UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MARK S. JACKSON
United States Air Force

ACM 34419

28 January 2003

Sentence adjudged 29 September 2000 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Mark S. Ruppert.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Patience E. Schermer.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

BRESLIN, EDWARDS, and STONE
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

A general court-martial comprised of officer and enlisted members convicted the appellant, contrary to his pleas, of the wrongful use of methamphetamine, in violation of Article 112(a), UCMJ, 10 U.S.C. § 912(a). The sentence adjudged and approved was a bad-conduct discharge, confinement for 30 days, and reduction to E-1.

On appeal, the defense asserts for the first time that the government failed to disclose "exculpatory evidence" of an "August 2000 Brooks lab analytical false positive urinalysis result," and that the failure violated the appellant's due process rights. This Court accepted copies of the laboratory test in question, some of the discovery requests

and responses, and affidavits from defense counsel in order to consider this issue. *See United States v. Dixon*, 8 M.J. 149, 151 (C.M.A. 1979). Finding no error that materially prejudices the appellant's substantial rights, we affirm.

Facts

The appellant was assigned to the Explosive Ordnance Disposal (EOD) unit of the 99th Civil Engineer Squadron, Nellis Air Force Base (AFB), Nevada. The squadron commander ordered all members of the EOD unit to submit to a urinalysis to inspect the readiness, fitness, good order, and discipline of the unit. *See* Mil. R. Evid. 313. Pursuant to this order, the appellant provided a urine sample on 21 March 2000. The Air Force Drug Testing Laboratory at Brooks AFB, Texas, tested the appellant's sample in March and April 2000, and reported finding methamphetamine in his urine, at a concentration of 1964 nanograms per milliliter (ng/mL), well above the 500 ng/mL cut-off set by the Department of Defense. Based upon the positive urinalysis test result, the government charged the appellant with the wrongful use of methamphetamine.

Before trial, the defense counsel submitted several formal requests for discovery. The defense submitted a general request for discovery on 26 May 2000, well before charges were preferred, seeking a broad range of documents and information relating to the testing of the appellant's urine sample. The request included the following at paragraph 3l:

> Please provide copies of any reports, memos for record or other documentation relating to Quality Control and/or inspections pertaining to quality control at the Brooks Lab . . . for the *three quarters* prior to TSgt Jackson's sample being tested, and the available *quarters* since TSgt Jackson's sample was tested.

(Emphasis added.)

By letter dated 12 June 2000, the government provided a response to portions of the defense counsel's discovery request, and noted that the government had requested certain documents from the Brooks AFB laboratory. The specific response to paragraph 3l of the defense counsel's 26 May 2000 discovery request noted that the quality control section discontinued quarterly inspections in January 1999, and that they were now done on a monthly basis by the quality assurance (QA) section. The government also advised the defense that: "The QA *monthly* reports and QA *monthly* inspections for the *three months* prior to the member's specimen, the *month* of testing, and the *month* after testing have been requested from Brooks AFB Drug Testing Division." (Emphasis added.)

There is no indication that the defense counsel objected to the government's proposal to provide the monthly reports detailed in the response, or continued to request

quality control reports covering the greater period of time. To the contrary, it appears the defense accepted the government's offer to provide the monthly reports described above. The subsequent affidavit from the defense counsel, Captain Megan, indicates that the defense received the requested documents before trial, and received some updated discovery shortly before and during the trial. This is reflected in Captain Megan's affidavit, where she wrote: "I contacted the Circuit Trial Counsel assigned to the case, Capt Carrie Wolf, and asked her to contact the lab and obtain for me all reports completed between the time Brooks Lab responded to my initial discovery request and that date, as well as any other recently identified discovery that was responsive to my discovery request." We also note that the defense counsel did not make a motion at trial for appropriate relief for any failure by the government to provide discovery, as required by Rule for Courts-Martial (R.C.M.) 905(b)(4).

The appellant submitted to this Court a copy of a document from the Brooks AFB Laboratory entitled discrepancy report, dated 2 August 2000. The appellant variously describes the subject of the 2 August 2000 report as a "blind quality control sample" and an "analytical false positive." The report indicates that the specimen in question was supposed to be a negative blind quality control specimen, but that it tested positive for the presence of the metabolite of cocaine at 1242 ng/mL, apparently due to mishandling. The appellant contends that the government's failure to provide this report to the defense before trial denied him due process of law.

Law

Article 46, UCMJ, 10 U.S.C. § 846, provides: "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Acting on this Congressional delegation, the President prescribed R.C.M. 701, setting out the rules for discovery in courts-martial.

R.C.M. 701 requires the government to provide certain information to the defense regardless of whether the defense has made a written request. This includes copies of documents accompanying the charges upon referral, the orders convening the court-martial, signed statements relating to the charged offenses, the names and addresses of witnesses, and records of prior convictions to be offered on the merits. R.C.M. 701(a)(1), (3) and (4). *See United States v. Kinney*, 56 M.J. 156 (2001) (interlocutory order); *United States v. Brozzo*, 57 M.J. 564, 565-66 (A.F. Ct. Crim. App. 2002).

