UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON THOMPSON
United States Air Force

ACM S31996

7 August 2013

Sentence adjudged 16 August 2011 by SPCM convened at Randolph Air Force Base, Texas. Military Judge: Matthew Van Dalen.

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

Appellate Counsel for the Appellant: Major Thomas Franzinger; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

HARNEY, MITCHELL, and SOYBEL
Appellate Military Judges

PER CURIAM:

A panel of officer members sitting as a special court-martial convicted the appellant, contrary to his pleas, of a single specification of wrongfully using cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence included a bad-conduct discharge, confinement for 30 days, and reduction to E–1.

The appellant raises four issues on appeal: 1) Whether testimonial hearsay was erroneously admitted through a drug testing report (DTR) and the testimony of a government expert witness; 2) Whether it was error to admit the DTR as a record of regularly conducted activity under Mil. R. Evid. 803(6); 3) Whether trial counsel's

argument was improper because it blurred the line between punitive and administrative discharges; and 4) Whether the appellant was deprived of due process because proper procedures were not followed for resolving an ambiguous sentence.

Background

The appellant provided a urine sample as part of his training squadron's random urinalysis inspection. It was sent to the Air Force Drug Testing Laboratory (AFDTL), which returned a DTR reporting its forensic analysis that the sample tested positive for cocaine.

At trial, the defense filed a motion in limine seeking to keep the DTR out of evidence. The DTR was offered and admitted at trial. It contained redacted copies of the cover sheet and all of the internal certifications by non-testifying AFDTL personnel. The remaining pages were chain of custody documents and machine generated scientific data. The appellant avers that the military judge erred when he admitted the DTR as evidence at his court-martial because it violated his right under the Sixth Amendment of the United States Constitution[1] to confront the witnesses against him.

An expert witness in the field of forensic toxicology and the drug testing operations and procedures at the AFDTL, Dr. H-M, testified about the processing of the appellant's sample through the drug testing laboratory. She also interpreted the scientific results, which were presented as a series of numerical data and grafts in the DTR.

Dr. H-M was the branch chief of the forensic science section of the AFDTL. She did not personally test the appellant's sample herself, but based on her personal knowledge of the laboratory, and her interpretation of the scientific results in the DTR, she testified that the appellant's sample came up positive for benzoylecgonine (BZE), the metabolite of cocaine, in the amount of 118 nanograms/milliliter.

Dr. H-M went through all 25 pages of the DTR and interpreted not only the scientific data but also the chain of custody information. She also explained the process the AFDTL implements when testing a batch of urine samples. On cross examination, she admitted that she did not personally test the appellant's sample and that the results were dependent on humans performing their task properly. She also acknowledged humans sometimes make mistakes.

The defense's theory at trial was that, notwithstanding the guidance in *United States v. Blazier*, 26 M.J. 218 (C.A.A.F. 2010), the DTR should have been excluded in its entirety under *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011). We disagree, and affirm the conviction.

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

Testimonial Hearsay

Even though a military judge's decision to admit evidence is reviewed under an abuse of discretion standard, *United States v. Clayton*, 67 M.J. 283, 286 (C.A.A.F. 2009), the question of whether the admitted evidence violates the Confrontation Clause is reviewed de novo. *Blazier*, 69 M.J. 218; *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008*)*; *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007). If we find a violation of the Confrontation Clause, we cannot affirm the decision unless this Court is convinced beyond a reasonable doubt that the error was harmless. *See Rankin*, 64 M.J. at 358.

The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees an accused the right to confront witnesses who are giving testimony against him, unless the witnesses were unavailable to appear at trial and the accused had a prior opportunity to cross examine them. *See Crawford v. Washington*, 541 U.S. 36 (2004). The Supreme Court addressed this issue in *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009). There, the trial court admitted into evidence affidavits from state forensic laboratory analysts reporting the results of their examination of a substance alleged to be cocaine. *Id*. at 308. The results were sworn to by the analysts before a notary public. *Id*.

In finding that the admission of this evidence violated the accused's rights under the Confrontation Clause, the Court identified several "core" classes of testimonial statements covered by the Confrontation Clause. The forensic affidavits attesting to "the fact in question" – that the substance tested was in fact cocaine – was "the precise testimony the analysts would be expected to provide if called at trial." *Id*. at 310. The Court explained that the affidavits were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id*. (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006)). *See, e.g*., *United States v. Cavitt*, 69 M.J. 413, 414 (C.A.A.F. 2011); *United States v. Dollar*, 69 M.J. 411 (C.A.A.F. 2011).[2]

Our superior court in *United States v. Tearman*, 72 M.J. 54 (C.A.A.F. 2013), found that chain of custody documents and internal review documents are non-testimonial. The *Blazier* Court held that machine-generated documents were also non-testimonial. To the extent those types of documents were in the DTR here, there was no Confrontation Clause problem.

[2] For this reason, *Williams v. Illinois*, ___ U.S. ___, 132 S. Ct. 2221 (2012), is inapplicable; that information was not admitted for the truth of the matter asserted though relied upon by the testifying expert witness.

Testimony about Certification

However, it appears some testimonial hearsay was admitted through the testimony of the expert witness, Dr. H-M. Although the Government redacted the certifications on most of the documentation admitted, and redacted the signatures of the certifying officials, some of the certifying language remained.

Page four of the report was entitled "Presumptive List." It listed the appellant's sample as "presumptive positive" and indicated that additional testing would be required. At the bottom of this page were three separate statements. For each, the signatures and date signed were redacted. The first statement said all other samples were "certified as negative/untestable and can be destroyed." The second statement said, "Presumptive positive specimen bottles were removed from the confirm tray in secure storage for the purpose of bottle label review and returned to the confirm tray in secure storage." The third statement said, "Additional bottle(s) were removed from the batch tray and transferred for the following reason:." There were no reasons given, leading one to assume no additional bottles were removed from that batch tray.

Dr. H-M was asked about the "presumptive positive list" and said it was actually a certification form where a laboratory certifying official indicated that the appellant's specimen was positive after the screening test and would need to undergo further screening and that all the negative samples in that batch could be destroyed.

Dr. H-M's discussion about another lab worker's certification of the presumptive positive results introduced testimonial hearsay into the trial. Even though the signature was redacted, the panel president specifically asked about the signature after Dr. H-M testified that it was certified by a certifying official indicating that it was presumptively positive. This created a situation where an in-court expert witness testified about another (unidentified) person's certification in a laboratory report prepared in part by the non-testifying individual. Thus an out-of-court certifying official is essentially testifying through an in-court expert witness's interpretation of the DTR without the appellant having the opportunity to confront that witness.[3] Thus, we find the admission of the "Presumptive List," coupled with Dr. H-M's testimony, negated the intended effects of the redaction – to keep the certifying official's "testimony" out of the minds of the members.

Effect of Error

[3] We note that the appellant did not specifically object to this testimony, but the entire report was the subject of the motion in limine.

Having found that testimonial hearsay was erroneously admitted, we must evaluate its impact on the case. We assess the impact of such error de novo to see whether this constitutional error is harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Sweeney*, 70 M.J. at 306 (C.A.A.F. 2011); *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). As our superior court in *Tearman* articulated: "To determine whether a Confrontation Clause error is harmless beyond a reasonable doubt, this Court has adopted the balancing test established in *Van Arsdall*, considering such factors as: "[1] the importance of the unconfronted testimony in the prosecution's case, [2] whether that testimony was cumulative, [3] the existence of corroborating evidence, [4] the extent of confrontation permitted, and [5] the strength of the prosecution's case." *Tearman*, 72 M.J. at 62 (quoting *Sweeney*, 70 M.J. at 306 (citing *Van Arsdall*, 475 U.S. at 684)). This list of factors is not exhaustive, and "'[the] determination is made on the basis of the entire record.'" *Sweeney*, 70 M.J. at 306 (quoting *Blazier*, 69 M.J. at 227). "To conclude that a Confrontation Clause error was harmless beyond a reasonable doubt, we must be convinced that the testimonial hearsay was unimportant in light of everything else the court members considered on the issue in question." *Tearman*, 72 M.J. at 62 (citing *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)).

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.

We find that the admission of the testimonial hearsay was harmless beyond a reasonable doubt.

First, the remainder of the scientific evidence in the case was machine-generated scientific data, such as raw data and calibration charts absent any testimonial hearsay associated with it. Dr. H-M interpreted these results based on her own expertise and firsthand knowledge of the lab and the procedures used there. In her own expert opinion, she concluded that the appellant's urine sample was positive for the cocaine. The amount of testimonial hearsay in this case is a fraction of the amount admitted in *Blazier* which was held not be a constitutional error even though some testimonial hearsay was introduced. *See Blazier*, 69 M.J. at 226.

Further, the discussion about the certifying official centered on the fact that the appellant's sample was found positive after the initial screening test. Other parts of Dr. H-M's testimony established that this was the first of two screening tests performed on the appellant's sample. She testified that a confirmation test, which utilized a different type of scientific testing procedure, was also used after the first two screening tests proved positive. The confirmation test would not have been used unless both screening tests were positive and the sample would not have been reported as positive unless all

three tests were positive. The defense questioned Dr. H-M extensively about the scientific tests used by the laboratory: whether they met the prevailing scientific standards; the possibility of unknowing ingestion; the reliability of initial collection procedures; the possibility of inadvertent contamination; and many other aspects of the Air Force's drug testing procedure including potential flaws or mistakes when humans operate within the process. Dr. H-M accepted the possibility of errors raised by the defense's hypothetical questions but testified that, in her expert opinion, the results in the appellant's case were forensically and scientifically reliable.

In addition to the scientific evidence presented at trial, just after the appellant found out his sample had tested positive for cocaine, he wrote a letter to his commander admitting that, "I have breached not only my contract, but also the trust and respect of those who serve above me by testing positive for drug usage in a urinalysis." He also apologized "wholeheartedly" and committed to "NEVER again do anything that goes against the principles of the Air Force." In finishing the letter, he admitted to having "made a mistake" and asked for "just one chance to prove myself."

Besides the appellant's letter, the Government also presented evidence that about two weeks after his sample was collected, the appellant was escorted to the Criminal Investigations Division (CID) on Fort Hood, Texas, apparently for questioning about his drug usage. His escort testified that on the return trip, the appellant was quiet and somber and said out loud to himself something to the effect of, "Damn I f**ked up."

Having applied the *Van Arsdall* factors to the facts in this case, we are convinced that the erroneous admission of testimonial hearsay was harmless beyond a reasonable doubt. The court members heard a qualified expert explain the machine-generated printouts produced by the forensic laboratory and specifically related to the appellant's urine. They heard Dr. H-M provide an independent opinion that the tests showed the presence of cocaine. They heard her consider all of the hypothetical problems that could have occurred within the drug testing process raised by the defense. However, in her opinion, those problems did not impact the appellant's testing. The testimonial hearsay was redundant to the other tests performed on the appellant's sample by the AFDTL and was cumulative with the expert's own opinion. This, coupled with the appellant's letter to his commander and his spontaneous statement to his escort after he was questioned by the CID, virtually eliminated any prejudicial impact the testimonial hearsay may have had. Therefore, in the posture of this case, we do not find a reasonable possibility that the evidence complained of might have contributed to the conviction.

Regularly Conducted Activity under Mil. R. Evid. 803(6)

We review for a military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. Mott*, 72 M.J. 319 (C.A.A.F. 2013); *United States v. Blazier* (*Blazier* I), 68 M.J. 439, 441–442 (C.A.A.F. 2010) (citing *United*

States v. Clayton, 67 M.J. 283, 286 (C.A.A.F. 2009)). Discretion represents a range of choices, not a single correct choice. *United States v. Gore*, 60 M.J. 178, (C.A.A.F. 2004). *See also United States v. Datz*, 61 M.J. 37, 43 (C.A.A.F. 2005) (citing *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000)).

Our sister court tackled this issue in *United States v. Byrne*, 70 M.J. 611 (C.G. Ct. Crim. App. 2011). There the Coast Guard Court found that those portions of the DTR which are not testimonial hearsay but which qualify as forensic laboratory reports are specifically admissible under Mil. R. Evid. 803(6). They found this because the Rule specifically recognized "forensic laboratory reports" in the examples of admissible evidence. *Byrne*, 70 M.J. at 621. Indeed, forensic laboratories are recognized under Mil. R. Evid. 803(6) "as impartial examining centers." Drafter's Analysis, *Manual for Courts-Martial, United States*, A22-55 (2012 ed.). Dr. H-M testified that the lab was required to keep the documents in the report, the documents were kept in the regular course of business at the lab, the information they contained was of the type the laboratory was regularly required to keep in accordance with her job, and the documents were maintained in accordance with the laboratory's rules for file management. We find that Dr. H-M was a "qualified witness" as that term is use in the Rule to lay out the predicate facts for admissibility of the report under Mil. R. Evid. 803(6).

Accordingly, we agree with our sister court that when a document meets the criteria of Mil. R. Evid. 803(6), and it has been sanitized to remove any of its testimonial character, as it did in this case, the military judge was well within his discretion to admit it as evidence.

Sentencing

During sentencing arguments, the defense objected to two comments made by trial counsel. The first was when he argued that "[t]o not give a bad-conduct discharge as a punishment is to say that we . . . can accept conduct like this in the military. And we can't send that message. It says that this person's service as a whole can still be called honorable----." At this point, the defense's objection was sustained by the military judge who instructed the members that a bad-conduct discharge was "punishment" and it did not have "an equation to members who are not getting in trouble." In the presence of the members, the military judge told trial counsel, "[T]o the extent you're mischaracterizing a bad-conduct-discharge, I will sustain the objection."

Later in trial counsel's argument, he told the members that a bad-conduct discharge was necessary because the appellant "needs to leave the service." When the defense renewed their objection, the military judge overruled it and told the members, "[T]o the extent the trial counsel's argument conflicts with my instructions, you are to rely on my instructions and to defer to them only as to the law." He later gave the

standard instruction from the military judges' bench book.[4] During deliberations on sentence, the members asked whether a bad-conduct discharge was their only option. The judge told them "that is the only type of discharge you are authorized to adjudge in this case."

On appeal appellant argues that trial counsel committed error by blurring the lines between a punitive discharge and an administrative separation. As evidence of this, his brief cites to letters that three of the five members sent to the convening authority after the trial stating that a bad-conduct discharge was "not appropriate in this case."

Improper argument is a question of law that we review de novo. *United States v. Marsh*, 70 M.J. 101 (C.A.A.F. 2011); *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). If we find an error, we must evaluate whether the error prejudiced the appellant. To do so, we balance the severity of the improper argument, any measures by the military judge to cure it, and the weight of the evidence supporting the sentence to determine whether the trial counsel's comment, taken as a whole, was so damaging that we cannot be confident that the appellant was sentenced on the basis of his convictions alone. *Marsh*, 70 M.J. at 107 (citation and quotation marks omitted). We evaluate this by considering the record as a whole, including the relative weight of the parties' respective sentencing cases. *Id*.

Despite the appellant's assertion, we find no error in this case. First, the judge sustained the first objection and informed the members to follow the sentencing instruction he would give later in the trial. The members are presumed to follow the judge's instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000); *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)

Second, a review of these letters shows they are all variations of the same basic letter. Indeed, they all have several identical sentences and the same basic message. All say that he is a good person and deserves mercy. Tellingly, none of them say they were confused about the difference between a bad-conduct discharge and an administrative discharge. None of the letters impeached the sentence. Each letter contained the identical first sentence of paragraph two, which read, "While I do not in any way condone the behavior that led to his conviction, I believe his is an appropriate case for *clemency*." (Emphasis added). It is clear that the members were appealing to the convening authority for clemency which is something completely different than sentence appropriateness or evidence of confusion on the part of the members. It is expressly provided for in the *Manual* after the members adjudged their sentence in court. *See* Rule for Courts-Martial 1105(b)(2)(D). A post trial recommendation for clemency is not evidence of an improperly influenced sentence.

[4] Department of the Army Pamphlet 27-9, *Military Judges' Benchbook* (1 January 2010).

However, even if we assume error, we would find no material prejudice to a substantial right of the appellant.

In *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005), our superior court supplied a 3-part test to determine if any prejudice occurred because of an improper sentencing argument. That test examines (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Id*. at 184. In applying the *Fletcher* factors in the context of an allegedly improper sentencing argument, we consider whether "'trial counsel's comments, taken as a whole, were so damaging that we cannot be confident' that [the appellant] was sentenced 'on the basis of the evidence alone.'" *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (quoting *Fletcher*, 62 M.J. at 184).

Applying the above test, we find that no prejudice occurred because of the trial counsel's comments. As already discussed, any improper statement was minor and objected to by the defense and the military judge gave curative instructions. Additionally, we are confident that the appellant was sentenced on the basis of the evidence alone. He had less than a year of active duty service and was in the highly structured environment of military training at the 382nd Training Squadron, Fort Sam Houston, Texas. He was aware of the Air Force's standards concerning illegal drug use, but chose to violate them anyway before completing his technical training. When the members were considering all of this, including the appellant's matters in mitigation, they specifically asked if any other type of discharge could be given. They were properly instructed that their sentence could only include a bad-conduct discharge or no discharge. They were not confused on the law but three of them nonetheless recommend clemency which the convening authority did not exercise.

While our responsibility is to ensure that the sentence was correct in law and fact, it is not our function to exercise clemency. *See* Article 66, UCMJ; *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988); *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F 1999). Given the totality of the circumstances as contained in the entire record, we find the appellant's sentence was correct in law and fact and the appellant was sentenced on the basis of the evidence alone.

Sentence Ambiguity

The appellant next avers that the Government deprived him of due process when it failed to follow prescribed procedures for resolving an ambiguous sentence. He bases this argument on *United States v. Kosek*, 41 M.J. 60 (C.A.A.F. 1994). This claim has no merit.

In *Kosek*, our superior court found it could not rule on an appeal based on search and seizure issues because the record was ambiguous as to whether the military judge

actually ruled on certain facts or questions of law. The answers to those questions were essential predicate questions which had to be answered before the *Kosek* Court could rule on the appeal. The Court's solution was to return the case to the military judge to "make essential findings of fact and conclusions of law so that the record will reflect the necessary predicate facts and applicable legal principles underlying the military judge's ruling." *Id*. at 65.

The appellant also relies on *Unites States v. Kaylor*, 27 C.M.R. 213 (C.M.A. 1959). There, immediately after announcing the sentence, which included a bad-conduct discharge, the president of the court-martial announced, sua sponte, "[t]he court recommends clemency in the above-entitled case. The clemency recommended is that the portion of the sentence adjudging bad conduct discharge be remitted." The court's president then gave various reasons for the recommendation. *Id*. at 213-14.

Our superior court found the sentence to be ambiguous because of the "contemporary announcement of clemency in the form of a remission of a portion of the sentence just adjudged." *Id*. at 215. The court also noted there was nothing to indicate the court members knew they did not need to impose a bad-conduct discharge. This is because at the time of that court-martial in 1959, there was no requirement to give instructions on sentence and the members had no such instructions. In that same case, the appellate court distinguished it from *United States v. Doherty*, 17 C.M.R. 287 (C.M.A. 1954), where the court did not find an ambiguous sentence. *Doherty* had facts similar to *Kaylor*, except there the members recommend clemency in the form of remission of the bad-conduct discharge in clemency submissions prepared by defense counsel, not contemporaneously with announcement of the sentence, and they received sentencing instructions regarding punitive discharges.

Given the above, it is clear that the appellant's argument is misplaced. The sentence in the instant case was not ambiguous. The members were instructed on the law. They asked a question about their options regarding discharges and received clarification. They submitted their clemency recommendation through defense counsel, not spontaneously with the announcement of sentence. Based on these facts there is no reason to label their sentence ambiguous. Accordingly, there is no need to remand the case to either the convening authority or order a new sentencing procedure as requested by the appellant.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).[5]
Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court

[5] 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).