UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	)	
Respondent	)	**Misc Dkt. No. 2006-03**
	)	
	)	**ORDER**
v.	)	*Petition For New Trial*
	)	
Master Sergeant (E-7)	)	**Panel 2**
JEFFREY D. BEATTY, USAF	)	
Petitioner	)	**13 April 2006**

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

The petitioner was tried by a general court-martial composed of officer and enlisted members at Ellsworth Air Force Base (AFB), South Dakota. Contrary to his pleas, the petitioner was found guilty of one specification of taking indecent liberties with his daughter, JB, and one specification of committing indecent acts with JB, in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] The petitioner was sentenced to confinement for 18 months and reduction to E-1.

Background

The appellant's court-martial was held in late October 2002. The charges and specifications were based on JB's allegations. She was 17 years old when she testified at trial, and she was unwavering in her account of the appellant's actions. JB testified four times under oath during the course of the proceeding: Twice during pretrial motion practice, once on the merits, and once in presentencing.

On 31 March 2004, appellate defense counsel filed a petition for new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873.[2] Under Article 73, UCMJ, and Rule for

[1] The court members found the appellant not guilty of assaulting JB. The members found the appellant guilty of committing indecent acts by exceptions, finding him not guilty of one of the specific acts alleged in the specification.

[2] The appellant simultaneously filed an assignment of errors for our consideration in the course of our review under Article 66(c), UCMJ, 10 U.S.C. § 866. The first error assigned was "Whether the appellant's petition for a new trial

Courts-Martial (R.C.M.) 1210, an accused may petition The Judge Advocate General for a new trial at any time within two years after the convening authority approves the court-martial sentence. The petition is appropriately before us because the petitioner's appeal was pending before us at the time the petition was filed.[3] *See* Article 73, UCMJ; R.C.M. 1210(e).

Many months after the appellant's trial, JB recanted her allegations against him. Appellate defense counsel assert her recantation amounts to newly discovered evidence and a fraud on the court, the two bases for a new trial under Article 73, UCMJ. The government originally contended the petition should be denied because it did not comply with the procedural requirements of R.C.M. 1210(c) in two respects: The petition was not signed under oath or affirmation by the appellant or someone else authorized to do so, and it did not include the "affidavit of each person whom the [appellant] expects to present as a witness in the event of a new trial." R.C.M. 1210(c)(9). The latter contention became moot when we granted the appellant's subsequent motion to submit an affidavit from JB. The petition for new trial was not signed under oath or affirmation. Nevertheless, we granted the appellant's motion to submit the petition and other documents on 15 April 2004.[4]

The petition initially included a 4 March 2004 statement signed by JB, the purpose of which was to admit "the fact that I wasn't truthful about the allegations I brought forth against my father Jeffrey Dean Beatty during his court martial. I made up the allegations because I was upset with him. It was a stressful time for me when he returned from his TDY from Saudi Arabia." We declined to accept the statement because it was not in affidavit format as required by R.C.M. 1210(c)(9), but the circumstances of the statement were explored later during a post-trial hearing we ordered pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

On 27 October 2004, JB executed an affidavit that we accepted in support of the appellant's petition. The affidavit, prepared with the assistance of a civilian attorney in

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should be granted based on newly discovered evidence and fraud on the court-martial." Our Article 66(c), UCMJ, review is pending.

[3] The record reflects that a copy of the appellant's petition for new trial was delivered to me personally on 31 March 2004 in my capacity then as the Chief, Military Justice Division, Air Force Legal Services Agency. Because the case was already pending review by this Court, the record includes a 31 March 2004 memorandum from the Chief, Appellate Records Branch of the Military Justice Division, formally forwarding the petition to this Court in accordance with R.C.M. 1210(e). I do not recall any personal involvement in any aspect of the appellant's petition; indeed, the Military Justice Division would have taken no action on the petition given the fact the case was pending before this Court. I find no basis to recuse myself from participating in this decision. *See* Air Force Uniform Code of Judicial Conduct, Canon 3E, *Disqualification* (17 Aug 05).

[4] We granted the appellant's motion before receiving the government's response (and objections) to the petition on 29 April 2004. We could have denied the petition for noncompliance with R.C.M. 1210. *See United States v. Teeter*, 12 M.J. 716, 727 (A.C.M.R. 1981). Our decision to consider the petition should not be construed as condoning noncompliance with the requirements of R.C.M. 1210(c).

