

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

BEFORE

D.O. VOLLENWEIDER

J.E. STOLASZ

V.S. COUCH

UNITED STATES

v.

**Michael S. GLADDEN
Staff Sergeant (E-6), U.S. Marine Corps**

NMCCA 200600155

Decided 7 June 2007

Sentence adjudged 9 December 2004. Military Judge: M.P. Gilbert. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, 2d Supply Battalion, 2d Force Service Support Group, Camp Lejeune, Camp Lejeune, NC.

LT ANTHONY YIM, JAGC, USN, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

VOLLENWEIDER, Senior Judge:

A military judge sitting as a special court-martial convicted the appellant, contrary to his pleas, of two specifications of larceny, in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921. The military judge sentenced the appellant to confinement for 12 months, forfeiture of \$787.00 pay per month for 12 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged but, in an act of clemency, suspended all confinement in excess of 6 months for a period of 12 months from the date of his action. The convening authority also suspended the adjudged forfeitures and waived automatic forfeitures in favor of the appellant's dependents for a period of 6 months from the date of his action.

We have carefully examined the record of trial, the appellant's two assignments of error, and the Government's response. We conclude that the findings and the 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.

Background

The appellant's offenses¹ involve two "convenience" checks that he fraudulently obtained from an MBNA of America (MBNA) credit card account belonging to his friend and former roommate, Staff Sergeant (SSgt) P. SSgt P testified that he had often used the appellant's personal computer to access his bank accounts. SSgt P also testified that he had written down the personal information needed to access his MBNA account on papers that he kept near the appellant's computer. The evidence presented at trial showed that someone accessed SSgt P's MBNA account via the internet at a time when SSgt P was deployed to Afghanistan and requested the issuance of two convenience checks, each in the amount of \$1,000.00 and payable to the appellant. The appellant received these checks and deposited them in an account at Navy Federal Credit Union (NFCU) that he owned jointly with his wife, Mary Gladden. SSgt P noticed the unauthorized transactions on his account and contacted MBNA from Afghanistan to report the fraudulent activity. MBNA then notified NFCU, which froze the appellant's account and later returned the funds to MBNA.

When SSgt P confronted the appellant about the checks via e-mail, the appellant denied having requested the checks and claimed that MBNA had told him that the checks were valid and had been sent to him because of a "skip trace".² Prosecution Exhibit 2 at 1. The appellant later gave a similar account when interviewed by an investigator from the Camp Lejeune provost marshal's office, explaining that he had believed the checks were the result of a "skip trace" that had determined he was owed money for back taxes he had paid on a recently purchased house. Record at 118. However, the appellant was unable to explain why SSgt P's name and address would have appeared on the checks if they were the result of a "skip trace." The appellant claimed that he and his wife had contacted MBNA to verify the checks before depositing them at NFCU and that MBNA had assured them the checks were valid. The appellant acknowledged that he did not attempt to contact SSgt P about the checks prior to depositing them.

The appellant and his wife did not testify at trial. In his closing argument, the appellant's trial defense counsel argued that the Government's evidence was insufficient to exclude the

¹ The appellant was charged with two separate larcenies, one for wrongfully taking the checks from MBNA of America and another for wrongfully taking \$2,000 in U.S. currency from the Navy Federal Credit Union. Although not raised by the appellant, we have considered the possibility of a fatal variance between the pleadings and the proof of ownership with respect to the U.S. currency. We find that the appellant was in no way misled in his defense and that his conviction for these offenses constitutes a bar to further prosecution for the same acts. Accordingly, we find no possible prejudice to the substantial rights of the appellant and conclude that any variance was not fatal. *See generally United States v. Craig*, 24 C.M.R. 28, 30 (C.M.A. 1957).

² Mary Gladden explained that a "skip trace" was an effort to find somebody, for example to find a person to whom money was owed. She also said that a "skip trace" could involve a search for assets.

possibility that the appellant's wife had requested the checks. The military judge found the appellant guilty and entered special findings that the conviction was not predicated on a theory of accomplice liability. The day after the court-martial adjourned, the appellant's wife provided an affidavit to the trial defense counsel stating that she had requested the checks and had done so without the appellant's knowledge. As the military judge had not yet authenticated the record of trial, the trial defense counsel moved for a post-trial Article 39(a), UCMJ, session "to consider newly discovered evidence and to reconsider the court's finding of guilty in this case, based on the newly discovered evidence." Appellate Exhibit XII³ at 1.

