30 April 2012

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	**BRIEF OF AIR FORCE APPELLATE DEFENSE DIVISION AS AMICUS CURIAE IN SUPPORT OF APPELLANT**
v.	)	
Lance Corporal (E-3) **Andrew D. Tearman,** USMC, *Appellant*.	)	Crim. App. No. 201100195
	)	USCA Dkt. No. 12-0313/MC

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

I

THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISASSPLIED THE *SWEENEY* FACTORS AND DID NOT CONSIDER THE *BLAZIER II* FACTORS IN ASSESSING PREJUDICE. DID THE LOWER COURT ERR IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION?

II

THE LOWER COURT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING, OVER APPELLANT'S OBJECTION, THE CHAIN-OF-CUSTODY DOCUMENTS AND INTERNAL REVIEW WORKSHEETS BECAUSE THEY WERE NON-TESTIMONIAL. ARE THESE NON-MACHINE GENERATED DOCUMENTS AND WORKSHEETS TESTIMONIAL?

Statement of Statutory Jurisdiction

The United States Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) reviewed Appellant's case pursuant to Article 66(b)(1), Uniform Code of Military Justice (U.C.M.J.).

This Court has jurisdiction to review this case pursuant to Article 67(a)(3), U.C.M.J.

Statement of the Case

On 14-16 December 2010, Appellant was tried by Special Court-Martial composed of members.[1] Appellant was convicted, contrary to his plea, of wrongful use of marijuana in violation of Article 112a.[2] The members sentenced Appellant to a reduction to E-1 and a bad-conduct discharge.[3] On 4 April 2011, the convening authority approved the sentence.[4] On 17 January 2012, N.M.C.C.A. affirmed the findings and sentence, holding that the testimonial hearsay admitted at trial was harmless beyond a reasonable doubt and the chain of custody documents and internal review worksheets were non-testimonial.[5]

Statement of Facts

On 7 July 2010, Appellant returned to duty after 17 days of leave.[6] Also on 7 July 2010, Appellant's command conducted a random urinalysis of 44 Marines, including Appellant.[7] Appellant's urine sample was sent to the Navy Drug Screening Laboratory (N.D.S.L.) for testing.[8] Appellant's urine tested

[1] Record at 105-106.
[2] Record at 10, 369-70; JA 31-32.
[3] JA at 33.
[4] JA at 11.
[5] JA at 5, 9-10.
[6] Record at 164.
[7] JA at 19.
[8] Record at 133.

positive for tetrahydrocannabinol (THC).[9] The amount of THC in the urine was 37.17 ng/ml, which is above the Department of Defense (DoD) cutoff for THC of 15 ng/ml.[10]

Appellant's Sergeant Major called Appellant into his office and advised him of the results of the test.[11] Appellant stated he had been near others who were smoking marijuana.[12] The primary evidence against Appellant in this case was the Drug Testing Report (D.T.R.), two witnesses who testified to the collection of the urine sample, and one government witnesses who testified to the validity of the test and the drug testing policies and procedures. These procedures included the proper handling, or chain of custody, of Appellant's urine sample.[13] During its case-in-chief, the government called Ms. Andrea Kaminski as an expert witness.[14] During direct examination, trial counsel provided Ms. Kaminski with a copy of the D.T.R.[15] Trial defense counsel reasserted his earlier objection to the admission of the D.T.R. based on Appellant's Sixth Amendment right of confrontation.[16] The defense motion was denied and

[9] JA at 24, 36.
[10] Record at 246, 248.
[11] Record at 112-13.
[12] JA at 15, 17. *See also*, *Tearman*, 70 M.J. at 645.
[13] Record at 227-28.
[14] Record at 220.
[15] Record at 229.
[16] Record at 230.

D.T.R. was admitted into evidence.[17] Trial counsel then asked Ms. Kaminski to describe each and every page of the D.T.R., with the exception of page 34.[18] The descriptions of each page of the D.T.R. by Ms. Kaminski varied in the amount of detail provided.[19]

Ms. Kaminski provided a comprehensive explanation of page 3 of the D.T.R., answering 12 questions from trial counsel regarding that page alone.[20] Page 3 contained the notation "THC" in block G.[21] While Ms. Kaminski was looking at page 3, trial counsel asked, "Now, for batch number 362, specimen 082, what was the result of any test that was done on that?"[22] Ms. Kaminski replied, "It was positive for THC."[23] Trial counsel continued and asked, "And in block D of this document…what does that marking indicate?"[24] Ms. Kaminski replied, "That is a 1 and a plus meaning there's one positive on the form."[25]

In addition to walking the members through each page of the D.T.R., Ms. Kaminski's testimony highlighted the importance of chain of custody in having a legally defensible test result.[26]

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[17] Record at 230-32.
[18] Record at 233-50.
[19] *Id.*
[20] Record at 234-35.
[21] JA at 36.
[22] JA at 24.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] Record at 227-28, 284, 287, 288.

