UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM E. DUNN V
United States Air Force

ACM S31584

31 August 2010

Sentence adjudged 1 August 2008 by SPCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Paula McCarron.

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $1,193.00 pay per month for 3 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, THOMPSON, and GREGORY
Appellate Military Judges

PER CURIAM:

Contrary to the appellant's pleas, a panel of officers convicted the appellant of two specifications of failure to go, two specifications of false official statement, one specification of wrongful possession of marijuana, one specification of wrongful use of marijuana, one specification of wrongful possession of ecstasy, one specification of wrongful use of ecstasy, one specification of larceny, and one specification of breaking restriction, in violation of Articles 86, 107, 112a, 121 and 134, UCMJ, 10 U.S.C. §§ 886,

907, 912a, 921, 934.[1] A panel of officer members sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, 90 days of confinement, forfeiture of $1,193 pay per month for three months, and a reprimand. The convening authority approved the sentence as adjudged and credited the appellant with two days for illegal pretrial confinement pursuant to the military judge's order.

On appeal, the appellant raises six assignments of error: (1) The military judge erred by denying the appellant's motion to dismiss the charges based on a violation of Article 10, UCMJ, 10 U.S.C. § 810; (2) The record of trial is incomplete because it is missing attachments to Appellate Exhibit X;[2] (3) The military judge erred by denying the appellant's motion to suppress his admissions to Senior Airman (SrA) DP; (4) The appellant's due process rights were violated by the delay in post-trial processing; (5) The government failed to prove by clear and convincing evidence that the appellant voluntarily consented to a urinalysis test; and (6) The appellant's rights under the Confrontation Clause[3] were violated when the drug testing results were admitted without the in-court testimony of the declarants involved in the testing. Finding no error, we affirm the findings and sentence.

Background

The appellant was a vehicle maintenance apprentice assigned to the 2d Logistics Readiness Squadron at Barksdale Air Force Base, Louisiana. On 19 March 2008, the appellant's first sergeant, Master Sergeant (MSgt) SM, called the appellant to his office to discuss his recent erratic behavior at work. Because of his erratic behavior, MSgt SM planned to ask the appellant to consent to a urinalysis test.

When the appellant arrived at MSgt SM's office he seemed coherent and did not appear to be under the influence of drugs or alcohol. MSgt SM pulled out a Consent for Search and Seizure form, which he read aloud and filled out in the presence of the appellant. Next, he asked the appellant to read aloud several entire paragraphs of the form to ensure that he understood his rights and the scope of the search. Later that morning, the appellant provided a urine sample which came back positive for marijuana and ecstasy on 2 April 2008.[4]

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[1] Pursuant to Rule for Court Martial (R.C.M.) 917, the military judge found the appellant not guilty of one specification of larceny under Article 121, UCMJ, 10 U.S.C. § 921. The members found the appellant not guilty of one specification of false official statement under Article 107, UCMJ, 10 U.S.C. § 907.

[2] In response to the appellant's assignment of error regarding the missing attachments from Appellate Exhibit X, the government provided this Court with the missing page. As the attachments are now part of the record, we find that this issue is moot. The record is in compliance with R.C.M. 1103(b)(2)(D)(v).

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

[4] The government called four witnesses involved in the collection, chain of custody, security, and shipping of the appellant's three urine samples. The government also called the medical review officer who reviewed the appellant's medical records to determine if there were any legitimate medical reasons for the positive results. Finally, the government called an expert witness who testified about the process of testing the appellant's urine and the test results.

On 24 March 2008, SrA DP, a co-worker of the appellant, noticed three credit cards missing from his wallet which had been stored at his duty section at the 2d Logistics Readiness Squadron. The next day, after speaking with his supervisor, the appellant approached SrA DP and confessed to stealing the three credit cards and to using one of the cards to put gasoline in his car. He also apologized and told SrA DP that he would pay him back, which he did.

