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

Before
E.E. GEISER, L.T. BOOKER, J.K. CARBERRY
Appellate Military Judges

UNITED STATES OF AMERICA

v.
RICHARD R. MOTT
SEAMAN (E-3), U.S. NAVY

NMCCA 200900115
GENERAL COURT-MARTIAL

Sentence Adjudged: 7 November 2008.
Military Judge: CAPT David L. Bailey, JAGC, USN.
Convening Authority: Commander, Navy Region, Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: LCDR W.A. Record, Jr., JAGC, USN.
For Appellant: LT Sarah E. Harris, JAGC, USN.
For Appellee: Capt Robert E. Eckert, Jr., USMC.

24 November 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Chief Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of attempted premeditated murder, in violation of Article 80, Uniform Code of Military Justice, 10 U.S.C. § 880. The approved sentence was confinement for 12 years, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge.

The appellant raised four assignments of error on appeal. First, the appellant asserts that he cannot be found guilty of attempted murder if, due to his mental disease, he thought his act of stabbing another was morally justified. Second, he avers that the Government violated the appellant's right to discovery by withholding the fact that the Government psychiatric expert's

opinion was that the appellant met both prongs of RULE FOR COURTS-MARTIAL 706, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Third, the appellant argues that under the circumstances of the case, confinement for 12 years was unjustly severe. Finally, the appellant asserts that the convening authority (CA) erred when he purported to execute the appellant's dishonorable discharge.

We have considered the record of trial and the pleadings. We agree with the appellant's second assignment of error. We will set aside the findings and the sentence in our decretal paragraph. In view of our action, the appellant's remaining three assignments of error are moot. Arts. 59(a) and 66(c), UCMJ.

Discovery

The facts of this case are largely undisputed. On 6 March 2007, Seaman JG checked onto USS CAPE ST GEORGE (CG 71) for duty. Two days later, while Seaman JG was eating breakfast on the ship's mess deck, the appellant attacked and stabbed Seaman JG with a pocketknife. The appellant was pulled away from the victim by other shipmates and emergency medical assistance was rendered which saved Seaman JG's life.

The parties agree that at the time of the stabbing incident, the appellant was suffering from paranoid delusions. Specifically, the appellant apparently believed that in the summer of 2003, the victim and upwards of fifteen unknown males leapt from the closet of his girlfriend's apartment and raped him. The men shoved "an unknown liquid and powder" in the appellant's anus and then began "cutting his anus with small plastic pieces." The appellant believed that he tried to fight back but his energy was fading so he passed out. The appellant further believed he was somehow able to fight his assailants off and clean the material from his anus. The appellant also asserted a belief that JG placed a bag over the appellant's head and stated "I need to kill [the appellant] or else the whole team will get caught." The appellant believed that he played dead until everyone left the room and then wriggled away. When asked why he did not report the crime, the appellant explained that he did not report the incident because he did not know how to explain it.

The appellant further believed that the assailants told him that they would "always be watching him from spots around the outside of his apartment." The appellant also concluded that "[t]he things that have happened to me have caused me to want the people involved in raping me to be brought to justice. [JG] has tried to kill me before. Now I want . . . justice served and any male/female involved in my rape and attempted murder (on the ship) brought to justice." Prosecution Exhibit 5. The parties agree that there is no evidence the appellant ever actually met or had dealings with the victim prior to the attack.

After hearing the appellant's bizarre explanation for his attack, an R.C.M. 706 evaluation was conducted. The evaluation was conducted on 28 July 2007 by Captain Edward Simmer, MC, USN. Dr. Simmer is a board certified forensic psychiatrist and Senior Executive Director for Psychological Health for the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury. He testified that he has conducted over 500 R.C.M. 706 evaluations.