At the close of findings, the military judge gave the member's the following instruction:

> Chain of custody: The chain of custody of an exhibit is simply the path taken by a sample from the time it is given until it is tested in the laboratory. In making your decision in this case, you must be satisfied *beyond a reasonable doubt* that the sample tested was the accused's or was in the possession of the accused and that it was not tampered with or contaminated in any significant respect before it was tested and analyzed in the laboratory.[27]

During closing argument, trial counsel further emphasized the importance of chain of custody, calling the DD Form 2624 one of "a few of the important documents out of this drug package."[28]

On appeal, the lower court found that two portions of the DD Form 2624, blocks G and H, were testimonial hearsay.[29] The court held that their admission constituted an abuse of discretion.[30] Block G indicated the official test result reported by the NDSL as "THC," and Block H certified "'that the laboratory results … were correctly determined by proper laboratory procedures, and that they are correctly annotated.'"[31] The court held that the rest of the D.T.R., including the remainder of the DD Form 2624, was nontestimonial.[32]

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[27] JA at 29 (emphasis added).
[28] Record at 352
[29] JA at 6.
[30] *Id*.
[31] *Id.*
[32] *Id.*

When determining the prejudice to the Appellant, the lower court found the evidence "played no role in the Government's case," and that, "there was no reasonable possibility that this testimonial evidence contributed to the verdict."[33]

Argument

I

THE LOWER COURT HELD THAT THE ADMISSION, OVER APPELLANT'S OBJECTION, OF TWO PIECES OF TESTIMONIAL HEARSAY FOUND WITHIN THE DD FORM 2624 WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT. BUT IT MISAPPLIED THE SWEENEY FACTORS AND DID NOT CONSIDER THE BLAZIER II FACTORS IN ASSESSING PREJUDICE. THE LOWER COURT ERRED IN HOLDING THAT THE TESTIMONIAL HEARSAY DID NOT CONTRIBUTE TO APPELLANT'S CONVICTION.

Standard of Review:

When testimonial hearsay is admitted over objection, this Court examines whether there is a reasonable possibility that the evidence complained of *might* have contributed to the conviction.[34] This determination is made on the basis of the entire record.[35]

Discussion:

Blocks G & H contributed to Appellant's conviction

The lower court held that, "there was no reasonable possibility that this testimonial evidence contributed to the

[33] JA at 10.
[34] *United States v. Gardinier*, 67 M.J. 304, 306 (C.A.A.F. 2009)(citing *Chapman,* 386 U.S. 18, 23 (1967)) (quoting *Fahy v. State of Connecticut,* 375 U.S. 85, 86–87 (1963))(emphasis added).
[35] *United States v. Sweeney*, 70 M.J. 296, 306 (C.A.A.F. 2011).

verdict."[36] However, the N.M.C.C.A. applied the wrong standard in its review of this case. As made clear by the United States Supreme Court in *Chapman* and *Fahy* and this Court in *Sweeney* and *Gardinier*, the standard is whether the evidence complained of *might* have contributed to the conviction, not that it did. This broader standard was not utilized by the N.M.C.C.A. in reaching its decision.

In applying the above standard, this Court utilizes the five *Van Arsdall*[37] factors: 1.) the importance of the testimonial hearsay to the Government's case; 2.) whether the testimony was cumulative; 3.) the existence of corroborating evidence; 4.) the extent of confrontation permitted; and 5.) the strength of the prosecution's case.[38] These factors are not exclusive.[39]

(1) The testimonial hearsay was important to the Government's case

The Court in *Van Arsdall* held, "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." In a contested "naked" urinalysis case such as this one, supporting the accuracy and reliability of the drug testing procedure is vital to the Government's case. In this case, the

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[36] JA at 10.
[37] *Deleware v. Van Arsdall*, 475 U.S. 673, 684 (1986).
[38] *Sweeney*, 70 M.J. at 306 (citing *Van Arsdall*, 475 U.S. at 684.
[39] *Id*.

N.D.S.L. testing procedures were directly attacked by the defense from the beginning.[40] During opening statements, the defense highlighted defects in the Government's case, including that no one who either handled Appellant's sample or conducted any of the tests would testify.[41] Moreover, while an N.D.S.L. employee, Ms. Andrea Kaminski, did testify, she admitted she did not inspect the sample on arrival at the laboratory,[42] did not perform any of the tests on Appellant's sample,[43] was not involved in setting up the screen or re-screen,[44] was not involved in the aliquot pours,[45] and could not even testify that the sample was the Appellant's.[46] Ms. Kaminski also testified that her name is not in the drug lab report,[47] and that she first reviewed the drug lab report four months after the testing.[48] Ms. Kaminski also testified to recent human and machine errors at the N.D.S.L.[49]

In analyzing these facts, we must assume that the damage of any cross-examination of the declarant of the testimonial hearsay was fully realized and his or her testimony was

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[40] Record at 109-10.
[41] *Id.*
[42] JA at 26.
[43] JA at 25.
[44] JA at 26.
[45] *Id.*
[46] Record at 287.
[47] JA at 26.
[48] *Id.*
[49] Record at 265-67.

completely discredited. Ms. Kaminski, absent the testimonial hearsay, was unable to provide the court any independent evidence establishing the propriety of the testing of the Appellant's specific sample. With this as a backdrop, Ms. Kaminski answered no fewer than 12 questions in front of the members while reading directly from page 3 of the D.T.R., which contained the testimonial hearsay in question.[50] Because the members were aware that Ms. Kaminski did not perform any of the tests on Appellant's sample and could not even testify that the sample was the Appellant's, the member's had no choice but to rely on the testimonial hearsay in coming to the conclusion that the Appellant tested positive for marijuana use. Under these facts, the testimonial hearsay was more than important to the government's case, it was vital.

Cumulative and corroborating evidence

When discussing whether evidence is cumulative and/or corroborative, we must assume that the damaging potential of the cross-examination was fully realized, leaving the in-court affiant's credibility unbolstered. A review of the cross-examination of Ms. Kaminski shows the defense called into real question Ms. Kaminski's ability to speak to Appellant's specific test given her *de minimus* participation and lack of personal knowledge regarding the testing of Appellant's sample. Though

[50] Record at 232, 234-35.

her testimony was cumulative and corroborative of the testimonial hearsay to a point, it is reasonable to assume Ms. Kaminski's testimony would not have been as credible absent the bolstering provided by the DD Form 2624, blocks G and H given the defense cross-examination.

Appellant was not permitted to confront the witnesses against him.

The lower court correctly held that Appellant was not provided the opportunity to cross-examine the declarants.[51]

The prosecution's naked urinalysis case was weak.

When viewed as a whole, the government's case was weak. First, the lower court erroneously characterized Appellant's adamant denial of marijuana use as evidence that could have strengthened the government's case.[52] To the contrary, his explanation that he was around people who were using marijuana supports the *affirmative defense* of innocent ingestion. Additionally, the only witness the government had from the laboratory in this case was a witness who testified she did not perform any of the tests, was not present for shipping Appellant's sample, was not involved in setting up the screen or re-screen, was not involved in the aliquots pours, and could not testify that the sample was the Appellant's.

[51] JA at 8-9.
[52] JA at 9, note 19.

Plainly, the government could have presented its case by preparing Ms. Kaminski to testify without the repetition of virtually the entire D.T.R. or admitting the D.T.R. It is instructive on the importance of the D.T.R. to the government's case that the prosecutor's did not. Moreover, trial counsel showed how much the government relied on this testimonial hearsay when trial counsel reinforced it in his own closing argument.[53] In closing, trial counsel argued to the members, "But I do want to focus on a few of the important documents out of this drug package … Page 3 … [y]ou'll see it's got Lance Corporal Tearman's social security number from batch 0429, specimen 10 …. That lab accession number tested positive for THC."[54] Under these facts, the evidence complained of directly contributed to Appellant's conviction.

The lower court did not consider one of the *Blazier II* factors.

When assessing harmlessness in the constitutional context, an additional factor this Court relies upon is whether the expert witness repeated the testimonial hearsay in court.[55] That is precisely what occurred in this case. While holding the D.T.R., Ms. Kaminski was asked, "Now, for batch number 362, specimen 082,

[53] Record at 352-53.
[54] *Id*.
[55] *United States v. Blazier* (*Blazier II*), 69 M.J. 218, 226-27 (C.A.A.F. 2010).

what was the result of any test that was done on that?"[56] Ms. Kaminski replied, "It was positive for THC."[57] Trial counsel continued, "And in block D of this document…what does that marking indicate?"[58] Ms. Kaminski replied, "That is a 1 and a plus meaning there's one positive on the form."[59] In short, Ms. Kaminski repeated the testimonial hearsay in open court.

II

THE LOWER COURT HELD THAT THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING, OVER APPELLANT'S OBJECTION, THE CHAIN-OF-CUSTODY DOCUMENTS AND INTERNAL REVIEW WORKSHEETS BECAUSE THEY WERE NON-TESTIMONIAL. THE LOWER COURT SHOULD BE REVERSED BECAUSE THESE NON-MACHINE GENERATED DOCUMENTS AND WORKSHEETS ARE TESTIMONIAL HEARSAY.

Standard of Review:

When an objection is raised by the defense, "this Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion."[60] However, "the antecedent question here – whether evidence that was admitted constitutes testimonial hearsay – is a question of law reviewed *de novo*."[61]

Discussion:

A statement is testimonial if "'made under circumstances which would lead an objective witness reasonably to believe that

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[56] JA at 24.
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *United States v. Blazier (Blazier I)*, 68 M.J. 439, 441-42 (C.A.A.F. 2010)(citations omitted).
[61] *Id at 442*.

the statement would be available for use at a later trial.'"[62]

Further,

> [w]here, as here, the accused's sample tests positive in at least one screening test, analysts must reasonably understand themselves to be assisting in the production of evidence when they perform re-screens and confirmation tests and subsequently make formal certifications on official forms attesting to the presence of illegal substances, *to proper conducting of tests, and to other relevant information*.[63]

The chain of custody & internal review documents are testimonial.

When an accused's sample tests positive on at least one screening test, analysts must understand themselves, thereafter, to be assisting in the production of evidence. In this case, the chain of custody documents, the internal review documents, and, more specifically, those who signed them, were attesting that the specimen was handled according to testing protocol and that the sample tested actually belonged to the Appellant. At least after the first presumptive positive, the analysts and those handling the samples should have reasonably known that they were assisting the government in the production of evidence. Notably, the government offered no alternate purpose for creating the documents and worksheets at issue. Accordingly, under this Court's precedent, at least those chain of custody and

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[62] *Sweeney*, 70 M.J. at 301 (citing *Blazier I*, 68 M.J. at 442).
[63] *Id.* at 302-03 (emphasis added)(footnote omitted).

internal review documents created after the initial presumptive positive screening contain testimonial hearsay.

Moreover, the military judge highlighted the chain of custody documents specifically instructing: "Chain of custody: The chain of custody of an exhibit is simply the path taken by a sample from the time it is given until it is tested in the laboratory. In making your decision in this case, you must be satisfied *beyond a reasonable doubt* that the sample tested was the accused's…." The "witnesses" who testified to this required finding testified by signing their names on the chain of custody documents admitted at trial. Not even the government's expert witness, Ms. Kaminski, could testify that the urine sample tested came from the Appellant. On cross-examination, the defense asked plainly: Q – "And again, you cannot testify that the sample described in the packet belongs to Lance Corporal Tearman?" A – "Correct."[64] Moreover, when trial counsel tried to recover from this assertion by reminding Ms. Kaminski that she had matched the specimen bottle to the LAN number and the Social Security number contained on the "*lab documents*," Ms. Kaminski's affirmative response only cemented the testimonial nature of the documents at issue.[65]

When objected to, this Court reviews the trial judge's refusal to exclude this evidence for an abuse of discretion.

[64] Record at 287.
[65] Record at 287-88.

While this Court did not decide *Sweeney* until August 2011, the Supreme Court decided *Melendez-Diaz v. Massachusetts* in June 2009.[66] In *Melendez-Diaz*, the Supreme Court was clear that "what [testimonial chain of custody evidence] *is* introduced must (if the defendant objects) be introduced live."[67] Though dicta, the Supreme Court's decision to include this in its ruling signaled to judges its view on this issue.

Additionally, while the *Sweeney* Court held that the admission of the chain of custody documents and internal review sheets did not constitute plain error, that holding was in large measure based on facts not present in this case. First, in Sweeney, objection to the D.T.R was not raised. Additionally, in *Sweeney*, one of the declarants of the data review sheet actually testified at trial.[68] Moreover, it was unclear to the Court whether that witness was also the declarant of the other forms.[69] Accordingly, the Court found there was no plain error.

However, in this case, objection *was* raised to the documents at issue. Further, the government's expert did not sign any of the declarations contained in the laboratory packet. While Ms. Kaminski was *present* for the final confirmation test and certified the test results, she took no part in the testing.

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[66] 129 S. Ct. 2527 (2009).
[67] *Id.*, at note 1 (emphasis in original).
[68] Sweeney, 70 M.J. at 305.
[69] *Id*.

Because Ms. Kaminski was not a declarant of any of the statements in the D.T.R, her testimony is akin to the surrogate's testimony disallowed by this Court in *Blazier II*, decided 14 days before this trial. Further, while the documents in this case were not "formalized," they were, in fact, official forms. Accordingly, the judge abused his discretion when he denied the defense request to exclude these testimonial documents.

Conclusion

The amicus respectfully urges this Court to reverse the decision of the lower court and set aside the Appellant's conviction for wrongful marijuana use.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because an *amicus brief may not exceed 7,000 words or 650 lines.* This brief contains 3208 words.

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