UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN G. WEEKS
United States Air Force

ACM S31625 (f rev)

17 July 2012

Sentence adjudged 14 January 2009 by SPCM convened at Hurlburt Field, Florida. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel James B. Roan; Major Shannon A. Bennett; Major Marla J. Gillman; Major Anthony D. Ortiz; and Major Robert D. Stuart.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Jeremy S. Weber; Major Charles G. Warren; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and HARNEY
Appellate Military Judges

UPON REMAND

GREGORY, Senior Judge:

A special court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of one specification alleging wrongful use of cocaine in violation of Article 112a, UCMJ; 10 U.S.C. § 912(a). The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1. We affirmed the findings and sentence after concluding that admission of testimonial hearsay in the Drug Testing Report's (DTR) cover

memorandum was harmless beyond a reasonable doubt. *United States v. Weeks*, ACM S31625, (A.F. Ct. Crim. App. 26 July 2010) (unpub. op.).

The Court of Appeals for the Armed Forces (CAAF) granted review, set aside our decision, and remanded the case for consideration of whether the erroneous admission of testimonial hearsay in both the cover memorandum and specimen custody document (DD Form 2624) was harmless beyond a reasonable doubt in light of *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011), *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010), and *United States v. Blazier*, 68 M.J. 439 (C.A.A.F. 2010).[1] *United States v. Weeks*, 70 M.J. 354 (C.A.A.F. 2011). Our previous decision found that only the cover memorandum contained testimonial hearsay, but our superior court's later decision in *Sweeney* also found the certification on the DD Form 2624 to be testimonial hearsay.

The Air Force Drug Testing Laboratory (AFDTL) tested a random urinalysis specimen provided by the appellant. Testing included an initial immunoassay, a second immunoassay, and a gas chromatograph/mass spectrometry (GC/MS) test. The testing is documented in a 31-page DTR. Page 1 of 31 is the erroneously admitted cover memorandum which certifies that the subject specimen identified by the appellant's Social Security Account Number (SSAN) was "confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS)" for the metabolite of cocaine at a concentration of "170 ng/ml." Andrea Lee certified the memorandum. The two-page DD Form 2624 follows the cover memorandum. It shows that the specimen linked to the appellant's SSAN was positive for cocaine and certifies that the result was "correctly determined by proper laboratory procedures" which are "correctly annotated." Constantinos Zachariades signed the certification as a Laboratory Certifying Official (LCO). Neither Ms. Lee nor Mr. Zachariades testified at trial.

To prove the charge of wrongful use of cocaine, the Government offered the DTR and the testimony of Dr. S, an expert in forensic toxicology. Using the DTR as a basis, Dr. S explained the machine-generated printouts and gave his independent expert opinion that the urine specimen identified as the appellant's showed the presence of a cocaine metabolite at a level of 170.67 ng/ml, a level above the Department of Defense cut-off of 100 ng/ml for a positive result. When asked by trial counsel if there was any reason to question the results of the testing, Dr. S replied that there was not.

But Dr. S went beyond rendering an independent expert opinion. He quoted the testimonial hearsay in the cover memorandum to the members: "The cocaine metabolite Benzoylecgonine concentration detected was 170 nanograms per milliliter. The DoD cut-off is 100 nanograms per milliliter." He explained that "it represents the findings from all of the tests put together as forensically defensible identification of Benzoylecgonine at or

[1] *Williams v. Illinois*, 132 S. Ct. 2221 (2012), does not appear to substantively impact our superior court's decisions in *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) and *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). We had awaited release of this decision before proceeding.

above the level for DoD set as the cut-off." Dr. S further testified that "multiple someone's" review the results at the AFDTL for "[a]ll the same things" that he reviewed and that the LCO acts as a "final check of everybody else's work before it is signed out as a positive." Explaining the role of the LCO who signed the certification on the DD Form 2624, Dr. S testified that the LCO reviews "[a]ll three tests as well as the integrity as documented on the chain of custody forms." In response to trial counsel's question of whether the DTR was "properly reviewed to ensure its accuracy," Dr. S replied that it was.

In an extensive cross-examination defense counsel attacked the expert's lack of personal familiarity with the AFDTL. Dr. S admitted that he had not visited the AFDTL in over five years, had not conducted an audit or inspection of the AFDTL in over 17 years, and had never worked at the AFDTL. He freely admitted that his opinion relied on the presumption that laboratory personnel "are doing what they are supposed to be doing" and that "dozens of presumptions [are] embedded in a decision that's forensically defensible." Defense counsel probed multiple specific presumptions that the expert used in reaching his conclusion about the AFDTL results. For example, when asked if he was assuming no spillage occurred at the laboratory, Dr. S replied that he was "not assuming, [but] presuming it based on the documentation provided." On redirect, Dr. S again emphasized the role of LCO in ensuring the validity of the result: "The [LCO] is the first place where it all comes together and they look at the total result for reporting purposes." In his closing argument defense counsel told the members that they did not hear any witnesses at all from the AFDTL to describe how they actually handled the sample. And that is the problem in this case: the members only heard testimonial hearsay from personnel at the AFDTL.

Although an expert may properly rely on inadmissible evidence in forming an independent opinion, an expert may not "act as a conduit for *repeating* testimonial hearsay." *Blazier*, 69 M.J. at 225 (citing *United States v. Mejia*, 545 F.3d 179, 198 (2nd Cir. 2008)). Dr. S did provide his independent expert opinion. However, by impermissibly quoting testimonial hearsay of laboratory officials, Dr. S essentially brought the LCO into the courtroom to validate the AFDTL results and chain of custody procedures. He testified that the LCO "reviews [a]ll three tests as well as the integrity as documented on the chain of custody forms" to ensure the accuracy of the DTR. He also told the members that "multiple someone's" reviewed and validated the results by looking at "[a]ll the same things" that he considered. The appellant had no opportunity to cross-examine Ms. Lee, Mr. Zachariades, or any of the unnamed "multiple someone's" who validated the results.

We must determine whether the erroneous admission of testimonial hearsay in the cover memorandum and the DD Form 2624 as well as the expert's reference to that testimonial hearsay in his testimony were harmless beyond a reasonable doubt. In assessing constitutional error, the question is not whether the admissible evidence is

sufficient to uphold conviction but "'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Blazier*, 69 M.J. at 227 (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Among the factors we consider are: (1) the importance of the testimonial hearsay to the prosecution's case; (2) whether the testimonial hearsay was cumulative; (3) the existence of other corroborating evidence; (4) the extent of confrontation permitted; and (5) the strength of the prosecution's case. *Sweeney*, 70 M.J. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). We review de novo whether a constitutional error is harmless beyond a reasonable doubt. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

The DTR was the only evidence of drug abuse. Although the expert provided an independent opinion, his opinion depended on a number of presumptions that were validated by the testimonial hearsay. In the context of this naked urinalysis case, that validation was important to shoring up the weaknesses highlighted by the defense counsel – weaknesses that lost much of their force by the testimonial hearsay. Of course, an expert witness need not be involved in the actual testing or even work in the same laboratory to render an expert opinion on data produced by a laboratory – such matters go to the weight of the expert opinion. What the expert may not do is improperly bolster that weight by relaying testimonial hearsay.

We find that the members in all likelihood gave some weight to the testimonial hearsay relayed by the surrogate expert. The testimonial hearsay provided the only evidence from someone (or "someone's") at the laboratory, and the members might have used it to satisfy any concerns about not hearing from someone involved in the actual testing. Under these circumstances, we conclude there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Therefore, the error is not harmless beyond a reasonable doubt.

Conclusion

The findings and sentence are set aside.

The record is returned to the Judge Advocate General of the Air Force for remand to an appropriate convening authority who may order a rehearing.

OFFICIAL

STEVEN LUCAS
Clerk of the Court