Rapid City, South Dakota, was much more detailed than JB's 4 March 2004 statement. In that affidavit, JB stated:

> [V]irtually all of the material testimony I gave during [the appellant's] court-martial was false. . . . I made up my story because I was angry with my father for leaving to go to Saudi Arabia (for military duty) and because I felt he had been very strict with me upon his return to Ellsworth Air Force Base. . . . However, I cannot live with these lies any longer and feel compelled to get the truth out. . . . on a couple of different occasions I told the Air Force attorneys that I did not want to testify against my father, but they told me that I had to. . . . I realize in making this Affidavit I may be admitting that I committed perjury at my father's court-martial. However, no one has pressured me to make this statement and I'm making it of my own free will.

Towards the end of November 2004, an appellate government counsel, Major (Maj) S, contacted JB by phone to discuss her affidavit and recantation. In the course of two conversations that day, JB told Maj S that she did not lie at the appellant's trial and explained she signed the affidavit in an effort to reunite with her family.[5] She told Maj S her family had offered her a car, money, and clothes if she would sign the 27 October 2004 affidavit.

In light of the uncertain state of JB's recantation, on 31 May 2005 we returned the record of trial to The Judge Advocate General for referral to an appropriate convening authority to conduct a *DuBay* hearing. We ordered the hearing, in part, for a military judge to "enter findings of fact concerning the allegations set out in the appellant's petition for a new trial in order to resolve the credibility of the matters raised by JB's written [re]cantation."

The *DuBay* hearing was conducted at Ellsworth AFB on 3 August 2005. JB testified she had lied at the appellant's trial. She asserted her reason for lying was that "I was 16 and wanted to kind of rebel against my parents and I was real mad at them." She could not recall why she was angry with her father, and she admitted she had not told anyone associated with the case that her allegations were untrue prior to the 4 March 2004 statement.

JB explained the circumstances surrounding her written recantations. She described the 4 March 2004 statement as having been prepared by her parents (the appellant had been released from confinement by then) and presented to her before the

[5] The conversation was recounted by Maj S during the *DuBay* hearing. Maj S was a captain when the conversation occurred.

three went out for dinner. She testified that her father arranged the meeting with the civilian attorney whom she believed drafted the 27 October 2004 affidavit.

A number of post-trial statements made by JB conflicted with her recantation. In an electronic, instant message exchange, JB's brother asked her "why [she] lied about dad." JB replied: "Carl, I didn't lie." The exchange continued:

> [Carl]: when you going to come clean?
> [JB]: clean about what?
> [Carl]: I told you I would help
> [Carl]: about dad
> [JB]: Carl. u don't know how much i want to change what i did.
> [JB]: i didn't lie.

On redirect examination by defense counsel, JB explained that her statement "I didn't lie" was itself a lie.

With regard to her conversations with Maj S, JB admitted telling him her original trial testimony was true and that her parents had offered her $5000, a jeep, and clothes to sign the affidavit. When the military judge asked her why she told Maj S her original trial testimony was true, JB explained she was afraid of perjury and was "still kind of skeptical about going back and telling them that I lied."

On 31 August 2005, the military judge made findings of fact. She found:

> 17. The matters raised by JB's written [re]cantation would have not have resulted in a substantially more favorable result for the appellant, nor that JB committed fraud upon the court [*sic*]. I find neither JB's written statement nor her sworn affidavit believable. I find that sufficient evidence still remains upon which a trial court could find the appellant guilty of the offenses of which he was convicted. The defense did not satisfactorily establish that the written statement or the sworn affidavit of JB would have undoubtedly resulted in a substantially more favorable result for the appellant, or that JB committed fraud on the court.[6]
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> . . . .

[6] The appellant correctly notes the R.C.M. 1210(f)(2)(C) consideration is whether the newly discovered evidence "would probably produce a substantially more favorable result for the accused," not that it would have "undoubtedly resulted in a substantially more favorable result for the appellant." We ordered the military judge to make findings of fact and she did so. The application of those facts to the law (including R.C.M 1210(f)(2)) is our task, and we are not influenced or constrained by the military judge's apparent efforts to do so. In any event, as we explain below, this petition is based on alleged fraud and resolution does not depend on R.C.M. 1210(f)(2)'s analytical framework.

> 19. Although JB was not directly threatened by anyone to recant her trial testimony, she was nonetheless bribed by her parents and pressured to recant her trial testimony. The timing of JB's affidavit is supportive of pressure from her parents to complete the affidavit in exchange for a place to reside. I find that JB's parents enticed her into signing the affidavit with offers of a vehicle, money and other items of value. The unpleasant situation between JB and her brother resulted in pressure upon her to continue to recant her trial testimony. I further find that appellant coerced JB into recanting her trial testimony.

Discussion

Article 73, UCMJ, recognizes only two grounds for a new trial: Newly discovered evidence or fraud on the court-martial. In R.C.M. 1210(f), the President has provided the basic standards by which these grounds are proved and assessed. To warrant a new trial for "newly discovered" evidence, the petitioner must show:

> (A) The evidence was discovered after the trial;
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> (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
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> (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.

R.C.M. 1210(f)(2). A new trial based on fraud is warranted only when the fraud had a "substantial contributing effect on a finding of guilty or the sentence adjudged." R.C.M. 1210(f)(3). The Discussion to the Rule includes "confessed or proved perjury in testimony" as an example of fraud on a court-martial.

A petitioner faces a very high bar in attempting to establish grounds for a new trial. "Petitions for new trials are disfavored in the law; relief is granted only to avoid a 'manifest injustice.'" *United States v. Harris*, 61 M.J. 391, 394 (C.A.A.F. 2005) (quoting *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993)). When considering a petition for new trial, our "prerogative" is to determine credibility by weighing the testimony at trial against the post-trial evidence. *United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (quoting *United States v. Brozauskis*, 46 C.M.R. 743, 751 (N.C.M.R. 1972)).

If petitions for new trial are generally disfavored, cases involving witness recantation are especially suspect. "Petitions for new trial based on a witness's recantation 'are not viewed favorably in the law.'" *United States v. Rios*, 48 M.J. 261, 268 (C.A.A.F. 1998) (quoting *United States v. Giambra*, 33 M.J. 331, 335 (C.M.A.

1991)). Petitions should not be granted unless "[t]he court is reasonably well satisfied that the testimony given by a material witness is false." *Giambra*, 33 M.J. at 335 (quoting *Larrison v. United States*, 24 F.2d 82, 87 (7th Cir. 1928)).

The post-trial evidence in this case consists of JB's recantation of her allegations against the appellant. The appellant characterizes this evidence as both newly discovered and a fraud on the appellant's court-martial, but fraud is the true focus here. We find our superior court's analysis in *Giambra*, 33 M.J. at 335, directly applicable:

> We are also mindful that many courts treat "recanted testimony" in the same manner as other forms of newly discovered evidence; that is, "that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." However, we are disinclined to put such an onerous burden on a petitioner when the alleged perjurer is the prosecutrix herself. Obviously, appellant has contended throughout that she has been lying. The only thing newly discovered is her admission that she was lying. If indeed she gave perjured testimony, her conduct amounted to "fraud" on the court. [internal citation omitted] *See* RCM 1210(f)(3).

The "real problem," then, is for us to determine whether JB's testimony at trial was false. *See Giambra*, 33 M.J. at 335. At trial, JB admitted to a history of telling lies to numerous people about a variety of things. The court members found the appellant not guilty of assault and a specific act alleged to have been indecent, allegations based primarily on JB's testimony. But, JB was consistent in her testimony throughout the proceeding and she presented a nearly clinical description of the appellant's actions. For example, she was able to describe in detail the appellant's genital modifications: "He has two piercings on his penis, on the underside. They go horizontal, one on top of the other, and they are round rods with one ball on each end of both of them."

In her recantations, JB contended she felt pressured to testify against the appellant. However, she conceded that she did not tell any of the counsel involved in the case that the allegations were untrue, nor did she recant to a neutral party or persons responsible for her welfare. *See Rios*, 48 M.J. at 269. It is obvious that JB desperately desired to restore a relationship with her parents and brother, and it is just as obvious that her family recognized that desire. JB's 4 March 2004 statement was prepared by her parents and presented to her for signature. She signed it without modification. The 27 October 2004 affidavit was prepared by an attorney,[7] but the appellant initiated contact with the attorney, asked JB if she would be willing to sign an affidavit, took her to the attorney's office, and sat in on a portion of the meeting between JB and the attorney. The military judge who presided at the *DuBay* hearing found that JB's parents bribed and pressured her to recant, and the evidence clearly supports that finding.

[7] The attorney "shared office space" with an attorney who represented the appellant at his court-martial.

JB did testify under oath at the *DuBay* hearing that she had lied at the appellant's court-martial. In her findings of fact, the military judge did not find any of JB's recantations – including her testimony at the *DuBay* – to be believable. Neither do we. We are not "reasonably well satisfied" that JB's trial testimony was false, which is to say we find no fraud on the appellant's court-martial.[8] *See id.*

The petition fails to establish any basis for a new trial under Article 73, UCMJ, and R.C.M. 1210(f). Therefore, the petition for new trial is

DENIED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

[8] Which is also to say that, even if we were to consider JB's recantation "newly discovered evidence," it would not have "probably produce[d] a substantially more favorable result for the [appellant]." R.C.M. 1210(f)(2)(C).