The military judge granted the defense motion, in part, and convened a post-trial Article 39(a), UCMJ, session to consider the newly discovered evidence. The appellant's wife, mother, and stepson gave testimony at this post-trial session. The appellant's wife testified that she would have admitted her guilt had she been called as a witness at trial. She also acknowledged that she had not told anyone this before or during trial and had in fact lied to both the appellant and his trial defense counsel by denying that she had requested the checks. The trial defense counsel admitted that before trial he had suspected the appellant's wife of requesting the checks. However, he explained that he did not call her as a witness because he believed on the basis of her previous denials that she would continue to deny any involvement and that this would diminish the effectiveness of his closing argument. Evidence presented at the post-trial session indicated that the appellant's wife was of untruthful character and had a record of crimes involving dishonesty.

At the conclusion of the post-trial session, the trial defense counsel asked the military judge to reopen the case and reconsider his findings, or in the alternative, to grant the appellant a new trial. The military judge denied both requests in a lengthy written ruling, concluding that the evidence proffered as "newly discovered" was not new evidence; that it could have been discovered before trial through the exercise of due diligence by the trial defense counsel; and that its credibility was so low that, if viewed in the light of all other pertinent evidence, it would probably not produce a substantially more favorable result for the appellant at a new trial. See Appellate Exhibit XVIII.

Motion for New Trial

The appellant does not on appeal allege that the evidence in his original trial was insufficient to support the military judge's findings of guilt. Rather, the appellant asserts that the military judge abused his discretion in denying the defense motion for a new trial. We disagree.

³ We note that both the military judge's special findings and the defense's post-trial motion are labeled "AE-XII."

"Article 39(a) of the [UCMJ] empowers the military judge to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate." *United States v. Scaff*, 29 M.J. 60, 66 (C.M.A. 1989). This includes evidence discovered after trial that would constitute grounds for a new trial under RULE FOR COURTS-MARTIAL 1210(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.). *Id.* at 65-66. *See also* R.C.M. 1102(b)(2). Rule for Courts-Martial 1210(f)(2) provides that a new trial shall not be granted on the basis of newly discovered evidence unless:

- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

When considering a motion raised under Rule for Courts-Martial 1210(f)(2), the military judge "must make a credibility determination" as to whether the newly-discovered evidence "is sufficiently believable to make a more favorable result probable." *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998). However, the military judge does not determine whether the proffered evidence is true. *Id.* "Petitions for new trial should be denied where post-trial attempts to exculpate the petitioner appear 'contrived.' In these situations, such attempts should simply be deemed unworthy of belief and rejected." *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982)(citations omitted). Requests for a new trial are "generally disfavored" and should be granted only where "a manifest injustice would result absent a new trial . . . based on proffered newly discovered evidence." *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993).

Whether sufficient grounds exist to grant a motion for a new trial is a decision "'within the [sound] discretion of the authority considering . . . [that] petition.'" *Bacon*, 12 M.J. at 492 (quoting *United States v. Lebron*, 46 C.M.R. 1062, 1066 (A.F.C.M.R. 1973)). "We review a military judge's ruling on a petition for a new trial for abuse of that discretion." *United States v. Humpherys*, 57 M.J. 83, 96 (C.A.A.F. 2002)(citing *United States v. Rios*, 48 M.J. 261, 268 (C.A.A.F. 1998)). An abuse of discretion occurs "if the findings of fact upon which [the military judge] predicates his ruling are not supported by evidence of record; if incorrect legal principles were used by him in deciding this motion; or if his application of the correct legal principles to the facts of a particular case is clearly unreasonable." *Williams*, 37 M.J. at 356.

Assuming, without deciding, that the military judge incorrectly applied the first two prongs of the Rule for Courts-Martial 1210(f)(2) analysis, we examine whether the military judge properly concluded that the proffered evidence would probably not produce a substantially more favorable result for the appellant at a new trial. The appellant argues that the military judge applied the wrong standard of review in reaching this conclusion, determining whether he himself believed the proffered evidence instead of "whether a neutral and detached fact-finder *could* have found a more favorable result" at a new trial. Appellant's Brief of 25 Aug 2006 at 7 (emphasis in original). However, it is the appellant who advances here an incorrect standard of review. The test to be applied in the third prong of the Rule for Courts-Martial 1210(f)(2) analysis is not whether the proffered evidence would make a "substantially more favorable result" *possible* at a new trial, but rather whether it would make such a result *probable*. See *Brooks*, 49 M.J. at 69.

In reaching his conclusion that a substantially more favorable result for the appellant was not probable at a new trial, the military judge evaluated the credibility of the proffered evidence. The military judge found the post-trial testimony from the appellant's wife to be "evasive and not credible in the main." Appellate Exhibit XVIII at 10. Regarding the specific facts to which the appellant's wife testified, the military judge found her story "implausible" and "contrived with respect to the perfection in which it matches the defense counsel's closing argument particularly since she maintained over the course of nearly a year that she did not know anything about the checks." *Id.* at 11 n.10, 27. For these reasons, the military judge found that the appellant's wife was "so wholly incapable of belief that her statements after trial have no credibility whatsoever." *Id.* at 25.

We have reviewed the record of the post-trial session and conclude that these findings are totally supported by the evidence. In her post-trial testimony, the appellant's wife wove a tale that ranged from improbable in some parts to obviously untrue in others. Accordingly, we adopt as our own the military judge's finding that the proffered evidence had no credibility whatsoever. "[A new trial] is made available as a means of relief from manifest injustice. That purpose would hardly be served if the law required the trial judge, who heard all of the evidence and saw all of the witnesses, to assume that [another fact-finder] would believe testimonial evidence however improbable and unworthy of belief he finds it to be." *Bacon*, 12 M.J. at 493 (citing *Jones v. United States*, 279 F.2d 433, 436 (4th Cir. 1960)). This is particularly true where, like here, the trier of fact was the military judge. Having found the proffered evidence to be implausible and unworthy of belief, the military judge properly rejected the appellant's motion for new trial. See *id.* at 492.

Ineffective Assistance of Counsel

The appellant also asserts, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that his trial defense counsel was ineffective. The appellant argues that his trial defense counsel failed to exercise due diligence to discover evidence of his wife's guilt before trial. We disagree.

The U.S. Supreme Court has articulated a two-pronged test for determining whether there has been ineffective assistance of counsel; that is, deficient performance and prejudice. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.* Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* This constitutional standard applies to military cases. *United States v. Scott*, 24 M.J. 186, 187 (C.M.A. 1987). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id.* at 188. In order to show ineffective assistance, an appellant "must surmount a very high hurdle." *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997).

In the appellant's case, we are not left to speculate why the appellant's counsel did not call the appellant's wife to testify as a witness at trial. The appellant's trial defense counsel told the military judge that he had relied on his prior dealings with Mrs. Gladden in making a tactical decision not to call her as a witness at trial. The trial defense counsel stated his belief that she would have denied her involvement on the witness stand, undermining his intended argument that she was the real culprit, and that she would in other ways be an unpredictable witness. She also would have been impeached by her prior felony convictions. Although the appellant's wife testified that she would have exonerated the appellant if only she had been called as a witness at trial, we reject her self-serving testimony in this regard and find that at the time of trial the appellant's defense counsel was faced with a witness whose testimony he reasonably believed would damage the appellant's case. Under the circumstances, we find that the appellant's trial defense counsel exercised due diligence and made a reasonable tactical decision on that basis. See *Williams*, 37 M.J. at 357 (finding due diligence where potential witnesses misled counsel before trial as to how they would testify if called at trial).

Assuming, *arguendo*, that the appellant's wife would have given substantially the same testimony if called as a witness at trial as she did during the post-trial session, our finding that her post-trial testimony had no credibility whatsoever removes any possibility of prejudice to the appellant. Accordingly, this assignment of error is without merit.

Conclusion

We affirm the findings and the sentence, as approved by the convening authority.

Judge STOLASZ and Judge COUCH concur.

For the Court

R.H. TROIDL
Clerk of Court