In pertinent part, Dr. Simmer opined that, at the time of the offense, the appellant suffered from a severe mental disease (paranoid schizophrenia). He further opined that, at the time of the offense, due to his severe mental disease, the appellant was unable to understand the wrongfulness of his actions. Appellate Exhibit XI at 2. In view of the R.C.M. 706 board result, the appellant requested and was granted the assistance of a psychiatric expert to assist the defense team. The Government similarly employed a psychiatric expert, Dr. Leigh Hagan.

As part of a pretrial agreement, the Government was provided the entire R.C.M. 706 board report and invited to have Dr. Hagan review the original board report and to conduct a separate mental health examination of the appellant. Dr. Hagan reviewed all the documents considered by the original R.C.M. 706 board and personally examined the appellant.

As a discovery matter, the defense requested "copies of any reports or statements or conclusions of experts made in connection with this case, including . . . mental health examinations." Attachments 1 and 2 to Appellant's Partial Consent Motion to Attach of 16 Jun 2009. The parties agree that the Government did not disclose any reports, statements, or conclusions reached by Dr. Hagan in connection with his mental health examination of the appellant.

On the merits at trial, the Government presented a stipulation of fact regarding the incident. The Government also introduced evidence of several statements made by the appellant after the incident which could be interpreted to reflect the appellant's understanding at the time of the incident that his stabbing of Seaman JG was wrongful, that the appellant's attack was motivated by revenge or retribution as opposed to self-defense, and that any threat perceived by the appellant was not sufficiently imminent to warrant a finding of self-defense.

Specifically, the appellant acknowledged to investigators that he purchased the knife "for protection" and because he wanted to be "prepared for a confrontation." The Government did not present any expert mental health testimony on the merits.

The defense case-in-chief focused on the appellant's mental state and featured the testimony of the R.C.M. 706 examining officer, Captain Simmer. Consistent with his written report, Dr. Simmer testified that the appellant suffered from paranoid

schizophrenia and that due to his paranoid delusions, at the time of the offense, the appellant did not understand the wrongfulness of his actions.

During cross-examination, Captain Simmer acknowledged the appellant's statements to investigators, but opined that any such statements must be understood in the context of the appellant's paranoid delusion. Specifically, Dr. Simmer testified that, in his opinion, the appellant believed Seaman JG was one of the individuals who sexually assaulted him, and that the appellant further believed JG had tried to kill him when he placed a bag over his head and said we need to kill Mott, otherwise the whole team will be caught. Record at 194. Dr. Simmer further testified that while the appellant understood the nature of stabbing someone and that such stabbing could cause grievous bodily harm and death, the appellant nonetheless genuinely believed that "attacking and trying to kill [JG] was the only way to prevent [JG] from killing him." Record at 212. According to Dr. Simmer, the morning the appellant saw [JG] on the mess deck, the appellant believed [JG] was watching him and plotting an imminent attack.

At trial, the military judge considered the expert testimony as well as the stipulation of fact and the statements the appellant made to investigators. He determined that, notwithstanding the expert testimony, the appellant had not met his burden to prove by clear and convincing evidence that he did not understand the wrongfulness of his action when he stabbed Seaman JG. In connection with his ruling, the military judge entered special findings in which he opined, *inter alia*, that Dr. Simmer's testimony was "inconsistent and contradictory." AE XIII at 4.

More specifically, the military judge found that Dr. Simmers did not discuss "legal or moral justification or wrongfulness with the [appellant]." Further, the military judge cited to Dr. Simmers' acknowledgment during cross-examination that the appellant understood he had other options available and that the appellant's statements indicated no timelines or imminence for the appellant's perception of threat from the victim. *Id.* The military judge ruled that the appellant had not met his burden and held that the appellant was, in fact, legally responsible for his actions. The appellant was subsequently convicted and sentenced.

