UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SHANNON L. DOLLAR
United States Air Force

ACM S31607 (f rev)

25 July 2012

Sentence adjudged 2 June 2008 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Maura T. McGowan.

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Lieutenant Colonel Gail E. Crawford; Major Shannon A. Bennett; Major Michael A. Burnat; Major Marla J. Gillman; Major Michael S. Kerr; Major Imelda L. Paredes; Captain Reggie D. Yager; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Douglas P. Cordova; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel Jeremy S. Weber; Major Deanna Daly; Major Scott C. Jansen; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

GREGORY, Senior Judge:

The appellant was found guilty by a panel of officer members of: (1) four specifications of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912(a), contrary to his pleas; and (2) one specification of adultery, in violation of

Article 134, UCMJ, 10 U.S.C. § 934, according to his plea. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for 6 months, and reduction to the grade of E-1. In *United States v. Dollar*, ACM S31607 (A.F. Ct. Crim. App. 22 Mar 2010) (unpub. op.), 69 M.J. 411 (C.A.A.F. 2011), we affirmed the findings and the sentence. On 24 March 2010, the appellant submitted a Motion for Reconsideration asserting that our decision was in conflict with our superior court's initial decision in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010). On 15 April 2010, we granted the Motion for Reconsideration and again affirmed, finding that: (1) testimony of the Government expert satisfied the Confrontation Clause;[1] and (2) even if it did not, the admission of testimonial hearsay was harmless beyond a reasonable doubt because the expert provided an opinion independent of the testimonial hearsay in the drug testing report (DTR).

The Court of Appeals for the Armed Forces (CAAF) granted review, set aside our decision, and remanded the case for reconsideration of the harmless error issue in light of *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010).[2] *Dollar*, 69 M.J. AT 412. CAAF determined our decision to be erroneous for two reasons in light of *Blazier*. First, a surrogate expert cannot satisfy the Confrontation Clause requirements for admission of the cover memoranda. Second, the harmless error analysis was flawed because we incorrectly found that the government expert did not rely on the testimonial hearsay in his testimony. *Id*. at 412. We note that after the remand in the present case, CAAF decided *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011), which found that certifications on both the cover memoranda and specimen custody document were testimonial hearsay.

On 23 August 2007, the appellant provided a urine specimen pursuant to a random urinalysis inspection. The Air Force Drug Testing Lab (AFDTL) tested the specimen and reported it positive for cocaine. On 10 September 2007, as part of the random urinalysis inspection program, the appellant submitted another urine specimen that also tested positive for cocaine. The appellant was found guilty of four specifications of using cocaine under Charge I:

- Specification 4 alleges use between 1 and 31 July 2007,
- Specification 7 alleges use between 1 and 12 August 2007,
- Specification 8 alleges use between 15 and 23 August 2007, and
- Specification 9 alleges use between 2 and 10 September 2007.

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

[2] *Williams v. Illinois*, S.Ct. 1221 (2012), does not appear to substantively impact our superior court's decisions in *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) and *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). We had awaited release of this decision before proceeding.

The Government presented two DTRs, the testimony of an expert witness, and the testimony of AM, a military spouse.

AM provided testimony, independent of the DTRs, concerning the four allegations of cocaine use. She described in great detail using cocaine with the appellant and others at an on-base residence in July 2007 (Specification 4), the first weekend in August 2007 (Specification 7), between 15 and 23 August 2007 (Specification 8), and in early September 2007 (Specification 9). AM named the individuals present on each occasion, specifically identified the locations, described the appearance of the cocaine, explained the method of ingestion, and discussed the effects of the drug. AM provided the only evidence for Specifications 4 and 7.

