

**UNITED STATES NAVY-MARINE CORPS  
COURT OF CRIMINAL APPEALS  
WASHINGTON, D.C.**

**Before  
J.F. FELTHAM, D.E. O'TOOLE, F.D. MITCHELL  
Appellate Military Judges**

**UNITED STATES OF AMERICA**

**v.**

**KYLE D. FULLER  
MACHINIST'S MATE FIRST CLASS (E-6), U.S. NAVY**

**NMCCA 200501607  
GENERAL COURT-MARTIAL**

**Sentence Adjudged:** 31 August 2004.

**Military Judge:** CDR Charles Schaff, JAGC, USN.

**Convening Authority:** Commander, Navy Region Southeast, NAS, Jacksonville, FL.

**Staff Judge Advocate's Recommendation:** CAPT D.L. Bailey, JAGC, USN.

**For Appellant:** CAPT Edward Mallow, JAGC, USN; CAPT B.G. Filbert, JAGC, USN.

**For Appellee:** LT Mark Herrington, JAGC, USN.

**6 December 2007**

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**OPINION OF THE COURT**  
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**AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.**

MITCHELL, Judge:

A military judge, sitting as a general court-martial, convicted the appellant, contrary to his pleas, of one specification<sup>1</sup> of committing indecent acts and taking indecent liberties with a female under the age of 16, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934.

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<sup>1</sup> The appellant was originally charged with two specifications of committing indecent acts or taking indecent liberties with a child. Pursuant to a defense motion, the military judge consolidated the two specifications into one.

The appellant was sentenced to confinement for 13 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant raises two assignments of error. He contends that: (1) he was denied his Sixth Amendment right to effective assistance of counsel; and (2) he has been denied speedy post-trial review by the unreasonable delay in processing his case. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

### **Facts**

The appellant was a neighbor and friend of the victim's stepfather and frequently visited the victim's home. On the morning of 27 September 2003, the appellant was at the home of AH, the victim in this case. AH's mother had to go to work and her stepfather, Machinist Mate Second Class (MM2) K, went to a football game. AH was going to be home that day babysitting a child named "T". During the course of conversation that morning, MM2 K told the appellant that AH would be home babysitting and asked him if he would periodically check on her. The appellant agreed to do so. Throughout the day, the appellant frequently went to AH's house. During his last visit, AH asked the appellant for a back massage, something the appellant often did for AH even in front of her parents. AH testified that after he massaged her shoulders, the appellant then kissed her on the mouth, rubbed her chest underneath her clothing, pulled her underwear and shorts down to her knees, and started masturbating. Record at 91-93. After hearing "T" make a sound, AH "pulled back," at which point the appellant asked AH "Are you sure you want to do this" and she said "no." The appellant then asked her if she wanted him to "eat [her] pussy" and she again said "no." Record at 95. The appellant then left her house. Crying, AH immediately called her good friend whom she had been talking to on the phone most of the day. Her friend told her to call Security. AH then called another friend whose father worked in Security. Security was eventually contacted and the appellant was apprehended while he was walking toward the victim's home.

### **Ineffective Assistance of Counsel**

In his initial assignment of error, the appellant avers that his trial defense counsel were ineffective in their assistance during the trial on the merits and sentencing. He submitted an affidavit to that effect on 8 August 2006.

### **Case Background**

On 6 December 2006, this court ordered the Government to contact the appellant's trial defense counsel and secure, in affidavit form, their responses to the appellant's allegations of

ineffective assistance of counsel. The responses, when considered in light of the record of trial, were insufficient for this court to adequately address the ineffective assistance of counsel issue. Therefore, on 25 January 2007, we returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority to either order a hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1968), or to order a rehearing on findings and sentence.

A *Dubay* hearing was conducted on 6 April 2007. Specific findings of fact and conclusions of law were made by the military judge who presided over the hearing. After considering all of the evidence adduced at the *Dubay* hearing, as well as the entire record of trial, the military judge concluded that "the appellant was prejudiced by the deficient performance of his counsel and thus failed to receive effective assistance on the merits of his case." *Dubay* Hearing Findings of Fact and Conclusions of Law dated 4 May 2007 at 5.

### The Law

In order to prevail on a claim of ineffective assistance, the appellant must overcome the strong presumption that his counsel acted within the wide range of reasonably competent professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The appellant has the burden of demonstrating: (1) his counsel were deficient; and (2) he was prejudiced by such deficient performance. *Id.* at 687. To meet the deficiency prong, the appellant must show that his defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.*; *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001). The appropriate test for prejudice under *Strickland* is whether there is a reasonable probability that, but for counsel's error, there would have been a different result. *United States v. Quick*, 59 M.J. 383, 387 (C.A.A.F. 2004). The appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (C.A.A.F. 1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997)).

The effectiveness of counsel is a mixed question of law and fact. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001). The factual findings of the military judge are reviewed under a clearly erroneous standard, and the ultimate determinations whether the representation was ineffective and, if so, whether it was prejudicial, are reviewed *de novo*. *Id.*; see *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004).

The *Dubay* judge found several facts which he used to form the basis for his legal conclusion that the assistance of counsel in this case was ineffective. Reviewing these findings of fact

under a clearly erroneous standard, we conclude that they are supported by the record and we adopt them as our own. We additionally defer to the *Dubay* judge's determinations of credibility in this regard.

We must now consider *de novo* whether these facts support a finding of deficiency, and if so, whether this deficiency rises to the level of prejudice. We disagree with the *Dubay* judge's conclusions that counsel's performance was deficient and that the appellant was prejudiced.

## **Analysis**

The appellant's brief details multiple actions or inactions by the trial defense team which rendered their assistance ineffective. He specifically alleges, *inter alia*, that his trial defense team was ineffective because: (1) they failed to obtain telephone records from the victim's home, the telephone used by the victim's friend BW, as well as his own home telephone, which would have cast doubt on the victim's testimony; and, (2) that it made no strategic sense not to have the appellant testify on the merits in a "he-said, she-said" case. Appellant's Brief of 16 Aug 2006 at 10-15. While the military judge, at the conclusion of the *Dubay* hearing, opined that the defense counsel team was ineffective, he identified two separate errors. Specifically, he identified their failure to offer into evidence the results of the DNA tests conducted on the victim's and the appellant's clothing, and their failure to inform the appellant that he could plead guilty by exceptions and substitutions. *Dubay* Hearing Conclusions of Law at ¶¶ 1 and 2. We will consider all four alleged errors below.

### **1. Failure to retrieve phone records**

On 29 September 2003, the appellant met with LT Susan Donovan, JAGC, USN, at the Naval Legal Service Office Southeast Detachment, Charleston. The appellant told LT Donovan of his 27 September 2003 arrest by civilian authorities and the allegations made by the alleged victim. During the course of this conversation, LT Donovan recalls the appellant mentioning that his phone records would show that the victim was constantly calling him on that day.<sup>2</sup>

LT Donovan was not detailed to represent the appellant until 26 February 2004, over four months later. After unsuccessfully attempting to negotiate a pretrial agreement, the appellant and his defense team commenced preparing for trial. LT Donovan

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<sup>2</sup> This meeting with counsel took place a few days after the appellant's arrest. There were no charges preferred at that time and, consequently, no letter from higher authority detailing LT Donovan to this case. Although LT Donovan may have established an attorney-client relationship with the appellant, she was not functioning as his trial defense attorney prior to being detailed to the case.

testified at the *Dubay* hearing that she spoke with "someone" in the legal department at BellSouth concerning retrieving the aforementioned phone records, and had prepared written requests for such. She was informed at that time that she needed a subpoena in order to receive these documents. Record at 362. Although she could not specifically remember the date she spoke to the BellSouth representative, she thought it was about one month prior to the subpoenas being sent, which would have been around the June timeframe.<sup>3</sup> She was also informed that, as a standard practice, BellSouth telephone records were only kept for 30-60 days. *Id.* The offenses for which the appellant was tried occurred on 27 September 2003. The appellant has neither asserted nor offered evidence that the phone records were still available after the date his trial defense team was detailed. Quite to the contrary, the record suggests the telephone records, in all likelihood, were not available at the time the defense team was detailed.<sup>4</sup> Even assuming, *arguendo*, that the trial defense counsel had a duty to diligently seek evidence months prior to even being assigned to the case, the available evidence suggests the telephone records would not have supported the appellant's version of events. LT Rust, Defense Counsel, Affidavit of 26 Dec 2006 at 1.

## **2. Election to Remain Silent**

The appellant next contends that he received ineffective assistance of counsel when he was advised by his trial defense team not to testify on the merits. When reviewing tactical decisions by counsel, the test is whether such tactics were unreasonable under prevailing professional norms. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001)(citing *Strickland*, 466 U.S. at 688-90). We will not second-guess those tactical decisions. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993)(quoting *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Concerning the advice to the appellant not to testify on the merits, his trial defense counsel, LT Donovan, testified that she was concerned about his credibility. She testified during the *Dubay* hearing that "[The appellant's] story had changed that he relayed to us... him [sic] admitting to fondling and things of that nature... [W]e did discuss the idea of putting him on the stand and having him testify on the merits... and it just wasn't coming up credible." Record at 369-70. This decision was obviously a tactical one, reached after consultation with the appellant. We decline to second-guess it.

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<sup>3</sup> The record reflects that the subpoenas for the phone records were issued on 23 July 2004. Record at 363.

<sup>4</sup> There is nothing in the record to explain why the appellant could not or did not preserve and provide his own BellSouth records to his counsel after his initial meeting.

### 3. Right to Plead Guilty with Exceptions and Substitutions

The military judge, after hearing testimony in the *Dubay* hearing, opined that defense counsel were deficient because they did not inform the appellant that he could plead guilty by "exceptions and substitutions." The military judge further concluded that by not being advised of this right, the appellant was unable to make an intelligent decision as to whether to testify on the merits. Assuming, *arguendo*, that the trial defense counsel committed error, as the military judge concluded, we find this error to be harmless beyond a reasonable doubt.

The appellant was convicted and sentenced by a military judge sitting alone. We presume that the military judge knows the Rules for Court-Martial, just as we presume that military judges know the law. *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997). The evidence the appellant wanted the military judge to consider on the merits was presented to the military judge under oath during the presentencing phase of the trial. Pursuant to RULE FOR COURTS-MARTIAL 924(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed), the military judge had the option to, and in did fact consider on the record, whether to, *sua sponte* reconsider his findings after the appellant testified during sentencing. The military judge reviewed the testimony of a Government witness before deciding not to reconsider. Record at 259-60. The appellant has the burden of persuasion and, under these facts, he has not established how he was prejudiced.

### 4. Failure to offer DNA Evidence

Finally, the military judge conducting the *DuBay* hearing opined that defense counsels' performance was deficient in that they did not offer the results of DNA testing to rebut the victim's testimony. We do not agree.

After AH made the allegations against the appellant, the clothing each was wearing was tested for DNA. The results were inconclusive. Both the appellant and the victim agree that the appellant was in the victim's home, that the appellant gave her a shoulder massage at her behest, and that there was a kiss exchanged between the two of them, although there is a question as to who initiated the kiss. Additionally, the victim alleges that the appellant felt her breast under her shirt, pulled down her shorts and panties, and commenced masturbating. There was nothing in the record to suggest that the appellant masturbated to the point of ejaculation, or that any of the other activities described would have deposited bodily fluids during this encounter. The inconclusive and negative DNA results, therefore, have a low probative value. Furthermore, it is unclear what part of the victim's testimony these inconclusive results would rebut. We do not concur with the *Dubay* judge's assessment that the appellant was prejudiced by the defense team's failure to offer these results into evidence or that the results of the DNA testing controverted the testimony of the victim.

We have thoroughly considered the appellant's extensive arguments on each of these issues and conclude that the appellant was not denied effective representation under the applicable standards of review. Accordingly, we find the appellant's claim that he was denied effective assistance of counsel to be without merit.

### **Post-Trial Delay**

In his final assignment of error, the appellant avers that his right to a speedy post-trial review was materially prejudiced by unreasonably delay in post-trial processing. In this case, a delay of approximately 15 months occurred from the date of sentencing to the date of docketing with this court.

In light of *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), and *United States v. Allison*, 63 M.J. 365 (C.A.A.F. 2006), we assume, without deciding, that the appellant was denied his due process right to speedy post-trial review and appeal. We must, therefore, now consider prejudice to the appellant.

The appellant submitted a declaration claiming in general terms that after release from confinement, he returned to his home in Texas and could not be hired for a number of jobs because he could not provide a DD-214.

In *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005), our superior court found prejudice where the appellant submitted not only his own declaration, but declarations from three employees of a company verifying that the appellant would have either been hired, or at least seriously considered for employment, had he been able to present documentation concerning his discharge from the military. Here, the appellant has not provided any evidence to support his declaration. Furthermore, the declaration itself lacks sufficient detail to permit the Government an opportunity to verify or rebut his claims. As our superior court stated in *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990), "relief may not be predicated upon claims of prejudice that are unverified and unverifiable. The burden rests with appellant."

We find the appellant's unsupported allegations of prejudice both speculative and conclusory, and reject his claim of prejudice on that basis. We find the appellant's denial of speedy post-trial review to be harmless beyond a reasonable doubt. We additionally find that the delay does not affect the findings and sentence that should be approved in this case.

*United States v. Tardiff*, 57 M.J. 219, 224 (C.A.A.F. 2002);  
*United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim.App. 2005) (*en banc*); see Art 66(c), UCMJ.

**Conclusion**

The findings and sentence are affirmed.

Senior Judge FELTHAM and Judge O'TOOLE, concur.

For the Court

R.H. TROIDL  
Clerk of Court