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

Before
E.E. GEISER, V.S. COUCH, R.G. KELLY
Appellate Military Judges

UNITED STATES OF AMERICA

v.

JOHN W. WIDDOWSON
HOSPITAL CORPSMAN THIRD CLASS (E-4), U.S. NAVY

NMCCA 200700252
GENERAL COURT-MARTIAL

Sentence Adjudged: 21 December 2006.
Military Judge: CAPT Daniel E. O'Toole, JAGC, USN.
Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.
Staff Judge Advocate's Recommendation: CAPT D.M. Tompkins, JAGC, USN.
For Appellant: LT Kathleen Kadlec, JAGC, USN.
For Appellee: Maj Tai D. Le, USMC; Capt R.E. Mattioli, USMC.

31 March 2009

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Senior Judge:

On 13 November 2006, a military judge sitting as a general court-martial convicted the appellant, consistent with his pleas, of attempting to commit an indecent act on a minor female and four specifications of committing indecent acts on a minor female, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934. At this hearing, the military judge sentenced the appellant, *inter alia*, to confinement for 28 years.

On 14 November 2006, the Government discovered that the tape recording of the appellant's trial was blank. An affidavit by

trial counsel reported that the recording equipment had tested satisfactorily both before and immediately after the blank tape issue was revealed, and that no other cause for the blank tapes could be positively identified. She opined that the most likely cause was that the tapes had been inadvertently erased or recorded over. After consulting with experts at USACDIC, the trial counsel reported that, while it was remotely possible to recover the lost recordings, it was highly unlikely. Appellate Exhibit XIII.

A post-trial Article 39(a), UCMJ, hearing was called by the military judge on 20-21 December 2006 to resolve the issue. After discussing the matter with the appellant and counsel, the military judge declined to declare a mistrial or to forward a summary record to the convening authority (CA). He instead elected, over defense objection, to conduct a "proceeding in revision" under RULE FOR COURTS-MARTIAL 1102, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), to recreate a verbatim record of trial. Record at 124-27.

A record in verbatim format was prepared by the trial counsel using notes provided by the court reporter, the military judge, the trial counsel, and the Navy Trial Guide. AE XIX, Record at 60. The military judge proceeded through AE XIX, with the parties, soliciting additions or deletions to each page of the verbatim format record. After each section, the military judge specifically obtained the appellant's concurrence that he could not identify any matters that had been omitted from, added to, or mischaracterized in the record. The appellant confirmed that his answers on 13 November 2006 had not changed in the interim. Following this painstaking inquiry and citing specifically to the heavily formatted nature of a guilty plea inquiry, the military judge was satisfied that the recreated verbatim record accurately reflected what happened at trial on 14 November 2006.

Noting that sentencing proceedings are less formatted and more free-wheeling, the military judge opined that he was less certain the recreated sentencing hearing was substantially verbatim. Record at 108. The military judge determined to reconsider his sentence and permitted trial defense counsel wide latitude with regard to supplementing the record. Counsel were permitted to present evidence and argue on sentencing, the military judge validated which exhibits had previously been offered and accepted. Of note, the military judge expressly declined to consider evidence from a Government sentencing witness who had testified on 13 November 2006 but was unavailable to testify at the 20-21 December 2006 hearing. In addition, the appellant made a new unsworn statement.

Following the presentation of evidence, the military judge sentenced the appellant to confinement for 20 years, total forfeiture of pay and allowances, reduction to pay grade E-1 and a dishonorable discharge. The military judge subsequently

authenticated the new record. *Id.* at 150. Following post-trial processing, which included two separate clemency requests; the CA approved a sentence of confinement for 18 years, total forfeiture of pay and allowances, reduction to pay grade E-1 and a dishonorable discharge. In accordance with the pretrial agreement (PTA), the CA suspended, *inter alia*, all confinement in excess of four years for a period of two years from the date of trial.

In his initial Brief and Assignment of Error of 30 May 2007, the appellant raised one assignment of error alleging that the CA had taken action without affording trial defense counsel (TDC) an opportunity to offer comments. On 6 July 2007 the appellant withdrew this assignment of error based on documentation of TDC waiver. On 05 November 2007, this court specified four issues for briefing. The first issue was whether the record of trial authenticated by the military judge is a "complete record of the proceedings and testimony" sufficient for this court to conduct a through Article 66, UCMJ, review. The second issue was whether the military judge erred when he sentenced the appellant after having previously gained knowledge of the sentence limitation provisions of the appellant's PTA at the 14 November 2006 hearing. The third issue was whether the CA's action was "remiss" in not crediting the appellant with 39 days of pretrial confinement credit. The fourth issue was whether the CA was authorized to suspend a reduction in pay grade for a period of six months when such suspension included a provision for automatic execution of the reduction at the end of the suspension period. On 08 November 2007, this court permitted the appellant to file a supplemental assignment of error alleging ineffective assistance (IAC) by both his trial and appellate defense counsel.

Upon consideration of the record of trial, the pleadings of the parties, and the appellant's IAC claims, the court determined that additional fact-finding was necessary. On 29 July 2008, this court ordered the record of trial returned to the Judge Advocate General for remand to an appropriate CA who was empowered to direct a *DuBay*[1] hearing. The CA subsequently directed such a hearing which was conducted on 19 September 2008. The authenticated record of the hearing and the original record of trial were returned to this court on 18 November 2008. The appellant filed additional matters challenging the *DuBay* hearing military judge's findings and conclusions on 19 November 2008. The Government responded on 18 February 2009.

After carefully reviewing the record of trial, the record of the post-trial *DuBay* hearing, and the various pleadings of the parties, 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.

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968)

Reconstructed Transcript

A "complete record of the proceedings and testimony" must be prepared for every general court-martial in which the adjudged sentence includes a bad-conduct discharge. Art. 54(c)(1)(A), UCMJ. "A 'complete record' is not necessarily a 'verbatim record.'" *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981)(quoting *United States v. Whitman*, 11 C.M.R. 179, 181 (C.M.A. 1953)). The Constitution does not require a verbatim record of a criminal trial. *Id.* at 236. The President has directed that a complete record in a general court-martial in which a bad-conduct discharge was adjudged shall include, in addition to a transcript of the trial itself, exhibits which were received in evidence and any appellate exhibits. RULE FOR COURTS-MARTIAL 1103(c)(1), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Whether a record of trial is incomplete is a question of law we review *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). Where an omission from the record of trial is identified and it is found to be substantial, it raises a presumption of prejudice that the Government must rebut. *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979).

The appellant asserts that the entire record of trial was, in effect, omitted when the tapes were found to be blank. Appellant's Brief and Assignment of Error of 5 Nov 2007 at 8. The appellant goes on to argue that such an omission is substantial both "qualitatively and quantitatively." *Id*. We disagree with the appellant's premise that the entire authenticated record of trial was omitted. While the tapes of the 14 November 2006 hearing were blank, R.C.M. 1102 expressly permits a military judge to conduct post-trial hearings in order to correct "an apparent error, *omission*, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused." R.C.M. 1102(b)(1). The military judge conducted such a hearing and submitted what he authenticated as a verbatim record of the proceedings. At issue is not the sufficiency of the original blank tapes, but rather the sufficiency of the final authenticated record of trial.

The appellant fails to identify any missing, additional, or misstated elements of the final authenticated record of trial. While we agree with the appellant that the presentencing proceeding involved the military judge reconsidering his prior sentence, as opposed to merely validating the completeness and verbatim nature of the record of the 14 November 2006 proceeding, no omissions or other errors were identified at trial or subsequently on appeal by the appellant. While additional evidence was, in fact, obtained during the post-trial session, said session substantially incorporated, at the express request of the defense, matters submitted by the accused at the 14 November 2006 hearing. We find that the hearing was not called for the "purpose of presenting additional evidence." R.C.M. 1102(b)(1) Discussion. The hearing was expressly called for the

purpose of validating the completeness and verbatim nature of the record of trial.

We further note that, even assuming, *arguendo,* that the military judge did exceed his authority by permitting the appellant to make a new unsworn statement, the additional evidence obtained certainly did not materially prejudice the appellant but rather inured to his benefit. The remainder of the sentencing evidence was precisely the same as that offered at the 14 November 2006 hearing with the exception of a Government sentencing witness. The absence of such a witness clearly benefited the appellant. Finally, we note that the ultimate result of the military judge's sentence reconsideration was a reduction of the appellant's confinement from 28 years to 20 years.

In the absence of any identified omission from the authenticated record, substantial or otherwise, and given that the appellant was clearly benefited by the military judge's sentence reassessment, we find that the record of trial in this case is substantially verbatim and we decline to grant the relief requested by the appellant.

Knowledge of PTA Provisions/PTC Credit/ Suspension of Reduction

The second, third and fourth issues specified by this court are without merit. In a trial before a military judge alone the military judge "ordinarily" shall not examine any sentence limitation . . ." until after the sentence is announced. R.C.M. 910(f)(3). We agree with our superior court that "there is no reasonable risk that knowledge of the sentence provision of a pretrial agreement would incline the military judge to abstain from adjudging a less severe sentence than he would otherwise have imposed." *United States v. Villa*, 42 C.M.R. 166, 169 (C.M.A. 1970). The appellant has asserted no specific prejudice arising from this assignment of error and we find none.

With respect to the third specified issue as to whether the CA was "remiss" in not expressly documenting the fact that the appellant was credited with 39 days of pretrial confinement, we agree with the Government that R.C.M. 1107 only requires that the CA specifically document any judicially ordered credit arising from illegal pretrial confinement. R.C.M. 1107(f)(5)(F). The 39 days awarded by the military judge was for ordinary pretrial confinement. PTH at 130. In any case, the appellant does not assert and we do not find that he actually served any additional confinement arising from this assignment of error.

With regard to the appropriateness of the CA's decision to suspend execution of the approved reduction to pay grade E-1 for a period of six months with automatic execution at the end of the suspension period, we note that R.C.M. 1107(f)(4)(B) provides that a CA may suspend execution of an approved sentence. No

reason need be stated. No other limitations are imposed on this suspension authority. There is no requirement that suspension of an approved sentence be automatically remitted at the end of the suspension period. The CA was within his authority to order the approved reduction executed at the end of the suspension period.

Ineffective Assistance of Counsel

In his supplemental assignment of error, the appellant asserts that his TDC was ineffective when he failed to consult with the appellant prior to submitting two clemency requests on the appellant's behalf. Specifically, he asserts that the TDC's failure to consult resulted in the CA not considering the appellant's request to have his dishonorable discharge mitigated to a bad-conduct discharge. In support of this assignment of error, the appellant asserts that he would have submitted a personal statement focusing on his military record as well as letters from family and co-workers attesting to his rehabilitative potential.

The appellant further asserts that his first appellate defense counsel (ADC) failed to submit two *Grostefon*[2] issues raised by the appellant. Specifically, the appellant asserts that appellate defense counsel (ADC) failed to raise the clemency issues the appellant had with his TDC as well as the appellant's concerns regarding the adequacy of the authenticated record of proceedings and testimony discussed above. In addition to the briefings of counsel and the record of trial, we have before us sworn declarations from the appellant,[3] from two defense sentencing/clemency witnesses,[4] and the record of the post-trial DuBay hearing.[5]

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 was 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 the defendant by the 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*.;

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[2] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] Affidavit of John W. Widdowson of 7 Nov 2007.

[4] Affidavit of Dr. Robert Powell, MD, of 16 Nov 2007 and Affidavit of Jeremy McMillan, HMC, USN, of 14 Nov 2007.

[5] Record of Post-Trial Article 39(a), UCMJ, session of 19 Sep 2008.

United States v. Scott, 24 M.J. 186, 188 (C.M.A. 1987). 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)).

Both the appellant and his TDC testified at the 19 September 2008 *DuBay* hearing and articulated diametrically opposed versions of events. The TDC testified that he spoke with the appellant concerning clemency on several occasions after the initial 14 November 2006 hearing, and that he recalled providing the appellant with contact information and of always being available to the appellant if additional matters needed to be discussed. He had no recollection of any unanswered phone messages or of the appellant ever expressing a desire to pursue clemency in the form of a discharge upgrade. Further, the TDC specifically recalled the appellant being uncomfortable with TDC contacting any member of his family or coworkers given the nature of his misconduct.[6] Having observed the demeanor of the appellant and the TDC at the *DuBay* hearing, the military judge credited the TDC's version of events over the appellant's. AE XXXVIII at (Findings of Fact and Conclusions of Law of 4 Nov 2008).

Our own assessment comports with that of the military judge. We find that the TDC's version of events better comports with the record. In particular we note that the appellant read and signed a post-trial rights form which included a discussion of post-trial matters to include clemency and his ability to submit letters from family and coworkers in support. AE XXVIII. We have little doubt that the appellant fully understood the clemency process.

The growing discontent testified to by the appellant was further contradicted by the fact that the appellant specifically asked that the record and SJAR be submitted to the TDC as opposed to himself. Finally, the appellant repeatedly stated on the record that he was satisfied with his TDC in all respects and believed the TDC's advice had been in his best interest. The appellant offered no evidence aside from his own testimony that there were any unanswered phone calls or that he changed his post-trial clemency focus from limiting confinement to the quality of his discharge.

Evidence that co-workers were willing to write letters on the appellant's behalf is of little weight given the appellant's professed concern about publicizing the nature of his misconduct to family and coworkers. The issue is not whether the co-workers or family would have written letters, but whether the appellant would have been willing to publicize his misconduct by asking them to do so. Having considered the entire record, we find that the TDC did not err when he proceeded to file two clemency

[6] The appellant pled guilty to repeatedly rubbing his penis on the outside of a minor female's vagina to satisfy his sexual desires. This conduct occurred on divers occasions between February 2003 – November 2005.

petitions on the appellant's behalf without additional consultation. We find that the TDC reasonably believed he understood the appellant's concerns and was acting with the appellant's blessing. Further, even assuming *arguendo* that the TDC did err by not going back to the appellant one final time; we find that, given the nature of the appellant's misconduct and the duration of that misconduct, he was not prejudiced by the TDC's error.

In view of our consideration of and findings on the appellant's two *Grostefon* issues, we find that, even assuming *arguendo* that the ADC erred by not submitting the issues on appeal, that the appellant was not materially prejudiced by such error.

Conclusion

The findings and approved sentence are affirmed.

Senior Judge COUCH and Judge KELLY concur.

For the Court

R.H. TROIDL
Clerk of Court