The trial counsel's obligation to provide certain other documents arises only when the defense has made a request. R.C.M. 701(a)(2). This includes:

> Any results or reports of . . . scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense . . . ."

R.C.M. 701(a)(2)(B).

Finally, R.C.M. 701(a)(6) also requires the trial counsel to disclose to the defense, regardless of whether there was a request, "the existence of evidence known to the trial counsel which reasonably tends to: (A) Negate the guilt of the accused of an offense charged; (B) Reduce the degree of guilt of the accused of an offense charged; or (C) Reduce the punishment." This portion of R.C.M. 701 was based in part upon the decision of the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963). *Manual for Courts-Martial, United States (MCM)*, A21-33 (2000 ed.). The government's duty to disclose includes evidence that may be used for impeachment purposes. *Strickler v. Greene*, 527 U.S. 263 (1999); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Guthrie*, 53 M.J. 103, 105 (2000); *United States v. Watson*, 31 M.J. 49, 54 (C.M.A. 1990). The defense has the burden of showing that the government failed to produce discoverable evidence. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *Guthrie*, 53 M.J. at 105.

Analysis

We begin by recognizing that the appellant's characterization of the August 2000 test as an "analytical false positive" is not accurate. The August 2000 test that forms the basis of the defense allegations was an internal blind quality control specimen. The quality control specimens are not members' samples; instead they are control standards used by the laboratory to check the accuracy of the testing process. These quality control specimens are placed in the batches for testing as a check on the processes. The technician performing the test knows that some of the specimens are quality control specimens (so-called "open" controls); those that are not known to the technician are called "blind" controls. The quality control specimens are prepared in the quality control section, which is different from the section that prepares members' samples for testing. Finally, the test in question was not reported as positive; instead the error was caught immediately and the specimen was marked, "Redo."

We must determine whether the government breached its duty to provide a copy of this report in discovery, as required by R.C.M. 701. We find that the report in question was not a paper accompanying the charges. Thus, the government was not obligated to provide the report under R.C.M. 701(a)(1).

We also find the defense did not request a copy of this document, thus the government was not obligated to provide a copy under R.C.M. 701(a)(2). As noted above, the appellant's sample was tested in March and April 2000. The defense discovery request asked for the quality control reports for the three quarters preceding the accused's test, the quarter of the test, and all the quarters following the test. This initial request would have covered the quality control testing done in July/August 2000. However, the government's response advised the defense that the reports were not done on a quarterly basis any longer. The government agreed to provide the quality control monthly reports for the three months before the test, the month of the test, and the month after the test, and the defense accepted this proposal. Thus, the final request did not include quality control reports for the month in question, August 2000. We also note that the defense did not specifically request discrepancy reports; the quality control monthly report is not the same as the specific discrepancy report that forms the basis of the appellant's assignment of error in this case. *See Brozzo*, 57 M.J. at 567.

The appellant argues that the government's obligation to disclose included later months because the defense made a "continuing request." *See also* R.C.M. 701(d). The defense's request, as finally agreed upon, was for the quality control reports for the months of January through May 2000. If after providing discovery the government prepared another report covering the period of January to May 2000, the government would have been obligated to disclose it. However, the continuing duty to disclose requested information would not enlarge the timeframe of the original request, under the circumstances of this case. We find that the government's continuing obligation to disclose requested information did not include documents created outside the requested dates.

Finally, we conclude that the discrepancy report in question was not evidence favorable to the defense as provided by R.C.M. 701(a)(6) or exculpatory evidence under *Brady*, such that the prosecution would have been required to provide it to the defense even absent a request. The evidence did not tend to negate the guilt of the accused, reduce the degree of the offense charged, or reduce the punishment. R.C.M. 701(a)(6). Unlike the circumstances in *Brozzo*, 57 M.J. at 565, the discrepancy report in this case concerned a different drug and was not close in time to the appellant's test.

Although perhaps unnecessary, we also considered the materiality of the August 2000 discrepancy report. "The key question when discovery is denied is whether the information or evidence that was not disclosed was 'material to the preparation of the defense.'" *United States v. Morris*, 52 M.J. 193, 197 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at

682. The defense need not show that disclosure of "the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The evidence is material if, taken in context with all the evidence in the case, there is a reasonable probability of a different outcome. *Bagley*, 473 U.S. at 682; *Brozzo*, 57 M.J. at 567.

The contested evidence was an erroneous result for an internal blind quality control specimen tested almost four months after the appellant's test, apparently caused by mishandling. The mishandling of a non-member sample may have some value in impeaching the validity of the laboratory processes. However, in light of all the evidence, including the substantial amount of other, similar matters in impeachment raised at trial, we do not find that the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. We find no material prejudice to the appellant's substantial rights for failure to provide this information in this case.

The approved findings 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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator