IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Timothy T. RYAN
Staff Sergeant (E-6), U.S. Marine Corps

NMCCA 9900374 Decided 30 December 2005

Sentence adjudged 7 May 1998. Military Judge: S.A. Jamrozy. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding Officer, Marine Corps Detachment, Fort Lee, VA. .

LCDR ERIC MCDONALD, JAGC, USN, Appellate Defense Counsel
CAPT RYAN WILSON, JAGC, USNR, Appellate Defense Counsel
LT JANELLE LOKEY, JAGC, USNR, Appellate Defense Counsel
CDR G.F. REILLY, JAGC, USN, Appellate Government Counsel
LT JASON LIEN, JAGC, USNR, Appellate Government Counsel
LT STEVEN CRASS, JAGC, USNR, Appellate Government Counsel

PRICE, Senior Judge:

This is our third review of this case. We will summarize the case history before we discuss the assignments of error.

Contrary to his pleas, the appellant was convicted of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The only evidence supporting the charge was a positive urinalysis. On 7 May 1998, a special court-martial consisting of officer and enlisted members sentenced the appellant to restriction for 60 days, reduction to pay grade E-1, and a bad-conduct discharge. On 16 February 1999, the convening authority approved the sentence as adjudged, but as a matter of clemency, suspended the restriction for 12 months. Given the passage of time and the absence of any evidence of vacation proceedings, we conclude that the restriction has been remitted. On 22 April 1999, the Naval

Clemency and Parole Board remitted the bad-conduct discharge and directed administrative separation with a General discharge.

On appeal to this court, the appellant asserted that the evidence supporting his conviction was legally and factually insufficient. In a supplemental assignment of error submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant once again contended that the evidence was factually insufficient, although the supporting argument emphasized facts distinct from the first brief. In our first decision, relying on *United States v. Campbell*, 50 M.J. 154 (C.A.A.F. 1999), *supplemented on reconsideration,* 52 M.J. 386 (C.A.A.F. 2000), we set aside the findings and sentence and dismissed the Charge and specification. *United States v. Ryan*, No. 9900374, unpublished op. (N.M.Ct.Crim.App. 8 August 2000). Upon certification by the Judge Advocate General, the U.S. Court of Appeals for the Armed Forces (C.A.A.F.) set aside our decision and remanded the case to this court for further consideration in light of *United States v. Green*, 55 M.J. 76 (C.A.A.F. 2001).

After the remand, the appellant once again asserted that the evidence was factually insufficient. In our second decision, we rejected the assignment of error and affirmed the findings and sentence. *United States v. Ryan*, No. 9900374, unpublished op. (N.M.Ct.Crim.App. 29 July 2003). Upon review, our superior court cited *United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004), set aside our decision, and remanded the case to this court for a new review pursuant to Article 66(c), UCMJ, before a panel of judges who have not previously participated in this case. In its remand order of 29 September 2004, our superior court did not address any matters other than the *Jenkins* issue. On 30 September 2004, the Government filed with this court a Motion to Stay Proceedings and Notice of Intent to Petition for Certiorari in the U.S. Supreme Court. That motion was denied. In the absence of any notification of a Writ of Certiorari, we have jurisdiction to comply with our superior court's remand.

The appellant has submitted two supplemental assignments of error: (1) "In light of *Crawford v. Washington*, 541 U.S. 36 (2004), appellant was denied his Sixth Amendment right to confront the witnesses against him where the Government's case consisted solely of appellant's positive urinalysis;" and (2) unreasonable post-trial delay. We have carefully considered all appellate filings in this case, including those submitted previously to this court and our superior court. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Sufficiency of the Evidence

The test for legal sufficiency is well-known. It requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987).

The test for factual sufficiency, however, is more favorable to the appellant. It requires this court to be convinced of the appellant's guilt beyond a reasonable doubt, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325. Proof beyond a reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)(citing *United States v. Steward*, 18 M.J. 506 (A.F.C.M.R. 1984)). "[T]he factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). So too may we. In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, but have given no deference to the factual determinations made at the trial level. *See United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

In arguing that the evidence is legally and factually insufficient, the appellant's first brief relied on *Campbell.* Thus, the appellant argued that the Government's evidence failed to show that: (1) the Department of Defense (DoD) cutoff level and reported level for the cocaine metabolite BZE reasonably discounted the possibility of innocent ingestion; and (2) the appellant felt the physical and psychological effects of the drug. The appellant also argued that the testimony of Lieutenant Commander (LCDR) Klette, the expert witness for the Government, did not provide an adequate basis to infer the wrongfulness of ingestion of cocaine. In his *Grostefon* supplemental assignment of error, the appellant took a different tack and argued that various discrepancies in the chain of custody rendered the evidence factually insufficient. Following the first CAAF remand, the appellant argued that the evidence is factually insufficient, repeating arguments previously made and asserting new arguments.

The Government presented standard urinalysis evidence in its case-in-chief, including testimony of the urinalysis coordinator, observer, and LCDR Klette. The Government also introduced documentary evidence of the collection, chain of custody, and biochemical analysis of the appellant's urine sample. The documentary evidence extended not only to the customary threefold testing culminating in gas chromatograph/mass spectrometry analysis, but also to a retest of the appellant's sample employing the same threefold testing. The appellant exercised his right not to present any evidence on the merits.

Our scrutiny of the record reveals that the local collection and chain of custody was not perfect. However, perfection is not required. *See United States v. Strozier,* 31 M.J. 283 (C.M.A.

1990); *United States v. Pollard*, 27 M.J. 376 (C.M.A. 1989). The minor deviations cited by the appellant are administrative in character and did not affect the integrity and reliability of the collection, handling and testing of his urine sample. We are satisfied that the appellant's urine sample is the same sample tested by the Navy Drug Screening Laboratory and that the sample was not contaminated or tampered with at any point in time.

As to the lab analysis, we are impressed with the clarity and credibility of LCDR Klette's testimony. While the appellant complains that the DoD cutoff level of 100 nanograms per milliliter (ng/ml) for the cocaine metabolite BZE and the appellant's test result of 148 ng/ml were not high enough to reasonably discount the possibility of unknowing ingestion, we conclude that LCDR Klette's testimony and the documentary evidence of the two separate rounds of lab analysis refute that complaint. We also reject the appellant's argument that the evidence did not demonstrate that the DoD cutoff level was greater than the margin of error and sufficiently high to reasonably exclude the possibility of a false positive and establish wrongful use.

Finally, the appellant asserts that the Government failed to demonstrate that the metabolite BZE can only be found in the body through knowing ingestion. During LCDR Klette's testimony, he conceded that it is possible to create BZE in a urine sample "outside the body." Record at 162. Although not clarified in his testimony, we take judicial notice of the well-known scientific fact that it is possible to pour pure cocaine into a urine sample and produce BZE in that sample. The defense obviously suggested through cross-examination and argument that such tampering with the appellant's sample might have produced the positive urinalysis, vice normal bodily metabolizing of cocaine ingested by the appellant. Had there been some real defects in the Government's chain of custody, we might credit this argument. Given the state of the evidence, as previously noted, we cannot do so.

We conclude that the evidence supporting the appellant's conviction is legally and factually sufficient.

Urinalysis Documents and *Crawford v. Washington*

Citing *Crawford v. Washington*, 541 U.S. 36 (2004), the appellant asserts that Prosecution Exhibits 6 and 7, the litigation packages from the Navy Drug Screening Laboratory for the initial and retest urinalysis, represent the type of "testimonial hearsay" that violates the Sixth Amendment. We disagree.

The appellant cites no other authority for this novel argument. In *Crawford*, the Court suggested that business records did <u>not</u> fall under the rubric of "testimonial hearsay". *Crawford*, 541 U.S. at 56. The Government cites several decisions

issued after *Crawford* for the proposition that documents admitted as business records are not "testimonial hearsay." *See United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005)(holding that a Certificate of Nonexistence of Record [CNR] was properly admitted into evidence as a public record to establish that the Government had not consented to the defendant's presence in the country); *People v. Shreck*, 107 P.3d 1048 (Colo.Ct. App. 2004) (holding that official records, like business records, are not testimonial under *Crawford); State v. Dedman*, 102 P.3d 628 (N.M. 2004)(holding blood alcohol report admissible as a public record). We are persuaded that a report of laboratory analysis of a urine sample prepared in accordance with standard scientific and technical procedures and admitted as a business record does not comprise the type of "testimonial hearsay" condemned in *Crawford*. This assignment of error is without merit.

Post-Trial Delay

The appellant contends that prejudice should be presumed from unreasonable post-trial delay and asks this court to set aside the bad-conduct discharge as relief. We decline to grant relief.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay, (2) the reasons for the delay, (3) the appellant's assertion of the right to a timely appeal, and (4) prejudice to the appellant. *United States v. Jones,* 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60, M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay itself is not unreasonable, there is no need for further inquiry. If, however, we conclude that the length of the delay is "facially unreasonable," we must balance the length of the delay with the other three factors. *Id.* Moreover, in extreme cases, the delay itself may "'give rise to a strong presumption of evidentiary prejudice.'" *Id.* (quoting *Toohey*, 60 M.J. at 102).

The appellant has been deprived of his right to a timely review of his conviction and sentence by this Court. He was sentenced over seven years ago. We find that the delay alone is facially unreasonable, triggering a due process review. The Government relies primarily on the troubled appellate history of this case to explain the delay. There is no question that the majority of the delay accrued after the case was first docketed at this court in March of 1999. We could parse the chronological record to assign accountability to various parties to the process, but see no need to do so. The bottom line is that the appellant has been waiting for nearly 3000 days for the review that Congress guaranteed him under Article 66(c), UCMJ. Since there are no satisfactory explanations for the delay in the record other than the obvious appellate review process, we look to the third and fourth factors. We find no assertion of the right to a timely appeal until this most recent brief was filed,

nor do we find any claim or evidence of actual prejudice. Thus, we conclude that there has been no due process violation due to the post-trial delay.

We are aware of our authority to grant relief under Article 66(c), UCMJ. However, we decline to do so. *Id.; United States v. Oestmann,* 61 M.J. 103 (C.A.A.F. 2005); *Toohey*, 60 M.J. at 100; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002).

Conclusion

The findings are affirmed. We note that the bad-conduct discharge, which has been remitted by the Naval Clemency and Parole Board, is no longer before us. *United States v. Dedert*, 54 M.J. 904, 909 (N.M.Ct.Crim.App. 2001); *United States v. Olinger*, 45 M.J. 644, 650 (N.M.Ct.Crim.App. 1997). We also note that the convening authority approved, but effectively remitted, the restriction. Nevertheless, the restriction is still part of the punishment. *United States v. Gaines,* 61 M.J. 689, 695-96, (N.M.Ct.Crim.App. 2005). We affirm that part of the sentence extending to restriction for 60 days and reduction to pay grade E-1.

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court