UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major JASON A. VAN VALIN
United States Air Force

ACM 37283

26 July 2010

Sentence adjudged 22 May 2008 by GCM convened at Los Angeles Air Force Base, California. Military Judge: Steven J. Ehlenbeck.

Approved sentence: Dismissal and a fine of $25,000.00.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Tiffany M. Wagner, Captain Nicholas W. McCue, and Harvey Volzer, Esquire (civilian counsel).

Appellate Counsel for the United States: Lieutenant Colonel Jeremy S. Weber, Captain Naomi N. Porterfield, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A panel of officer members found the appellant guilty, contrary to his pleas, of one specification of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a dismissal and a fine of $25,000.

The appellant asserts two errors before this Court: (1) whether it was plain error to admit the drug testing and retesting reports in light of the appellant's Sixth

Amendment[1] right of confrontation when the military judge did not compel the government to produce essential lab officials who handled the appellant's purported urine sample and instead allowed an expert witness to testify to non-admissible hearsay, and (2) whether the appellant is entitled to new post-trial processing because the staff judge advocate erroneously advised the convening authority during clemency that the appellant had no combat service.

Background

On 25 September 2007, while assigned to the Expeditionary Warfare Training Group, Pacific, Coronado Amphibious Base, Coronado, California (CA), the appellant provided a urine sample pursuant to a random urinalysis inspection conducted by the United States Navy. The specimen was sent to the Navy Drug Screening Laboratory (NDSL) in San Diego, CA, and forensic testing occurred on 28 September 2007. The specimen tested positive for benzoylecgonine, the metabolite of cocaine, with a concentration level of 274 nanograms per milliliter (ng/mL), which is above the Department of Defense cutoff level of 100 ng/mL. A retest of the appellant's urine sample was conducted by NDSL on 3 March 2008 and it likewise tested positive for benzoylecgonine.

At trial, without objection by the trial defense counsel, the military judge admitted a 34-page drug testing report (DTR) for the 25 September 2007 urinalysis, consisting of a cover page, a table of contents, a summary of the test results, computer-generated data printouts from the various machines, and several chain of custody forms. The military judge also admitted, without objection, a 3-page document containing the results for the retest conducted on 3 March 2008.

During the trial, the government called Lieutenant (LT) NB as an expert in the field of forensic drug testing. LT NB explained that he is the assistant director of operations at NDSL and a laboratory certifying official (LCO) responsible for review of the analytical data. He testified about the two types of tests conducted by NDSL, the calibration and quality controls utilized by the Navy lab, and the contents of the DTR. He further testified about the results of the retest of the appellant's urine sample. On cross-examination, the trial defense counsel focused almost entirely on an innocent ingestion defense and did not challenge the testing procedures at the Navy lab.

The defense ultimately conceded the chain of custody with respect to the appellant's urine sample and admitted that cocaine was present in the appellant's body. The defense argued that the only issue for the members' consideration was whether the cocaine was knowingly ingested. The appellant testified that the night before he provided his urine sample, he ate two pieces of candy that unknowingly contained cocaine, which

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

he had acquired from a street vendor in Mexico sometime in June 2007. The defense also provided the testimony of Mr. ES, a forensic toxicologist from a civilian drug testing laboratory in Sacramento, CA, who tested pieces of the same candy acquired by the appellant in Mexico and determined that the candy contained cocaine. The members apparently did not believe the appellant's story as they found him guilty of wrongfully using cocaine.[2]

Discussion

Waiver versus Forfeiture

The appellant asserts that the military judge committed plain error by admitting the DTR and retesting report in violation of his Sixth Amendment right of confrontation because the military judge did not compel the government to produce the lab officials who handled the urine sample.

We first determine whether the appellant's failure to object to the DTR and retesting report constitutes forfeiture or waiver for purposes of appellate review. In determining whether a particular circumstance constitutes waiver or forfeiture, this Court considers whether the failure to object "at the trial level constituted an intentional relinquishment of a known right." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009). "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *Id.* (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). "While we review forfeited issues for plain error, we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal." *Id.* (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights."' *Id.* at 332 n.2 (quoting *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007))). "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

Admissibility of laboratory test results in various forms continues to be the subject of much litigation in the wake of *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), wherein the Court applied *Crawford v. Washington*, 541 U.S. 36 (2004), to hold

[2] The government also provided the testimony of the installation urinalysis program coordinator, who testified that on the day of testing, the appellant reported to the testing facility near the end of the required time for testing without his military identification card (ID). He then went back to his office to retrieve his ID and did not return to the testing facility for approximately 20 minutes, although it was located within a close proximity of his office. He also testified that the appellant seemed a little edgy when he reported for testing.

that admission of a laboratory official's affidavit summarizing test results violates the right of confrontation. Writing for the majority, Justice Scalia stated: "This case involves little more than the application of our holding in *Crawford v. Washington* . . . . The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error." *Melendez-Diaz*, 129 S. Ct. at 2542. Although Justice Scalia expressly limited the majority opinion to an application of existing law, the decision has certainly heightened evidentiary scrutiny of substantive evidence derived from laboratory analysis at both the trial and appellate levels. Thus, the settled law at the time of appellant's trial is, at a minimum, under further review. Under these circumstances we decline to find waiver of the issue and will therefore review admission of the DTR and retesting report for plain error.

Impact of United States v. Blazier[3]

Prior to the Supreme Court's decision in *Melendez-Diaz*, our superior court addressed DTRs and random urinalysis tests in *United States v. Magyari*, 63 M.J. 123, 127-28 (C.A.A.F. 2006), and concluded that the DTR contained non-testimonial hearsay with indicia of reliability and that the appellant's Confrontation Clause rights were not violated. Concerning whether or not the data recorded on lab reports are testimonial statements, the Court noted:

> [T]he better view is that these lab technicians were not engaged in a law enforcement function, a search for evidence in anticipation of prosecution or trial. Rather, their data entries were "simply a routine, objective cataloging of an unambiguous factual matter. Because the lab technicians were merely cataloging the results of routine tests, the technicians could not reasonably expect their data entries would "bear testimony" against Appellant at his court-martial. This conclusion is consistent with the *Crawford* Court's policy concerns that might arise where government officers are involved "in the production of testimony with an eye toward trial" and where there is "unique potential for prosecutorial abuse" and overreaching.

Magyari, 63 M.J. at 126-27 (internal citations omitted).

Although the facts of *Magyari* are very similar to the facts of this case, the appellant asserts that his case is distinguishable based on our superior court's initial decision in *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010). In *Blazier*, the Court 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 from the command for

[3] 68 M.J. 439 (C.A.A.F. 2010).

use at a later court-martial. *Blazier*, 68 M.J. at 442-43. The Court made no further rulings and ordered additional briefing on two issues: (1) whether the Confrontation Clause of the Sixth Amendment was nevertheless satisfied by the testimony of the government's expert, an employee of the Air Force Drug Testing Laboratory; and (2) if the expert's testimony did not itself satisfy the Confrontation Clause, whether the introduction of testimonial evidence was nevertheless harmless beyond a reasonable doubt. *Id*. at 443-44.

Applying the initial holding in *Blazier* to the present case, the appellant claims that we should reach the same result concerning pages 1 and 3 of the DTR and pages 1 and 3 of the retesting report and find that the military judge erred in admitting these pages from the reports. We concur that these pages should not have been admitted; however, we nonetheless find that this error was harmless because the Confrontation Clause was satisfied by the testimony of the government's expert witness, LT NB. As a LCO for NDSL, LT NB was responsible for verifying that the data from the various tests at the lab were correct. He testified about NDSL's procedures and tests, the science involved with these tests, the various quality controls for the tests, and the results of the appellant's tests. LT NB also provided his independent opinion after reviewing the DTR and opined that the appellant's urine specimens tested positive for benzoylecgonine. Additionally, the trial defense counsel cross-examined LT NB. Under these circumstances, the introduction of the testimonial evidence was harmless beyond a reasonable doubt.[4] Concerning the remainder of the information contained in the reports, the appellant contests neither the admissibility of the chain of custody documents nor the raw data. Regarding the chain of custody documents, as the appellant acknowledges in his brief, the Supreme Court noted in *Melendez-Diaz* that not "everyone who laid hands on the [urine sample] must be called" as a witness because "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)). Regarding the data entries in the report, in *United States v. Washington*, 498 F.3d 225 (4th Cir. 2007), *cert. denied sub nom. Washington v. United States*, 129 S. Ct. 2856 (2009), the Fourth Circuit noted that the statements LT NB testified about did not come from the lab analysts but from non-testimonial data generated by machines.

Further, the appellant has not shown how he was prejudiced by the introduction of the DTR and the retesting report. At trial, the defense's strategy was that the appellant did not knowingly ingest cocaine, and they specifically conceded the chain of custody with respect to the appellant's urine sample and admitted that cocaine was present in his body. Although in light of *Melendez-Diaz* and *Blazier* the defense may have changed its trial strategy, there is no evidence showing that it necessarily would have or that the

[4] Although it was error to admit the retest results, which did not contain the entire drug testing report, the retest results did not change the fact that the appellant's urine sample tested positive for benzoylecgonine, as found by the initial test conducted in September 2007.

outcome would have been any different with a new strategy. Even if the defense had objected to the introduction of the DTR and retesting report and the military judge had required the testimony of the lab analysts, the appellant has not shown how the testimony of the analysts would have changed the outcome of the case. Accordingly, the appellant was not prejudiced by any error committed in this case.

Omission of Combat Service from the SJAR

The appellant asks that we set aside the action of the convening authority because the information provided on a personal data sheet (PDS) attached to the staff judge advocate's recommendation (SJAR), dated 2 July 2008, failed to fully note the appellant's combat service. Neither the appellant nor his trial defense counsel noted the omission in their response to the SJAR. The PDS submitted to the members during sentencing correctly noted the appellant's combat service.

Errors or omissions in a SJAR are waived absent plain error. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). To prevail, the appellant must show plain and obvious error that materially prejudiced a substantial right. *Id*. Omission of the appellant's combat service from the PDS is clearly error, so we focus on the third prong of prejudice. Although the convening authority's vast power to grant clemency makes the threshold for prejudice low, the appellant nevertheless must make "some colorable showing of possible prejudice." *Id.* at 436-37 (quoting *Kho*, 54 M.J. at 65 (citing *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998))). The appellant has not done so in this case.

While the appellant correctly notes that the PDS attached to the SJAR failed to include his combat service, the combat service was referenced in the appellant's own clemency submission, which was presented to the convening authority.[5] The SJAR correctly informed the convening authority that, pursuant to Rule for Courts-Martial 1107(b)(3)(A)(iii), he was required to consider the appellant's clemency submission. We are convinced that the convening authority was aware of the appellant's combat service record because an indorsement memorandum to the SJAR indicates that he did, in fact, consider all of the matters submitted by the appellant.

Considering the particular circumstances of this case, the appellant has failed to make a colorable showing that he was prejudiced by the error. We certainly do not condone this inaccuracy in the SJAR, but we will not require a new Action where the inaccuracy resulted in no possible prejudice.

[5] The appellant's trial defense counsel also refers to the appellant's combat service in his 22 July 2008 submission to the convening authority and some of the character statements submitted with the clemency package included references to the appellant's combat service. All of these documents were considered by the convening authority.

Post-Trial Delay

Though not raised as an issue on appeal, we note that this case has been with this Court in excess of 540 days.[6] Thus, the overall delay between the trial and completion of review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(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. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370-71 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

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.

[6] This case was joined on 11 May 2010, and day 540 was on 26 February 2010. We note that the appellate defense counsel, with the consent of the appellant, moved for 15 enlargements of time to file the appellant's assignment of errors and brief with this Court. The appellate defense counsel ultimately filed their submission on 5 April 2010.

HELGET, Senior Judge, participated in the decision of this Court prior to his reassignment on 1 July 2010.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court