**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic JEFFREY J. KIM**
**United States Air Force**

**ACM 37613**

**07 February 2013**

Sentence adjudged 23 December 2009 by GCM convened at Hill Air Force Base, Utah. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 30 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; Major Phillip T. Korman; and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Captain Michael T. Rakowski; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ROAN, Senior Judge:

Contrary to his pleas, the appellant was convicted at a general court-martial comprised of officer members of wrongful use, distribution, and introduction of cocaine and heroin on divers occasions; wrongful use and distribution of marijuana and ecstasy on divers occasions; and wrongful introduction of ecstasy on one occasion, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The appellant was sentenced to a

bad-conduct discharge, confinement for 30 months, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

On appeal, the appellant argues that his Sixth Amendment[1] right to confrontation was violated when the military judge admitted testimonial hearsay in the form of two drug testing reports into evidence for the members' consideration. He also argues that each specification alleging use, distribution, and introduction of the identified drug was factually and legally insufficient.[2] He also argues that his sentence was overly severe.

*Background*

The appellant was selected for two random urinalysis inspections in March 2009. The two samples were subsequently tested at the Air Force Drug Testing Laboratory (AFDTL). The first sample tested positive for marijuana and cocaine. The second sample tested positive for cocaine. At trial, the appellant moved to exclude the drug testing reports (DTR) from evidence and to prevent testimony about them absent compliance with the Confrontation Clause. The military judge denied the appellant's motion and permitted the Government to introduce both DTRs into evidence for the members' consideration. He also allowed the Government's expert to testify about the information contained within the reports.

No one from the AFDTL testified at trial. Instead, Dr. Naresh Jain testified for the Government as an expert in forensic toxicology. Dr. Jain is a well known expert in this field, but has never been employed at the AFDTL and was not personally involved in any of the tests associated with the appellant's urine samples.

Dr. Jain testified about drug testing procedures in general and his knowledge of the AFDTL's procedures for testing the urine of military members. He also described the format and content of the DTRs prepared by the AFDTL, noting they included a compilation of raw data generated during the testing. Dr. Jain stated that each tested sample was identified by the identification number, the military member's social security number, and the laboratory accession number assigned by the AFDTL when the sample arrived at the facility.

The cover memorandum of the first DTR contained the following statement signed by the AFDTL's Lab Certifying Official (LCO): "I certify that I am a laboratory official, that the laboratory results indicated on this form were correctly determined by proper laboratory procedures, and they are correctly annotated." In response to the trial counsel's prompt, Dr. Jain read from that document, stating the "AFDTL found 31 nanograms per milliliter of marijuana metabolite, THC metabolite . . . [A]nd for the

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

[2] The appellant's assignment of errors with respect to the factual and legal sufficiency of all the drug specifications, other than wrongful use of cocaine and marijuana, were filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

cocaine metabolite . . . the laboratory found 5,937 nanograms per milliliter" in the tested specimen.

When asked what was denoted at the bottom of the Department of Defense (DD) Form 2624, *Specimen Custody Document – Drug Testing*, Dr. Jain replied that the signature at the bottom of the page indicated that the LCO "is certifying the results of these . . . samples" and that "one sample is positive for THC, that is marijuana metabolite, and cocaine." The DD Form 2624 itself contained a handwritten annotation of "THC" and "COC," signifying a positive test result for marijuana and cocaine, and the LCO attested that "the laboratory results . . . were correctly determined by proper laboratory procedures, and they are correctly annotated." Dr. Jain also testified that the chain of custody document indicated there were no discrepancies noted with the handling of the sample.

Dr. Jain testified similarly concerning the second DTR, noting the cover memorandum indicated the appellant's urine sample "tested positive for cocaine metabolite . . . at a concentration of 172 nanograms per milliliter." The DD Form 2624 for the second test was admitted into evidence, again with the LCO's signature attesting that proper laboratory procedures were followed and the results were correctly annotated. The document contained a handwritten comment that "COC" was detected in the sample.

*Testimonial Hearsay*

The DTR cover memorandum and the DD Form 2624 that identified the tests that were conducted, the substances that were detected, and the nanogram levels observed constitute testimonial hearsay. *United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). Similarly, Dr. Jain's testimony concerning the contents of the DTR cover memorandum and the DD Form 2624 improperly allowed him to act as a "conduit for *repeating* testimonial hearsay." *United States v. Blazier*, 69 M.J. 218, 225-26 (C.A.A.F. 2010) (citing *United States v. Mejia*, 545 F.3d 179, 198 (2d Cir. 2008)). In light of *Blazier* and *Sweeney*, we find that admission of the certifications on the respective cover memoranda, the LCO's certifications and handwritten annotations on the two specimen custody documents (DD Form 2624), and Dr. Jain's testimony concerning these specific documents violated the Confrontation Clause.

Having found that testimonial hearsay was erroneously admitted, we must evaluate its impact on the case. We review de novo whether evidence admitted in violation of the constitution is harmless beyond a reasonable doubt. *Blazier*, 69 M.J. at 226; *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005). In assessing harmlessness in the constitutional context, the question is not whether the admissible evidence is sufficient by itself to uphold the 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) (citation omitted), *quoted in*

*Blazier*, 69 M.J. at 227. This determination is made on the basis of the entire record and 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)).

Where the prosecution has only a laboratory report to prove its case, testimonial hearsay that validates the laboratory results increases in importance and, depending on the posture of the case, may have a reasonable possibility of influencing the verdict. Such is not the case here.

In addition to receiving the DTRs, the court members heard the testimony of Airman Basic (AB) JH who testified that he saw the appellant use marijuana and cocaine (amongst other drugs) on multiple occasions during the charged time frame. Further, Dr. Jain explained the significance of the multiple machine-generated printouts that were produced during testing of the appellant's urine (and provided to the members), and the members heard Dr. Jain state that, in his expert opinion, the appellant's urine included the presence of marijuana and cocaine in the first sample and cocaine in the second. Such testimony is not prohibited. *See Blazier*, 69 M.J. at 224 ("Because machine generated printouts of machine-generated data are not hearsay, expert witnesses may rely on them, subject only to the rules of evidence generally, and [Mil. R. Evid.] 702 and [Mil. R. Evid.] 703 in particular.").

Because the improperly admitted testimonial hearsay was cumulative with the expert's own opinion and the appellant's drug use was corroborated by the Government's independent evidence, we find its admission had little, if any, impact on the Government's overall presentation of the case. Therefore, we do not find a reasonable possibility that the testimonial hearsay evidence may have contributed to the appellant's conviction, and its erroneous admission was harmless beyond a reasonable doubt.

*Factual and Legal Sufficiency*

AB JH testified for the Government concerning all but one of the drug-related specifications.[3] Under a grant of testimonial immunity, AB JH stated that he used marijuana, cocaine, heroin, and ecstasy on different occasions with the appellant and that the appellant provided these same drugs to him during the charged time frame. AB JH also testified that the appellant brought cocaine, heroin, and ecstasy onto Hill Air Force Base (AFB), after which he would distribute the drugs to AB JH.

[3] The appellant was acquitted of wrongful distribution of 7.1 grams of marijuana. Airman Basic JH did not provide testimony concerning this specification.

At trial, the trial defense counsel's strategy was to discount AB JH's credibility before the members, pointing out that he had been previously court-martialed for drug offenses and assault and that, during his own trial, AB JH had not mentioned the appellant's involvement. Trial defense counsel also emphasized that AB JH received a reduction in his sentence by agreeing to testify, implying that he had a motive to lie. On appeal, the appellant argues his convictions for the various drug offenses were factually and legally insufficient because AB JH's testimony should be discounted due to his lack of credibility.

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we] are . . . convinced of the accused's guilt beyond a reasonable doubt." *Id*. at 325.

AB JH testified concerning his and appellant's use of and involvement with all four illicit substances. He thoroughly described the appearance of the drugs, the location the drugs were taken, the manner in which the appellant brought the drugs onto Hill AFB, the time frame in which the two used the drugs, and the effect the drugs had once ingested. While the appellant may believe AB JH's testimony is untrustworthy, a fact finder is certainly free to come to a different conclusion. Further, while we have the independent authority and responsibility to weigh the credibility of the witnesses in determining factual sufficiency, we are especially mindful of our duty under Article 66(c), UCMJ, 10 U.S.C. § 866 (c), to recognize that the trial court saw and heard AB JH's testimony. *United States v. Moss*, 63 M.J. 233, 239 (C.A.A.F. 2006) (Issues of witness credibility and motives are matters for the members to decide.). Considering all the evidence in the case and applying the requisite tests, we are convinced of the appellant's guilt beyond a reasonable doubt.

*Sentence Severity*

The appellant argues on his appeal that his sentence was overly severe, in part because the members sentenced him to 30 months of confinement despite trial counsel only recommending 24 months. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J.

35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M .A. 1988).

The appellant was convicted of multiple specifications of wrongful use, distribution, and introduction of illicit drugs. He faced a maximum period of confinement of 122 years. While the trial counsel recommended a 24-month period of confinement, the military judge properly instructed the members that they were responsible for determining an appropriate sentence. Additionally, the appellant's commander testified at trial concerning the detrimental impact the appellant's misconduct had on unit effectiveness. We have given individualized consideration to this particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all other matters contained in the record of trial.[4] The approved sentence was clearly within the discretion of the convening authority and was appropriate in this case. Accordingly, we hold that the approved sentence is not inappropriately severe.

*Conclusion*

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[4] We note that the appellant was previously tried by summary court-martial for drug-related offenses.

[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).