On 3 April 2008, agents from the Air Force Office of Special Investigations (AFOSI) interviewed the appellant on suspicion of drug use. After an Article 31, UCMJ, 10 U.S.C. § 831, rights advisement, the appellant waived his rights and admitted to Special Agent (SA) MJ and SA KH that he used marijuana one weekend in November 2007 and on 2 April 2008, but he denied using ecstasy. When confronted with his positive urinalysis results from the 19 March 2008 test, he admitted that he used marijuana a few nights before the test with his off-base civilian roommates. He also told the investigators that he thought there was something weird about the marijuana, but stated that he did not use ecstasy intentionally. The appellant consented to a search of his dorm room and his urine and provided a signed, sworn statement.

On 9 April 2008, SA MJ asked the appellant to be a confidential source (CS) to help AFOSI identify additional personnel involved with illegal drugs. After the appellant signed a Declaration of Agreement agreeing to work with AFOSI as a CS,[5] SA MJ asked the appellant to contact his civilian friend, Mr. JF, for marijuana. The appellant called Mr. JF, and the conversation led SA MJ to suspect Mr. JF had marijuana in his possession at the appellant's dormitory building. After locating Mr. JF in the day room of the dormitory, SA MJ searched for and found marijuana hidden under a seat cushion. SA MJ interviewed the appellant and he consented to another urinalysis test, which he provided later that day. The appellant also provided another signed, sworn statement indicating that the marijuana did not belong to him and that he had not smoked marijuana since his last urinalysis.

The appellant made three other contacts as a CS between 9 April 2008 and 11 April 2008. Based upon the information obtained during the CS contacts, SA MJ interviewed the appellant a third time. During that interview on 12 April 2008, SA MJ asked the appellant if he had ever used ecstasy and the appellant told him that he used ecstasy on two occasions—during Mardi Gras 2008 and on the weekend before the 19 March 2008 urinalysis when he smoked the blunt that was laced with ecstasy. Despite his earlier denials, the appellant admitted to SA MJ that he knew the blunt was laced with ecstasy. He also told SA MJ he smoked marijuana in his car with Mr. JF on 2 April 2008 and 7 April 2008 as they drove around off base. The appellant consented to a search of his dorm room and vehicle and provided a third signed, sworn statement stating that he

[5] Paragraph 8 of the Declaration of Agreement states that a confidential source (CS) "will not participate in any activities that would otherwise be illegal, unless specifically directed by [the Air Force Office of Special Investigations]." The appellant was specifically told that he could not use drugs while working as a CS.

asked a fellow airman to "spot" him two ecstasy tablets while working as a CS to avoid raising suspicion and that he flushed them down the toilet.

As the appellant was preparing his statement, other AFOSI agents were searching his dorm room and vehicle. They found two ecstasy pills hidden in a flashlight cap in his dorm room and traces of marijuana in his vehicle. When confronted with the ecstasy pills, the appellant told SA MJ that he did not know the ecstasy was in his dorm room and that he believed it belonged to Mr. JF.

The urinalysis samples provided by the appellant pursuant to his consent on 3 April 2008 and 9 April 2008 both tested positive for marijuana.

Discussion
Speedy Trial

The appellant asserts that the military judge erred by failing to dismiss all the charges and specifications based on a violation of Article 10, UCMJ. For reasons set forth below, we do not concur.

We review speedy trial issues de novo. *United States v. Thompson*, 68 M.J. 308, 312 (C.A.A.F. 2010); *United States v. Cooper*, 58 M.J. 54, 57 (C.A.A.F. 2003); *United States v. Proctor*, 58 M.J. 792, 794-95 (A.F. Ct. Crim. App. 2003). While doing so, we give substantial deference to the trial judge's findings of fact and will not overturn them unless they are clearly erroneous. *Thompson*, 68 M.J. at 312; *United States v. Mizgala*, 61 M.J. 122, 127 (C.A.A.F. 2005); *Proctor*, 58 M.J. at 795.

