UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman RAHNEE O. STEEN
United States Air Force

ACM 35246

30 June 2004

Sentence adjudged 24 January 2002 by GCM at Maxwell Air Force Base, Alabama. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Captain James M. Winner (argued), Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Major Shannon J. Kennedy (argued), Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, contrary to her pleas, of one specification of divers uses of ecstasy and one specification of possession of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The general court-martial, consisting of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 1 year, total forfeitures, and a reduction to E-1. The convening authority approved the sentence as adjudged. The appellant submitted seven assignments of error. We address only one—whether the government failed to provide evidence that would impeach a key government witness and impugn the reliability of the prosecution's scientific evidence. Finding error, we order corrective action.

Facts

The appellant was assigned to Maxwell Air Force Base, Alabama. She was summoned to the local detachment of the Air Force Office of Special Investigations (AFOSI) upon suspicion of wrongful use and possession of illegal drugs. During the course of the investigation, the AFOSI obtained the appellant's consent to search her dwelling, automobile, hair, and urine for evidence of drugs. Although she revoked her consent as to her home and car, the AFOSI obtained a specimen of her hair and sent it to a civilian forensic laboratory (CFL) for testing. The hair test was positive for multiple uses of ecstasy. The AFOSI investigation also included a statement from an informant who said he saw a civilian give the appellant a white pill he believed was ecstasy. The informant asked for, and received, a similar pill from the civilian. Testing at CFL established it was ecstasy.

Prior to trial, defense counsel made a formal discovery request for the "[r]esults of any and all quality checks and certifications done regarding [CFL]." A representative of CFL replied that Florida was the only state that met these criteria and supplied copies of Florida's two most recent inspection reports. These reports were used to cross-examine the prosecution's expert witness, Dr. M.

After trial, and during trial defense counsel's preparation for another case, the same laboratory official disclosed that New York also inspected CFL. Subsequently, this Court ordered production of the written reports of New York inspections conducted in 1999 and December 2001. These two reports contain evidence of deficiencies in CFL operations.

Based upon the information contained in these documents, the appellant seeks a new trial, pursuant to Rule for Courts-Martial (R.C.M.) 1210, and also argues that the failure of CFL to provide discovery violates her due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963).

Brady Violation

We review this issue de novo. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The prosecution's obligation to provide discovery "extends to a laboratory that conducts tests to determine the presence of controlled substances for the Government." *United States v. Sebring*, 44 M.J. 805, 808 (N.M. Ct. Crim. App. 1996). If the prosecution fails to provide discovery in response to a specific request, it must demonstrate that this error was harmless beyond a reasonable doubt. *United States v. Jackson*, 59 M.J. 330, 334 (C.A.A.F. 2004). For reasons set forth below,

we conclude that the prosecution's failure to disclose the requested information violated the appellant's due process rights.

The case against the appellant rested primarily on the results of hair testing done by CFL and interpreted by Dr. M, a forensic toxicologist. Though acknowledging deficiencies outlined in the certification report from the State of Florida, Dr. M opined that CFL's procedures were "sufficient and appropriate" to validate the presence of ecstasy in the appellant's hair sample. On cross-examination, Dr. M. admitted that he had not personally traveled to CFL to examine its procedures, personnel, or operations, but relied instead upon his review of CFL's standard operating procedures (SOP), the litigation package, and his conversation with a laboratory official, Dr. B. This cross-examination included the following colloquy:

> Q: Did you get anything else other than paper?
>
> A: I had several conversations with [Dr. B] where I discussed particular aspects of the testing and clarified some issues that I had.

However, as stated above, in addition to the Florida inspection report, CFL had in its possession at the time of the defense discovery request a written report of an inspection conducted by New York in 1999. Furthermore, New York had reinspected CFL in December 2001, a month prior to the appellant's trial. The written report of the 2001 inspection was not prepared until well after the conclusion of the appellant's case. Nonetheless, had the results of the 1999 inspection been provided, the parties would have inevitably learned of the 2001 inspection and the results thereof.

The 2001 report concluded: that lab personnel were not able to identify the acceptance criteria for certain drugs (this was a repeat deficiency from the 1999 inspection); that there were deficiencies in the method employed by CFL in weighing hair samples prior to forensic testing; that the inspectors discovered a breach of security concerning the storing of urine specimens; and that there was no evidence that the laboratory director had approved the SOPs, thereby reflecting insufficient oversight of operations. In addition, in June 2001 CFL failed a proficiency test on a urine sample, reporting false positives for butabitol, morphine, methadone, and ethanol. These were genuine false positives, in that the tested urine sample contained none of these drugs. This proficiency test was conducted approximately three months from the date of CFL's test of the appellant's hair.

We find no bad faith by the prosecution, and the record of trial is inconclusive as to bad faith by CFL. However, we do find that the 1999 report was discoverable and probably would have led to the further discovery of the 2001 inspection results.

As to whether the government has met its burden of establishing this error was harmless beyond a reasonable doubt, we note that Dr. M had no first-hand knowledge of CFL. Instead, he relied on his review of documents supplied by the laboratory and on his conversations with Dr. B. The 1999 and 2001 inspections revealed more than mere technical problems, such as shoddy record keeping. To the contrary, the information could have served as the basis for cross-examination of Dr. M in an effort to discredit and impeach his opinion as to the overall competence of the laboratory.

The government's case as to both possession and divers uses relied in substantial measure on the tests done by CFL. If the defense had been given the opportunity to discredit Dr. M and/or the reliability of the laboratory with the results of the New York inspections, we believe there is a reasonable probability the results of the trial would have been different as to both specifications. *See United States v. Figueroa*, 55 M.J. 525, 528 (A.F. Ct. Crim. App. 2001). Therefore, we are not satisfied that the failure to disclose this information was harmless beyond a reasonable doubt.

In light of our holding on this issue, the remaining assignments of error are moot. The findings and sentence are set aside. The record of trial is returned to The Judge Advocate General of the Air Force to forward to the convening authority for a rehearing or other appropriate disposition. R.C.M. 1203(c).

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator