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.

BRIAN M. THORNTON
FIRE CONTROL TECHNICIAN FIRST CLASS (E-6), U.S. NAVY

NMCCA 200800729
GENERAL COURT-MARTIAL

Sentence Adjudged: 8 May 2008.
Military Judge: CAPT Ross Leuning, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: CDR M.B. Shaw, JAGC, USN; **Supplement and Addendum:** LCDR W.A. Record, Jr., JAGC, USN.
For Appellant: Mr. James R. Klimaski, Esq.; LT Sarah Harris, JAGC, USN.
For Appellee: Capt Robert Eckert, USMC.

12 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AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.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 carnal knowledge and adultery, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The approved sentence was confinement for 18 months, reduction to pay grade E-1, and a dishonorable discharge.

The appellant raises three assignments of error on appeal. The first two assignments involve ineffective assistance of counsel (IAC). The last assignment of error challenges the legal

and factual sufficiency of the findings to both offenses. After considering the record of trial and the parties' pleadings, we agree that the trial defense counsel was ineffective. We will set aside the findings and sentence in our decretal paragraph.

Legal and Factual Sufficiency

Considering the evidence adduced at trial in the light most favorable to the Government, we find that a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); *United States v. Reed*, 51 M.J. 559, 561-62 (N.M.Crim.Ct.App. 1999), *aff'd,* 54 M.J. 37 (C.A.A.F. 2000); *see also* Art. 66(c), UCMJ. In addition, after weighing all the evidence in the record of trial and recognizing that we did not see or hear the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner,* 25 M.J. at 325; *see also* Art. 66(c), UCMJ.

Ineffective Assistance of Counsel

On 17 September 2005, the appellant hosted a birthday party for his wife. Among the attendees was a 13-year-old girl (TG), her mother and siblings. TG's and the appellant's families were friends and TG came to view the appellant's wife as a big sister. TG often spent the night at the appellant's house and babysat his children. In March 2007, TG, now 15 years old, claimed that the appellant raped her following the 2005 birthday party. TG's parents reported the incident to the Naval Criminal Investigative Service and an investigation ensued, leading to the arrest and court-martial of the appellant.

On appeal, the appellant alleges that his trial defense counsel "prevented him from making a (sic) informed decision about proceeding by judge alone." Appellant's Brief of 2 Mar 2009 at 25. Specifically, the appellant asserts that his trial defense counsel did not explain the pros and cons of each of his forum choices. Rather, the appellant alleges, his counsel "convinced him to proceed by judge alone, based on Counsel's subjective opinion that the Military Judge was a 'great guy'." *Id.*

The appellant also asserts that his counsel was ineffective when he failed to question TG or her mother about the circumstances surrounding TG's rape allegation. *Id.* at 25-27. Specifically, the defense had evidence that the accusation arose in the context of an argument between TG and her parents that TG might be sexually active. Further, the appellant asserts that evidence of the prior sexual conduct was, or at least had been, on TG's "MySpace" page, which the trial defense counsel made no attempt to obtain. *Id.* at 26. The appellant argues that his counsel could have cross-examined both TG and her mother in an

attempt to show that the rape allegation at issue was made simply to deflect attention away from TG's alleged sexual behavior.

The appellant also asserted that his counsel failed to prepare him to testify and, due to this lack of preparation, the appellant, although desiring to testify, *was* unable to do so due to the lack of preparation. *Id.* at 34-37. Finally, the appellant avers that his counsel was ineffective by failing to arrange for character witnesses to testify live before the court-martial. *Id.* at 27-33. Said witnesses testified telephonically due to what the appellant asserts was inadequate prior planning by the trial defense counsel.

This court has before it affidavits from the appellant and from his trial defense counsel. On 13 April 2009, this court returned the record of trial to the Judge Advocate General for remand to an appropriate convening authority authorized to conduct a *DuBay*[1] hearing on the appellant's IAC claims. On 11 June 2009, a hearing ordered by Commander, Navy Region Mid-Atlantic, Norfolk, Virginia, was conducted. After taking evidence and considering argument, the military judge entered written findings of fact and conclusions of law.[2] The *DuBay* judge found that the appellant's trial defense counsel was ineffective in two particulars. Following receipt of the *DuBay* transcript, this court afforded both counsel an additional opportunity to submit matters. The appellant declined to do so. The Government thereafter submitted its answer to the appellant's 2 March 2009 brief and in its answer contested the *DuBay* judge's IAC determinations.

While the Government contests several legal conclusions drawn by the military judge, neither party challenges the accuracy of the findings of fact. We have independently reviewed the military judge's findings of fact and find they are supported by the record. We adopt them as our own.

In order to prevail on a claim of IAC, the appellant must demonstrate that his counsel's performance "fell below an objective standard of reasonableness." *United States v. Edmond*, 63 M.J. 343, 345 (C.A.A.F. 2006)(citations omitted). Specifically, the appellant has the burden of demonstrating: (1) his counsel was deficient; and (2) he was prejudiced by such deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

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 the defendant by the

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[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1986).

[2] Appellant Exhibit V to Record of DuBay Hearing (General Court-Martial DuBay Hearing Findings of Fact and Conclusions of Law dated 17 Jun 2009).

Sixth Amendment." *Id.* To show prejudice, the appellant must demonstrate that any errors made by his defense counsel were so serious that they deprived him of a fair trial, "a trial whose result is reliable." *Id.; United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The appellant thus "'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 *DuBay* judge opined that the trial defense counsel made "two separate clusters of decisions that constitute ineffective assistance of counsel." Appellate Exhibit V at 13. The first cluster relates generally to counsel's failure to timely file a motion pursuant to MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The defense theory of the case was that the putative victim had a history of making up sexual encounters. As noted by the *DuBay* judge, the building blocks of the defense theory were as follows:

> a) TG sought to impress her friend CF on 18 September 2007 (sic) by telling CF that she had sex with the appellant the night before;
>
> b) TG later sought to impress CF by telling CF that she had sex with a Marine named John Smith;
>
> c) Both of these allegations were untrue;
>
> d) TG fabricates stories of sexual experiences to "show off," or "to be cool,";
>
> e) On 29 March 2007, the date TG reported the alleged rape, her MySpace page contained some hint of sexual activity, perhaps with John Smith;
>
> f) On 29 March 2007, TG's parents confronted her about her MySpace page and other behavior problems causing TG to run away from home for a day and to engage in suicidal gestures;
>
> g) TG then reported a "rape" by the appellant to her parents in order to deflect attention from problems that she was experiencing at school and home, and to deflect attention from the issue with her MySpace page and a possible sexual relationship with John Smith.

AE V at 4.

The DuBay judge opined that the trial defense counsel was ineffective when he failed to take the steps necessary to develop, preserve, and present this defense theory at trial. *Id.* We agree.

We acknowledge that the trial defense counsel faced an uphill battle in terms of gathering information. He requested both TG and her mother to testify at the Article 32, UCMJ, hearing. Both refused. Their statements to NCIS were included in the Article 32 record. Thereafter, both TG and her mother steadfastly refused to speak with the trial defense counsel at any time leading up to trial with the exception of a five-minute interview with TG's mother at the beginning of trial, which was swiftly terminated by the witness.

In response, the trial defense counsel never requested a deposition of either TG or her mother under RULE FOR COURTS-MARTIAL 702, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). The discussion under R.C.M. 702(c)(3)(A) articulates several "exceptional circumstances" under which a request for a deposition of a witness "unavailability of an essential witness at an Article 32 hearing."

Further, the trial defense counsel failed to formally request an opportunity to interview either TG or her mother prior to or following their direct examination by the Government. Thus, the first time the trial defense counsel was able to talk to TG or her mother about the circumstances surrounding the charges was during cross-examination.

These factors give the trial defense counsel's decision not to file a MIL. R. EVID. 412 motion greater significance. While he might have had a legally plausible argument that TG's lies about non-existent sexual activity were not 412 material, *per se*, he failed to recognize that a 412 motion would have required a hearing at which TG could be questioned about her relationship, if any, with John Smith, the timing of that relationship, references to the relationship on her MySpace page, and any conversations regarding the relationship that she may have had with CF or her parents. Similarly, CF or TG's mother and father could have been called as witnesses at the 412 hearing to describe what they knew or had been told of the alleged sexual relationship between TG and John Smith.

At trial, the trial defense counsel persuaded the military judge that he could ask TG whether she had ever told CF about a sexual relationship with John Smith. All parties agreed that the trial defense counsel would be stuck with the answer. We agree with the *DuBay* judge that when TG denied ever telling CF about a sexual relationship with John Smith, the defense theory effectively "collapsed." AE V at 6.

The trial defense counsel's testimony at the *DuBay* hearing that he "got all of the evidence ... we wanted," shows a fundamental lack of comprehension of what was needed to properly present the defense theory of the case. The defense needed to present some evidence that TG told CF about a sexual encounter with John Smith so they could then establish through TG's NCIS statement that she had lied about this sexual encounter, and

arguably had a motive to fabricate lies against the appellant as well. By failing to depose TG and her mother prior to cross-examination, the defense lost any chance it might have had to present evidence of its theory of the case to the military judge.

This result seems to have occurred to the trial defense counsel as well in that he asked no further questions of TG regarding the relationship with John Smith, about her failure to report the alleged crime for 18 months, or about the fact that she made the rape disclosure in the context of an argument with her parents about, *inter alia*, whether she was sexually active. Further, the trial defense counsel asked no questions of CF regarding what TG told her about a relationship with John Smith, notwithstanding his clear good-faith basis for believing that CF would testify favorably for the defense. Moreover, the trial defense counsel asked no questions of TG's mother about the argument with her daughter, the physical disciplining with a belt, TG running away from home, TG's MySpace account, or the mother's concern about her daughter's possible sexual activity.

In essence, the trial defense counsel asked nothing that could reasonably establish a motive for TG to fabricate the allegation against the appellant or otherwise challenge TG's credibility. Of particular note, the trial defense counsel had TG's father as a possible witness but failed to even put him on the stand, notwithstanding that he was also present during the argument leading up to TG's rape accusation against the appellant.

We agree with the *DuBay* judge that even taking into account the trial strategy articulated by the trial defense counsel, the counsel's performance in pursuit of that strategy fell below an objective standard of reasonableness. We further find that the errors were so serious that they deprived the appellant of a fair trial.

The second cluster of decisions identified by the *DuBay* judge as ineffective centered on the appellant's failure to testify. In essence, the *DuBay* judge held that the appellant was unable to testify at trial due to the trial defense counsel's failure to prepare the appellant to take the stand in the event he needed to do so.

While we agree that the trial defense counsel's failure to actively prepare the appellant to testify and for cross-examination was far less than optimal, we do not agree that counsel's stated tactical desire to avoid having the appellant appear "prepared" was so far outside the norm as to be objectively unreasonable. We make this determination fully cognizant of the fact that the trial defense team did conduct at least some question/answer preparation with the appellant's wife on the eve of trial. *Id.* at 164. While this is a very close

call, we are hesitant to second-guess a counsel's strategic decision-making.[3]

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

[3] We agree with the *DuBay* judge that the appellant's remaining claims of IAC are without merit.