Article 10, UCMJ, is triggered when a service member is placed under pretrial arrest or in pretrial confinement. Article 10, UCMJ. From that point, the government is required to take "immediate steps" to either "try him or to dismiss the charges and release him." *Id*. "The test for compliance with the requirements of Article 10[, UCMJ,] is whether the government has acted with 'reasonable diligence.'" *Proctor*, 58 M.J. at 798 (quoting *United States v. Birge*, 52 M.J. 209, 211 (C.A.A.F. 1999); *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). Our superior court has often said that it does "not demand 'constant motion [from the government], but reasonable diligence in bringing the charges to trial.'" *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007) (quoting *Mizgala*, 61 M.J. at 127). "Brief inactivity is not fatal to an otherwise active, diligent prosecution." *Id*. "In conducting our analysis, 'we remain mindful that we are looking at the proceeding as a whole and not mere speed.'" *Thompson*, 68 M.J. at 312 (quoting *Mizgala*, 61 M.J. at 129).

While Article 10, UCMJ, provides greater rights than does the Speedy Trial Clause of the Sixth Amendment,[6] we consider the four factors established by *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay in bringing the appellant to trial; (2) the reasons for the delay; (3) whether the appellant asserted his right to a speedy trial prior to trial; and (4) the extent of any prejudice to the appellant. *Thompson*, 68 M.J. at 312; *Cossio*, 64 M.J. at 256. The Supreme Court has identified three interests that the speedy trial right was designed to protect: (1) prevention of oppressive pretrial incarceration; (2) minimization of an accused's anxiety and concern; and (3) limitation of the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*.

It is a well-established policy in the military justice system to join all possible charges into a single court-martial. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing Rule for Courts-Martial (R.C.M.) 307(c)(4); *United States v. Weymouth*, 43 M.J. 329, 335 (C.A.A.F. 1995)), *cert. denied*, 129 S. Ct. 2416 (2009). "Ordinarily all known charges should be referred to a single court-martial." R.C.M. 601(e)(2), Discussion.

In ruling on this motion, the military judge made extensive findings of fact and conclusions of law. We find that the findings of fact are amply supported by the evidence and that the conclusions of law are correct; therefore, we adopt them as our own. On 26 March 2008, the appellant was restricted to base by his commander. The appellant was ordered into pretrial confinement on 12 April 2008, and a pretrial confinement hearing was held on 16 April 2008. On 21 April 2008, the base legal office was notified of the positive test results for marijuana from the 3 April 2008 and 9 April 2008 consent urinalyses. On or about 30 April 2008, AFOSI began investigating allegations that the appellant had sex with a 12-year-old girl on numerous occasions. The base legal office diligently attempted to obtain the cooperation of the victim and her mother and to further investigate the allegations. An investigating officer was appointed pursuant to Article 32, UCMJ, 10 U.S.C. § 832, to conduct a hearing, and the parties were involved in discovery and scheduling the hearing. On 13 May 2008, the appellant submitted a demand for speedy trial, a discovery request, and a request for an expert consultant in the field of forensic toxicology. The defense request for an expert consultant was granted, however, the appointed defense expert became unavailable on 2 July 2008. The government later located another expert witness acceptable to the defense. On 3 July 2008, the victim's mother informed the government that her daughter did "not want to talk about [the appellant] at all." On 27 June 2008, the government contacted the Central Docketing Office (CDO) and informed the CDO that it would be

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

ready to proceed to trial on 23 July 2008, a total of 102 days from the date of pretrial confinement.[7]

In the case at hand, while a delay of 102 days is sufficient to trigger an Article 10, UCMJ, inquiry, we find that the appellant was not denied his speedy trial rights under Article 10, UCMJ, even though the appellant asserted his speedy trial rights prior to trial. Of key importance to the military judge, as reflected in her findings of fact and conclusions of law, are the government's reasons for the delay and the lack of prejudice to the appellant.

With respect to the government's reasons for the delay, we agree with the military judge that for over half of the delay the government was actively investigating an allegation that the appellant had sex with a 12-year-old girl. The allegation arose while the appellant was in pretrial confinement. While the charge ultimately did not go to trial, the government was proactive in its investigation and it was not unreasonable for the government to attempt to join all possible charges to a single court-martial. Given the complexity of the case and the requirement to obtain records and reports from the drug testing labs, to coordinate expert witnesses for the government and defense, and to arrange the Article 32, UCMJ, investigation, the government's reasons for the delay are reasonable.[8] Concerning prejudice, the delay did not affect the appellant's ability to prepare and present his case. In fact, our review of the record indicates that the trial defense counsel were quite vigorous in their pretrial representation of the appellant. The military judge noted in her order that she received no evidence of prejudice other than the assertion by defense counsel that the appellant suffered prejudice by having to serve in pretrial confinement. Granted the appellant may have experienced anxiety and concern, but there is no evidence that the conditions of pretrial confinement were oppressive or harsh. In review of the proceedings as a whole, it is clear that the government took "immediate steps" to inform the appellant of the charges against him, and thereafter exercised "reasonable diligence" in accomplishing those tasks necessary to try him. *See* Article 10, UCMJ; *Proctor*, 58 M.J. at 798 (quoting *Birge*, 52 M.J. at 211; *Kossman*, 38 M.J. at 262). Therefore, we conclude that the military judge did not err by denying the appellant's motion to dismiss for a violation of Article 10, UCMJ.

Admissibility of the Appellant's Admissions to SrA DP

The appellant asserts that the military judge erred by denying his motion to suppress the statements he made to SrA DP, claiming that MSgt EA "urged" him to apologize to the victim, SrA DP. Additionally, the appellant argues that the subsequent statements he made to SrA DP were tainted by MSgt EA's failure to give him an Article 31, UCMJ, rights advisement prior to his initial admissions.

[7] The time period from 23 July 2008 to 27 July 2008 was specifically excluded for speedy trial computations in accordance with R.C.M. 707.

[8] The charges were preferred as a general court-martial and were later referred to a special court-martial.

We review a military judge's ruling on a motion to suppress under an abuse of discretion standard, "consider[ing] the evidence in the light most favorable to the prevailing party." *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008), *cert. denied*, 129 S. Ct. 267 (2008). "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *United States v. Quintanilla*, 63 M.J. 29, 35 (C.A.A.F. 2006). The abuse of discretion standard is strict and "involves far more than a difference in . . . opinion. . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." *United States v. Travers*, 25 M.J. 61, 62-63 (C.M.A. 1987) (alterations in original) (quoting *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980)).

The issue of whether a confession was voluntary is a question of law that we review de novo. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *United States v. Bresnahan*, 62 M.J. 137, 141 (C.A.A.F. 2005). A confession is involuntary, and thus inadmissible, if it was obtained "through the use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(c)(3); Article 31(d), UCMJ. "Where there has been no 'actual coercion' and an earlier statement is 'involuntary' only in the sense of a failure to give required warnings, there is no presumptive taint." *United States v. Lichtenhan*, 40 M.J. 466, 470 (C.M.A. 1994). The voluntariness of subsequent statements made following the earlier unwarned statements are determined by looking at the totality of the circumstances. *United States v. Gardinier*, 65 M.J. 60, 64 (C.A.A.F. 2007).

Likewise, in deciding whether an appellant's will was overborne and whether a resulting confession is involuntary, we examine the totality of the surrounding circumstances, considering both the characteristics of the appellant and the details of the interrogation. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008). Some of the factors we consider include the appellant's age; the appellant's education; the appellant's intelligence; whether any advice was given to the appellant concerning his constitutional rights; the length of any detention; the length and nature of the questioning; and the use of any physical punishment, such as the deprivation of food or sleep. *Id.*

In the case at hand, we find no error. The military judge made thorough and extensive findings of fact and conclusions of law. We find that the findings are amply supported by the record and her conclusions of law are correct. The appellant's supervisor, MSgt EA, asked the appellant to come to his office to discuss an incident during which the appellant's civilian supervisor used rough language and physical contact to awaken the appellant from a nap in the break room. The appellant was upset. Following their discussion, MSgt EA addressed the missing credit cards. After MSgt EA said "don't tell me you had anything to do with the credit cards," the appellant put his head down on the table. The appellant told MSgt EA that he took the credit cards because he needed gas. MSgt EA told the appellant that he "owed [SrA DP] an apology,"

and the appellant agreed. Later that day, the appellant approached SrA DP and asked if they could talk. The appellant told SrA DP that he took the credit cards and used one of the cards to buy gas. The appellant was remorseful and said that he would pay SrA DP back, which he did. SrA DP did not question the appellant.