On appeal, upon motion by the appellant, this court ordered the Government to produce the file Dr. Hagan maintained on his examination of the appellant. We determined that the file contained no discoverable reports, statements, or conclusions regarding the appellant. The Government concedes, however, that Dr. Hagan informed the trial counsel verbally that he agreed with the opinion of the defense expert that the appellant was suffering from paranoid schizophrenia and that as a result of

this severe mental disease, he was unable to understand the wrongfulness of his actions on the day of the stabbing.

Review of discovery issues involves a two-step analysis. First, we must determine whether the information or evidence at issue was subject to disclosure or discovery. If there is an affirmative finding on the first step, the second requires that we determine if nondisclosure prejudiced the appellant at trial. *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004).

Article 46, UCMJ, and R.C.M. 701 give an accused the right to obtain favorable evidence. Discovery in a court-martial context is broader than in federal civilian criminal proceedings and is designed to eliminate pretrial "gamesmanship." *United States v. Jackson*, 59 M.J. 330, 333 (C.A.A.F. 2004). Specifically, R.C.M. 701(a)(2)(B) requires that the Government permit the defense to inspect "[a]ny results or reports of physical or mental examinations . . . which are within the possession, custody, or control of military authorities . . . [and] which is known to the trial counsel, and which are material to the preparation of the defense . . . ." R.C.M. 701(a)(6) further requires the Government to disclose the existence of evidence known to the trial counsel which reasonably tends to "[n]egate the guilt of the accused . . . reduce the degree of guilt . . . or [r]educe the punishment." Aside from the statutory rules, the holding in *Brady v. Maryland*, 373 U.S. 83, 87 (1963) provides more broadly that an accused has a due process right to disclosure of evidence that is both favorable to the accused and material to either guilt or punishment.

In the instant case, this first step of analysis need not detain us. The Government concedes that their expert, Dr. Hagan, verbally informed the trial counsel that he agreed with the defense expert that the appellant suffered from a severe mental disease and that said disease caused the appellant not to understand the wrongfulness of his actions at the time of the charged misconduct. We have no doubt that knowledge of the existence of a Government medical expert whose professional opinion wholly supported the opinion of the defense expert is a fact both favorable to the appellant and material to an assessment of his guilt and/or punishment. We find, therefore, that the trial counsel's failure to disclose the expert medical opinion of their expert, Dr. Hagan, was error.

Having found error, the Government concedes that the defense is entitled to relief absent a Government showing that the nondisclosure was harmless beyond a reasonable doubt. *Roberts*, 59 M.J. at 326-27. The Government argues that the trial counsel's omission was harmless beyond a reasonable doubt in that the testimony of the Government's expert, Dr. Hagan, would accomplish nothing beyond duplicating the testimony already offered by Dr. Simmer. Further, the Government argues that the defense had another expert, Dr. Mansheim, who wasn't called to

testify. While the Government's argument has a surface reasonableness, we are not persuaded.

Under other circumstances, we might be persuaded that a simple duplication of testimony would add nothing to the mix of evidence before the trier of fact. Such was not the case in the instant trial, however. The military judge specifically found that Dr. Simmer's testimony regarding the "moral wrongfulness" of his conduct was "inconsistent and contradictory." AE XIII at 4. The issues raised by the military judge regarding what the defense expert discussed with the appellant and how that discussion fit with statements made to investigators suggest that questions posed by Dr. Hagan, perhaps different questions, may well have answered the military judge's concerns and resulted in a different finding on the appellant's understanding of the wrongfulness of his actions. While we will not speculate on what Dr. Hagan might have provided the defense, the burden is solidly on the Government to prove beyond a reasonable doubt that Dr. Hagan's testimony would not have aided the defense case. They have failed to meet this burden. We find, therefore, that the trial counsel's failure to disclose the expert medical opinion of their expert, Dr. Hagan, prejudiced the appellant at trial.

Conclusion

The findings and the approved sentence are set aside. A rehearing is authorized.

Senior Judge BOOKER and Judge CARBERRY concur.

For the Court

R.H. TROIDL
Clerk of Court