings were based on the circumstances under which these particular statements were generated—in response to an external request, done after testing was complete and summarizing voluminous data. *Id.* at 299; *Blazier I*, 68 M.J. at 442-43. As the test results and certifications on these documents constitute testimonial hearsay, it is plain and obvious error to admit them without making the declarant(s) available for cross-examination. *Sweeney*, 70 M.J. at 304.

Our superior court has also held the DTR's chain-of-custody documents (listing a stamped or handwritten name, signature/initials, date, and a stamped entry indicating the purpose for the change in custody) and data review worksheets (including names, signatures, and dates) to be nontestimonial. *Id*. at 305; *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013). In reaching this conclusion, the Court noted the materials were prepared pursuant to internal procedures and not to create evidence for law enforcement or use at a later trial. They are little more than part of the internal controls necessary to conduct the AFDTL's business, and they lack any indicia of formality (e.g. certification, swearing, attestation) suggesting an evidentiary purpose. *Id.* Similarly, machine-generated documents within the DTR are nontestimonial. *Blazier II*, 69 M.J. at 224.

Here, the appellant is complaining about the admission of: (1) the portions of the chain of custody documents for each confirmatory test that reflect the actions and signatures of quality review officers and LCOs involved in the testing and (2) "identifiers" within the DTR that associate a particular sample with the appellant. We find these issues to have been resolved by our superior court's decisions, as described above. Under that jurisprudence, these documents do not contain testimonial hearsay; thus, it was not error for the military judge to admit them over the defense objection.

The appellant's assertion that Dr. DT was an inadequate witness for Confrontation Clause purposes is inapposite.[1] He did not improperly act as a "conduit for repeating testimonial hearsay." *Blazier II*, 69 M.J. at 225-26. Additionally, it was permissible for Dr. DT to rely on the machine-generated reports in providing his expert opinion that the appellant's sample contained the drug metabolite. *Id*. at 224.

[1] The appellant also complains that the military judge improperly considered the appellant's failure to ask for the production of the Air Force Drug Testing Laboratory employees who handled the appellant's samples. We note our superior court has expressly referenced the defense's ability to call these types of employees as witnesses after the government has admitted nontestimonial hearsay from the drug testing reports, in order to "challenge, among other things, the accuracy, validity, and reliability of the test results. *United States v. Tearman*, 72 M.J. 54 n.13 (C.A.A.F. 2013) (citation omitted). As such, it was not improper for the military judge to consider the defense's failure to do so when he was evaluating the defense's assertions.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[2] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[2] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).