Not Reported in M.J. Rptr., 2010
WL 11030778 (Army Ct.Crim.App.)

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U.S. Army Court of Criminal Appeals.

UNITED STATES, Appellee

v.

Captain Clifton E. TAVARES,

United States Army, Appellant

ARMY 20080545

26 May 2010

United States Military Academy, David L. Conn, Military Judge, Colonel Robin N. Swope, Staff Judge Advocate (pretrial), Colonel Steven T. Strong, Staff Judge Advocate (post-trial).

For Appellant: Captain Michael E. Korte, JA; Gary Myers, Esquire (on brief).

For Appellee: Colonel Norman F.J. Allen III, JA; Lieutenant Colonel Martha Foss, JA; Major Lynn Williams, JA; Captain Stephanie R. Cooper, JA (on brief).

Before JOHNSON, COOK, and MAGGS, Appellate Military Judges

SUMMARY DISPOSITION

Per Curiam:

***1** An officer panel, sitting as a general court-martial, convicted appellant, contrary to his pleas, of four specifications of maltreatment in violation of Article 93, Uniform Code of Military Justice, 10 U.S.C. § 993 [hereinafter UCMJ], and sentenced him to dismissal from the service. The convening authority approved the sentence as adjudged. This case is before us for review under Article 66, UCMJ. We affirm the findings and the sentence.

Appellant contends that his conviction and sentence should be set aside because his trial defense counsel failed to investigate and elicit exculpatory testimony from a key defense witness, Ms. Mattie Moore. According to appellant, this failure resulted in ineffective assistance of counsel. To support this contention, appellant has submitted sworn statements from Ms. Moore. The government has responded by submitting conflicting sworn statements from appellant's trial defense counsel, Mr. Dale Saran and Captain (CPT) Jessica Conn.

The first and second specifications of the maltreatment charge, as found subject to exceptions and substitutions, say in part that appellant abruptly opened the door to a female changing room in order to see Specialist (SPC) AS and Private First Class (PFC) NB in a state of undress. The first specification of maltreatment also states in part that appellant called SPC AS by the nickname "Brown Sugar."

In her sworn statements, Ms. Moore, a civilian anesthesia nurse who worked with appellant, SPC AS, and PFC NB at Keller Army Community Hospital at West Point, disagrees with the panel's findings with respect to these specifications. Addressing the locker room incident, Ms. Moore asserts in part:

> The allegation that Captain Tavares kicked open the female locker room door and watched Specialist [AS] undress is untrue. I was present at the time this allegation occurred. The configuration of the locker rooms is such that the doors to the male and female locker rooms are directly across the hall from one another. There is a joke at the hospital that I have a small bladder and frequently have to use the restroom. As Captain Tavares was leaving the male locker room, I was running down the hallway toward the female locker room doing the 'pee dance.' I was jokingly running and wiggling my hips as though I had to pee really badly. Standing in the doorframe of the male locker room, Captain Tavares was able to stick his foot out and kick open the door to the female locker room so that I could get to the bathroom faster. The door opened and I ran inside. Specialist [AS] was in the locker room, but she was already dressed. The door was only open for a few seconds. Any allegation that he was watching Specialist [AS] undress is a complete manipulation of the facts.

With respect to the allegation that appellant called SPC AS by the nickname "Brown Sugar," Ms. Moore asserts:

> The 'Brown Sugar' comment is also untrue. I was present for this allegation also. We were in the operating room preparing for a patient. The radio was on. The Rolling Stones song 'Brown Sugar' was playing. Captain Tavares and I were singing the words to the song 'Brown Sugar'.... Captain Taveres did not refer to Specialist [AS] as brown sugar. Specialist [AS] was not being truthful regarding that instance.

***2** Although Ms. Moore testified at trial, trial defense counsel did not ask her questions relating to these incidents. Ms. Moore says in a separate sworn statement: "If the attorneys had provided clear questions that identified specific incidents, I would have provided the information contained in my previous declaration."

Appellant's civilian and appointed trial defense counsel disagree with Ms. Moore's recollection that she would have been able to provide the information contained in her sworn statements. Mr. Dale Saran asserts in a sworn statement:

> ...At the Article 32 [hearing], I specifically asked Ms. Moore about the incident in the locker room. Ms. Moore specifically stated that she did not remember anything about it. It was not until after the trial that these claims surfaced that she was present for the incident with PFC [NB] and SPC [AS] up in the locker room. If Ms. Moore had anything like that to present, I certainly would have elicited it both at the Article 32 hearing and at the court-martial.
>
> ...As a final matter, I always, as a matter of habit, ask every one of my clients if there is anything else we should present before we close our case. Ms. Moore simply did not have anything as specific as she now offers.

Captain Jessica Conn's sworn statement is similar in content. She asserts in relevant part:

> We did not elicit this information from Ms. Moore during her testimony at trial because she told us before trial she could not remember it....
>
> ....Mr. Saran conducted the questioning of Ms. Moore at the Article 32(b) investigation, but I offered suggested questions before and during the questioning. She was asked if she had personal knowledge of what happened in the female locker room, and she did not remember it. I am certain that I suggested he ask her about 'singing Brown Sugar' before Mr. Saran began his questioning of Ms. Moore. CPT Tavares, Mr. Saran, and I had a conversation about it at the defense table. My suggestion was rejected because I was told she did not remember 'singing Brown Sugar.' Based on that conversation before Mr. Saran questioned her, I was satisfied Ms. Moore had already been asked, and she did not recall it.

These sworn statements are in conflict. In essence, Ms. Moore says that she had specific information about the locker room incident and the "Brown Sugar" nickname and was not asked about them, but appellant's trial defense counsel assert that Ms. Moore was asked about these incidents and that she did not have specific information about them.

We cannot resolve a disagreement in post-trial sworn statements on appeal. Our superior court has emphasized that "a Court of Criminal Appeals' factfinding authority under Article 66(c) does not extend to deciding disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." *United States v. Fagan,* 59 M.J. 238, 242 (C.A.A.F. 2004). In this case, however, our inability to settle the disagreement does not require us to remand the case for an evidentiary hearing under *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). In *United States v. Ginn,* 47 M.J. 236, 248 (C.A.A.F. 1997), our superior court announced six principles for determining when a factfinding *DuBay* hearing is required or not required. Under the first of these principles, "if the facts alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in appellant's favor, the claim may be rejected on that basis." *Id.* This first principle applies to the present case. Even if every fact alleged in Ms. Moore's statements is true, the statements would not suffice to show ineffective assistance of counsel.

***3** "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green,* 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). In this case, for the reasons given below, we have determined that counsel's performance was not deficient based on the analysis outlined in *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). We therefore have no occasion to address the question of prejudice.

In *Polk,* our superior court identified three questions for determining whether an appellant has shown his trial counsel to have been ineffective. The first question under *Polk* is: "Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?" *Id.* at 153. In this case, even presuming that allegations by appellant are true—that is, Ms. Moore could have given exculpatory information at trial about the locker room incident and the "Brown Sugar" nickname—we can see a reasonable explanation for his defense attorney's decision not to investigate these matters further or to ask her about these matters during trial. In particular, Mr. Saran and CPT Conn reasonably thought Ms. Moore did not have any

information about these matters. The summarized transcript from the Article 32 hearing records Ms. Moore as saying: "I don't recall CPT Tavares kicking open the door to the locker room." Given this statement, Mr. Saran and CPT Conn would have no reason to ask Ms. Moore about the locker room incident. In addition, CPT Conn's sworn statement about their conversation with appellant indicates that CPT Conn and Mr. Saran had no reason to believe that Ms. Moore had knowledge about the "Brown Sugar" nicknames. In addition, SPC AS testified at trial that appellant called her "Brown Sugar" on at least three occasions. Calling Ms. Moore to testify that she and appellant had discussed a Rolling Stones song by the same name on one occasion therefore would not have disproved the allegation.

The second question under *Polk* is: "[D]id the level of advocacy 'fall[ ] measurably below the performance ... [ordinarily expected] of fallible lawyers' "? 32 M.J. at 153 (citing *United States v. DiCupe,* 21 M.J. 440, 442 (C.M.A. 1986), *cert. denied,* 479 U.S. 826 (1986)). In considering the quality of advocacy, "we do not scrutinize each and every movement or statement of counsel," but instead must look at the overall performance of counsel throughout the proceedings. *United States v. Murphy,* 50 M.J. 4, 8 (C.A.A.F. 1998). In this case, even were it incorrect not to press Ms. Moore for more details, defense counsel still provided effective assistance. Defense counsel actively cross-examined each of the government's witnesses and presented significant exculpatory evidence. The net result was the panel found appellant not guilty of both of the specifications of Charge I, which alleged wrongful sexual contact; the government agreed to the dismissal of the fifth specification of maltreatment under Charge II; and the military judge found appellant not guilty of the sole specification of conduct unbecoming an officer under Charge III on a motion under Rule for Courts–Martial [hereinafter R.C.M.] 917. In addition, although the panel did find appellant guilty of four specifications of maltreatment, the panel used exceptions to remove some of the language from three specifications. These favorable results occurred because appellant's defense counsel were able to identify significant weaknesses in the evidence. Our review of the entire record satisfies us that appellant received a thoroughly effective defense.

***4** The third question under *Polk* is: "If ineffective assistance of counsel is found to exist, 'is ... there ... a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?' " 32 M.J. at 153. Because we do not find ineffective assistance of counsel, we do not address this issue or any other issue concerning prejudice.

Finally, in our review of the record, we have noticed an error in the addendum to the staff judge advocate's recommendation to the convening authority. In the addendum, the staff judge advocate (SJA) states: "After careful consideration of the record and the accused's submission, I find that the accused does not raise any legal issues in his post-trial submissions." This statement is incorrect because appellant clearly alleges ineffective assistance of counsel in his R.C.M. 1105 submission. Rule for Courts–Martial 1106(d)(4) directs that "the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105." Under this rule, the SJA should have commented on the allegation of ineffective assistance of counsel, and should not have said that the submission raises no legal issues. In our view, however, the error in the addendum is harmless. Our court recently reiterated that if an allegation of legal error in R.C.M. 1105 ultimately lacks merit, then "returning the case to the SJA and convening authority is not necessary" even if "trial defense counsel had asserted a legal error in [appellant's] R.C.M. 1105 matters and the SJA had erred in not commenting on it." *United States v. Ney,* 68 M.J. 613, 616 (Army Ct. Crim. App. 2010) (citing *United States v. Hill,* 27 M.J. 293, 296–97 (C.M.A. 1988)). In this case, for the reasons given above, we have concluded that the ineffective assistance of counsel assignment of error lacks merit. Returning the record to the staff judge advocate for a corrected addendum "would not foreseeably [lead] to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority." *See Hill,* 27 M.J. at 297.

On consideration of the entire record, including the affidavits submitted by both sides, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

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