Referencing MSgt EA's forthrightness and demeanor, the military judge concluded that MSgt EA was truly interested in helping the appellant and was concerned about him based upon his recent erratic behavior. However, she also concluded that MSgt EA should have read the appellant his Article 31, UCMJ, rights once "he started putting things together." Thus, the military judge suppressed statements the appellant made to MSgt EA following the question, "don't tell me you had anything to do with the credit cards." However, the military judge did "not find that MSgt [EA] ordered the appellant to talk to SrA [DP], intended to use SrA [DP] as an agent for MSgt [EA] to get the [appellant] to incriminate himself, or to ask the [appellant] that which he could not." In making her determination, the military judge found it persuasive that MSgt EA did not tell the appellant that he needed to pay SrA DP back. The military judge concluded that the appellant voluntarily offered to repay SrA DP, and in fact did so. The military judge concluded that the appellant's will was not overborne by MSgt EA. We concur.

It is clear from our review of the record and the totality of the circumstances that the statements the appellant made to SrA DP were voluntary. Additionally, we conclude that MSgt EA's failure to provide an Article 31, UCMJ, rights advisement did not "taint" later admissions to SrA DP. The statements the appellant made to MSgt EA were not obtained by coercive methods; they were "involuntary" only in the sense they were obtained in violation of Article 31, UCMJ. The appellant was remorseful and wanted to apologize to SrA DP. He offered to repay SrA DP, and in fact did repay him. We conclude that the military judge did not abuse her discretion by denying the motion to suppress the appellant's statements to SrA DP.

Consent versus Command-Directed Urinalysis

The appellant asserts that the military judge erred by denying his motion to suppress the first urinalysis because it was actually a command-directed urinalysis. The appellant relies on the testimony of his immediate supervisor, Staff Sergeant (SSgt) JE, who testified during the motion hearing that he believed the urinalysis was command-directed.

As discussed above, we review a military judge's ruling on a motion to suppress under an abuse of discretion standard, "consider[ing] the evidence in the light most favorable to the prevailing party." *Larson*, 66 M.J. at 215. "An abuse of discretion occurs if the military judge's findings of fact are clearly erroneous or if the decision is influenced by an erroneous view of the law." *Quintanilla*, 63 M.J. at 35. The abuse of discretion standard is strict and "involves far more than a difference in . . . opinion. . . .

The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal." *Travers*, 25 M.J. at 62-63 (alterations in original) (quoting *Yoakum*, 8 M.J. at 768).

Mil. R. Evid. 314(e)(5) provides that "[c]onsent must be shown by clear and convincing evidence." The government "has the burden of proving that . . . consent . . . was freely and voluntarily given." *United States v. Radvansky*, 45 M.J. 226, 229 (C.A.A.F. 1996) (alterations in original) (quoting *Florida v. Royer*, 460 U.S. 491, 497 (1983)). "A military judge's determination that a person has voluntarily consented to a search, including a urinalysis, is a factual determination that will 'not be disturbed on appeal unless it is unsupported by the evidence or clearly erroneous.'" *Id*. at 229 (quoting *United States v. Kosek*, 41 M.J. 60, 64 (C.M.A. 1994)). In analyzing the voluntariness of a person's consent, the court must look at the totality of the circumstances. *Id*. "In evaluating the totality of the circumstances, courts should consider, among other things, such factors as the accused's age, education, experience, length of military service, rank, and knowledge of the right to refuse consent, as well as whether the environment was custodial or coercive." *Id*. (citing *United States v. Goudy*, 32 M.J. 88, 90-91 (C.M.A. 1991)).

In the case at hand, the military judge made detailed findings of fact which were amply supported by the evidence. Likewise, the military judge made thorough conclusions of law which are correct and with which we concur de novo. The military judge heard testimony from the immediate supervisor, SSgt JE; the first sergeant, MSgt SM; and the case agent from AFOSI. She also reviewed written motions from both parties and heard argument of counsel. The military judge made the following findings:

> With regard to the case at bar, the [appellant] was taken at MSgt [SM]'s request to MSgt [SM]'s office by SSgt [JE]. It does not appear the [appellant] was given an option about whether or not to go and was escorted by SSgt [JE], but there is no evidence that the [appellant] ask[ed] to leave. After arriving, MSgt [SM] started by asking how the [appellant] was and how work was going and then proceeded to talk about the [appellant's] erratic behavior. MSgt [SM] did not yell or raise his voice. Both the accused and MSgt [SM] were standing during the discussion. The accused did not appear stressed. There was some evidence provided by SSgt [JE] that before going over the AF IMT 1364, MSgt [SM] said the commander had directed the UA [urinalysis]. MSgt [SM] denied that he told the [appellant] the UA was commander directed. With regard to this point, I considered the demeanor of MSgt [SM] during his testimony. He was clear that he did not tell the [appellant] the UA was commander directed and did not hesitate when providing his response. Contrary to the defense's argument that MSgt [SM] looked down and shifted in his seat during this portion of his testimony, the Court does not agree. It was the

> Court's observation that MSgt [SM] directly and forthrightly answered this question and did not appear shifty or hesitant. On the contrary, SSgt [JE] confused this meeting with the [appellant] and MSgt [SM] and another meeting where the [appellant] was questioned about some missing credit cards. At one point, SSgt [JE] talked about there being two conversations with the [appellant] about consenting to a UA and at other times, SSgt [JE] testified that there was only one conversation. It was clear to the Court that SSgt [JE] was unclear about what happened in which situation. There was no evidence that the [appellant] felt coerced or intimidated and the situation does not demonstrate that the [appellant] was coerced or intimidated into consenting to the UA. The [appellant] was apparently 22 years old at the time and had been in the Air Force for over three years. The [appellant] acknowledged on the AF IMT 1364 that he was aware he had the right to consent to a search or refuse, as well as the consequences of what could happen if the [appellant] did not consent. MSgt [SM] read the form to the [appellant] and then took the additional step of having the [appellant] read the form out loud to make sure the [appellant] had actually read the form. The [appellant] had no questions about the form, did not indicate he did not understand it, and signed and initialed it. There was no evidence that the [appellant] was in distress or stressed or otherwise in a mental state indicating that he was confused, intoxicated, reluctant or anxious.

Based upon the totality of the circumstances, the military judge concluded that the appellant knowingly, intelligently, and voluntarily consented to the urinalysis. The military judge's findings are supported by ample evidence in the record of trial, and her ruling that the appellant knowingly and voluntarily consented was based on a correct view of the law. We concur with the military judge's assessment of the conflicting testimony of MSgt [SM] and SSgt [JE]. Under the totality of the circumstances, we also find that the appellant knew his options and made a voluntary decision to consent to the urinalysis. Accordingly, we hold that the military judge did not err by denying the motion to suppress.

Confrontation Clause of the Sixth Amendment

Prior to trial, the defense submitted a motion in limine to exclude the three drug testing reports (DTRs) for the positive drug tests. All three DTRs consist of chain of custody documents signed by analysts, data recordings, results, and chromatographs. The DTRs also contain a cover letter addressed to the legal office at Barksdale AFB, signed by the document custodian at the Air Force Drug Testing Laboratory (AFDTL), which reports the appellant's positive test results.

During the motion hearing, Dr. DT, a forensic toxicologist assigned to AFDTL, was called as a witness. Dr. DT testified that he has been employed as a forensic

toxicologist at AFDTL for the last four years and has served as an expert witness at trial. He further testified that he serves as a laboratory certifying official (LCO), which requires knowledge of and certification on all aspects of the lab and its testing procedures. He informed the military judge that he could explain how urine samples are processed, how the DTRs are prepared, and how the appellant's samples were processed based on the DTR. The military judge recognized Dr. DT as an expert in forensic toxicology and in the Department of Defense (DoD) Drug Testing Program, specifically AFDTL. During his testimony, Dr. DT testified that there was no difference in the way AFDTL tested the appellant's three samples. Although there can be different codes on the bottles, he explained that these codes are not seen by the technicians conducting the tests. The technicians only see the unique lab accession number that AFDTL assigns to each sample. In this case, the code used for the appellant's three tests was "VO," which stands for consent testing.

After hearing Dr. DT's testimony and the arguments of counsel, the military judge made thorough findings of fact and conclusions of law. The military judge determined that the AFDTL "personnel had no reason to anticipate that any particular sample would test positive and be used at trial." She concluded that the DTRs were "simply a routine, objective cataloging of an unambiguous factual matter;" therefore, the AFDTL technicians "could not reasonably expect their data entries would 'bear testimony' against the [appellant]." The military judge further concluded that the DTRs were nontestimonial and admissible, provided the government counsel could lay the proper foundation.

During the findings portion of the trial, Dr. DT testified about the information contained in the DTRs and the results of the testing.

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F.), *aff'd*, 68 M.J. 225 (C.A.A.F. 2009). "Whether evidence constitutes testimonial hearsay is a question of law reviewed de novo." *Id.*

On appeal, the appellant asserts that the military judge abused her discretion when she allowed the government's expert to present testimonial hearsay without affording the defense an opportunity to confront the analysts, as required by the Confrontation Clause of the Sixth Amendment. The appellant claims that the DTRs were prepared in response to requests from command authority and from law enforcement, therefore, they were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." *United States v. Melendez-Diaz*, 129 S. Ct. 2527, 2532 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). He asserts that under *Melendez-Diaz* and *United States v. Harcrow*, 66 M.J. 154 (C.A.A.F. 2008), the analysts' statements in the DTRs that Dr. DT relied upon

constituted testimonial hearsay. The appellant further asserts that the analysts' statements within the DTRs are functionally similar to in-court testimony.

The appellant is essentially arguing that the Supreme Court's decision in *Melendez-Diaz* has overruled our superior court's decision in *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006). We disagree. Similar to the factual scenario in *Magyari*,[9] several different people at AFDTL conducted tests, made clerical notations in the DTR, or at one time had physical custody of the appellant's urine sample. However, despite the appellant's assertion, there is no indication that any of these individuals engaged in a law enforcement function or searched for evidence in anticipation of prosecution. In this regard, we note that the code "VO," which appeared only on the specimen bottles and the DD Form 2624, indicated it was a consent urinalysis. The "VO" coding means the urinalysis sample was collected by consent, and consent could be for any number of purposes. It in no way indicates that the samples were from a particular member who was under investigation or suspected of wrongdoing. In this case, AFDTL followed the same urinalysis testing procedures as the Navy drug testing lab did in *Magyari* and as it commonly does in almost every other inspection. Therefore, any "statements"[10] by the analysts were not "'made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" *Melendez-Diaz*, 129 S. Ct. at 2532 (quoting *Crawford*, 541 U.S. at 52).

We further disagree with the appellant that the military judge erred by allowing the government's expert witness, Dr. DT, to testify about the information contained in the DTRs. As is done in many drug urinalysis cases, the government provided the testimony of an expert forensic toxicologist to explain the contents of the DTRs. We note that Dr. DT is assigned to AFDTL and although he did not personally conduct any of the tests of the appellant's urine sample, he is intimately familiar with AFDTL and was qualified as an expert in forensic toxicology and in the DoD Drug Testing Program, specifically AFDTL, and could testify about DTRs. As the Fourth Circuit noted in *United States v. Washington*, 498 F.3d 225, 232 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 2856 (2009), the statements Dr. DT testified about did not come from the lab analysts but from non-testimonial data generated by machines. Moreover, Dr. DT is better qualified to explain the science behind the testing and the test results than the analysts who operate the machines that generate the raw data. The Confrontation Clause of the Sixth Amendment requires that an accused be confronted with the witnesses against him. In this case, the primary witness against the appellant was Dr DT, who testified in court and was subjected to extensive cross-examination. Although the appellant points to some data entries made in the DTRs by the analysts, the interpretation of the raw data which

[9] *United States v. Magyari*, 63 M.J. 123 (C.A.A.F. 2006), involved a drug testing report from the Navy Drug Screening Laboratory.