A court member asked if the witness' own cocaine use inhibited her ability to observe what was happening around her, and AM replied: "No. Absolutely not. If anything, I was more aware of details." For example, AM recalled that, during the July cocaine use, the appellant snorted a line of cocaine off a white dinner plate and that he lifted up his baseball cap "so he didn't get his bill in it." She also recalled being with the appellant at a friend's residence on 23 August 2007, the day the appellant provided the first urinalysis specimen. She testified that the appellant was drinking a jug of water "because he was panicked that – well, he looked panicked that he'd been called in for a urinalysis." Defense counsel did little to impeach her testimony during a relatively brief cross-examination.

Dr. DT, an expert in forensic toxicology, testified concerning the two DTRs offered to support the later two charged uses. Dr. DT was employed by the AFDTL as a forensic toxicologist and laboratory certifying official, but he was not involved in the testing of the appellant's urine specimens. After Dr. DT explained the various machine-generated printouts contained in the DTR for the 23 August specimen, he quoted the testimonial hearsay in the cover memorandum when asked what the results indicated:

> Well, if you look at page 34, it states in the declarations page, it says "the cocaine metabolite benzoylecgonine concentration detected was 419 [nanograms per milliliter (ng/mL)]. The DOD cutoff level is 100 ng/mL.["] And we always round down decimals, so if somebody was 99.9 it would be negative.

He testified similarly concerning the second DTR, explaining the various machine-generated printouts and referring to the testimonial hearsay in the cover memorandum when asked about the results. He referred to the DD Form 2624, *Specimen Custody Document – Drug Testing* (February 1993), as showing no discrepancies, but did not directly refer to the testimonial hearsay in the certification on the form in either DTR. Dr. DT concluded his direct testimony with his own expert opinion that the testing of

both specimens showed that "benzoylecgonine, these two concentrations, were found in each sample, and the testing was accurate and complete."

Although an expert may properly rely on inadmissible evidence in forming an independent opinion, an expert may not "act as a conduit for *repeating* testimonial hearsay." *Blazier*, 69 M.J. at 225 (citing *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008)). Although Dr. DT concluded his direct testimony with his independent expert opinion, his reading of the certifications on the cover memoranda to the members resulted in him acting as a conduit of testimonial hearsay. In view of *Sweeney*, we also find that admission of the certifications on the respective cover memoranda, DD Forms 2624, and the rescreen and confirmation test reviews in the DTRs themselves violate the Confrontation Clause.

In assessing constitutional error, the question is not whether the admissible evidence is sufficient to uphold a conviction but "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), *quoted in Blazier*, 69 M.J. at 227. As directed by the remand order, we reconsider our prior assessment of the impact of the testimonial hearsay in light of this high constitutional standard. Among the factors we consider are: (1) the importance of the testimonial hearsay to the prosecution's case; (2) whether the testimonial hearsay was cumulative; (3) the existence of other 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)). We review de novo whether a constitutional error is harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). Under the circumstances of this case, we find the admission of testimonial hearsay harmless beyond a reasonable doubt.

Although trial counsel referred to the DTRs during his argument, he highlighted the machine-generated results from the gas chromatograph/mass spectrometry test which Dr. DT permissibly interpreted for the members. He did not quote or paraphrase the testimonial hearsay. After a relatively brief discussion of the drug test results, trial counsel used most of his argument to discuss the eyewitness testimony of AM. Defense counsel spent the bulk of his argument attacking the testimony of AM, and actually used Dr. DT's testimony concerning the quantity of cocaine to support his argument that AM was not credible. In rebuttal, trial counsel again emphasized the credibility of AM.

We find the testimony of AM compelling both in level of detail and candor. She described the specific circumstances of each drug use with the appellant, but expressly denied seeing him distribute or introduce cocaine. The presentation of the evidence and the closing arguments of both sides clearly show that AM, not Dr. DT, was the most important witness. The testimonial hearsay relayed by Dr. DT was cumulative to his own permissible expert opinion, applied to only two of the four specifications, and was

relatively unimportant compared to the strong testimony of AM. Applying the factors set forth in *Van Arsdall* to the evidence in this case, we find that the error in admitting testimonial hearsay contained in the DTRs and through the testimony of Dr. DT was harmless beyond a reasonable doubt.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court