[10] In our opinion, the alleged statements made in the DTRs by the analysts can best be described as data entries which are part of "a routine, objective cataloging of an unambiguous factual matter." *Magyari*, 63 M.J. at 126-27 (quoting *United States v. Bahena-Cardenas*, 411 F.3d 1067, 1075 (9th Cir. 2005)).

provided the positive result is the primary evidence against the appellant. Further, even if the data entries made by the analysts were considered testimonial statements,[11] as the Supreme Court noted in *Melendez-Diaz*, not "everyone who laid hands on the [urine sample] must be called" as a witness because any "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." *Melendez-Diaz*, 129 S. Ct. at 2532 n.1 (second alteration in original) (quoting *United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988)). Accordingly, the testimony of Dr. DT satisfied the appellant's rights under the Confrontation Clause.[12]

We likewise disagree with the appellant that our superior court's decision in *Harcrow* applies to the facts of this case. *Harcrow* was not a military urinalysis case but instead involved a civilian crime lab, the Virginia Division of Forensic Science. *Harcrow*, 66 M.J. at 155. The Virginia lab tested drug paraphernalia seized from Harcrow's residence pursuant to a request from the local sheriff's department. *Id*. at 158-59. Our superior court held that the laboratory reports documenting the presence of cocaine and heroin constituted testimonial statements under the Confrontation Clause of the Sixth Amendment and that it was error for the military judge to admit them at trial. *Id*. at 159. However, our superior court specifically distinguished the facts of *Harcrow* with the facts of *Magyari*, primarily because the lab technicians at the Navy drug testing lab were not "'engaged in a law enforcement function.'" *Id*. (quoting *Magyari*, 63 M.J. at 126). We concur with the military judge that the facts of this case are similar to the facts of *Magyari* and that our superior court's holding in *Harcrow* does not apply.

We conclude that the appellant's rights under the Confrontation Clause were satisfied in this case as he was afforded the opportunity to cross-examine the government's expert witness, Dr. DT, who was qualified by the military judge as someone who had inspected the lab, was intimately familiar with the lab's operating instructions and could explain the contents of the DTRs. Accordingly, the military judge did not err in allowing the testimony of Dr. DT or in admitting the DTRs in this case. However, the military judge did err by admitting the cover pages of the DTRs in this case. *See Blazier*, 68 M.J. at 442-43. Yet, we find that this error was harmless as the government called Dr. DT, an expert in forensic toxicology and a LCO at AFDTL, to provide a substantive analysis of the urinalysis test results.

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[11] We note that our superior court has held that the cover page of a DTR is testimonial, primarily because the cover page is not generated at the time of testing but rather in response to a request for use at a later court-martial. *United States v. Blazier*, 68 M.J. 439, 442-43 (C.A.A.F. 2010). However, this case is distinguishable because the data entries in the appellant's DTRs were made at the time of testing and as part of AFDTL's normal course of business.

[12] Last year, the Supreme Court of Indiana held that documents pertaining to DNA evidence were admissible as material on which the government's DNA expert could testify, and the laboratory supervisor satisfied the Confrontation Clause because she could testify to the accuracy of the tests and the standard operating procedures at the laboratory and could state whether the tests diverged from those procedures. *Pendergrass v. State*, 913 N.E.2d 703, 707-08 (Ind. 2009), *cert. denied*, 130 S. Ct. 3409 (2010). "Thus, Pendergrass had the opportunity to confront at trial two witnesses who were directly involved in the substantive analysis [of the test results] . . . ." *Id.* at 708.

Finally, assuming, arguendo, that Dr. DT's testimony itself did not satisfy the Confrontation Clause, we conclude that the introduction of such testimonial evidence was nevertheless harmless beyond a reasonable doubt under the circumstances of this case. Dr. DT was qualified as and testified as an expert under Mil. R. Evid. 702. Moreover, Mil. R. Evid. 703 provides that "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [upon which the expert relied] need not be admissible in evidence in order for the opinion or inference to be admitted."

Post-Trial Processing

In *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006), our superior court held that there is a presumption of unreasonable delay when the convening authority's action is not taken within 120 days of completion of trial. Thus, the overall delay of 136 days from completion of trial to action in this case is facially unreasonable. Because the delay is facially unreasonable, we examine the four *Barker* factors: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135; *see also Barker*, 407 U.S. at 530. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved 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 approved findings and sentence are

AFFIRMED.

THOMPSON, Judge participated in the decision of this Court prior to her reassignment on 29 June 2010.

OFFICIAL

STEVEN LUCAS
Clerk of the Court