UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANDREW J. BROZZO
United States Air Force

ACM 34542 (f rev)

26 August 2003

Sentence adjudged 23 March 2001 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, forfeiture of $779.00 pay per month for 1 month, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Antony B. Kolenc.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Major Linette I. Romer, and Captain C. Taylor Smith.

Before

BRESLIN, STONE, and MOODY
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

BRESLIN, Senior Judge:

A general court-martial convicted the appellant, contrary to his pleas, of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence was a bad-conduct discharge, forfeiture of $779.00 pay per month for one month, and reduction to E-1.

During our initial review of this case, the appellant asserted that the government violated the appellant's due process rights by failing to disclose documents revealing an error in the preparation or handling of an internal blind quality control sample test begun

on 31 July 2000. We ordered the government to produce copies of documents it provided the appellant in response to the defense discovery requests. We found that the defense specifically requested copies of reports relating to the quality control function, and that the government provided the defense with copies of the requested reports, including the report for the period in question. *United States v. Brozzo*, 57 M.J. 564, 567 (A.F. Ct. Crim. App. 2002). We found "that the government disclosed information that would have led diligent counsel to the analytical data in question." *Id.* We also ruled that the information at issue was not material because "evidence of one blind quality control sample that was not properly handled would not, in context, undermine confidence in the outcome of the trial." *Id.* at 568.

Subsequently, our superior court granted the appellant's petition for grant of review on a new issue raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982):

> IN VIEW OF THE CONCLUSION OF THE AIR FORCE COURT OF CRIMINAL APPEALS THAT TRIAL DEFENSE COUNSEL DID NOT EXERCISE REASONABLE DILIGENCE IN DISCOVERING THE ERRONEOUS TEST REPORT, WHETHER APPELLANT WAS PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court set aside our earlier decision and remanded the case for consideration of this issue. For the reasons discussed below, we again affirm the findings and sentence.

We must begin by correcting any possible misunderstanding of the earlier holding of this Court. In raising the issue of ineffective assistance of counsel, the appellant avers that this Court found "that trial defense counsel did not exercise reasonable diligence in discovering the erroneous test report," and maintains that we concluded trial defense counsel provided deficient performance. That is incorrect.

In order to appreciate the appellant's mistake, it is helpful to review the standards appellate courts use to review claims of error. In the most general terms, appellate courts look for two things: error and prejudice. *See generally* Article 59a, UCMJ, 10 U.S.C. § 859a ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."); 2 Steven A. Childress & Martha Davis, *Federal Standards of Review* § 7.01 (3d ed. 1999) ("[N]ot only must the appellant show the error, he also must make a strong showing of prejudice.").

In our earlier review of this case, we examined an allegation that the prosecution failed to provide discovery, even though they had provided copies of the specific quality control report the defense had requested. The test for error in such circumstances is that "evidence is not suppressed if the defendant knew, or in the exercise of reasonable

diligence should have known, of the essential facts that would have permitted him to take advantage of the evidence in question." *Brozzo*, 57 M.J. at 566 and cases cited therein. The test for prejudice for a failure to provide discovery is whether, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The issue before this Court now is whether trial defense counsel provided ineffective assistance of counsel to the appellant. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court set out a two-pronged test for error and prejudice under such circumstances. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating counsel's performance, we do not scrutinize only a single act in isolation, rather "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.

Id. at 690. "In considering the adequacy of counsel's performance, we view the totality of the attorney's actions and omissions and determine whether, under the circumstances, any other objectively reasonable lawyer might have taken the approach he actually took." *Crawford v. Head*, 311 F.3d 1288, 1318 (11th Cir. 2002).

The second prong of the test for ineffective assistance of counsel requires a showing of prejudice. In order to demonstrate prejudice, an appellant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

Comparing the standard of review for a finding of error regarding discovery issues with that for ineffective assistance of counsel, it is easy to see they are not the same. The test for finding error relevant to the discovery issue in this case focuses on specific information pertinent to specific documents, rather than a consideration of counsel's entire performance. Thus, this Court's earlier determination that "the government disclosed information that would have led diligent counsel to the analytical data in question," *Brozzo*, 57 M.J. at 567, is not tantamount to a determination that the trial defense counsel made errors "so serious that counsel was not functioning as the 'counsel'

guaranteed . . . by the Sixth Amendment." *Strickland*, 466 U.S. at 687. *See Wright v. Hopper*, 169 F.3d 695 (11th Cir. 1999).

We turn to the first prong of the test for ineffective assistance of counsel–whether counsel provided deficient performance. "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* We recognize that "[t]here are countless ways to provide effective assistance in any given case." *Id.* Part of our deferential review includes recognizing that different defense counsel might select different theories or different strategies to defend a particular case.

A defense counsel's duty to his or her client includes the duty to investigate the facts and available evidence in the case. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691.

The appellant asserts trial defense counsel was deficient for failing to investigate the quality control report showing a technician's error regarding one specific quality control sample occurring about two months before the testing of the appellant's sample. As discussed above, we did not previously find that trial defense counsel was deficient in this regard. Moreover, there is no evidence in the record that trial defense counsel failed to inquire more about this matter, either through discussion with the expert witness or through other independent means.[*] All we can tell from the record is that trial defense

---

* Interestingly, there is an indication that before trial, the counsel knew of an instance of mishandling quality control samples. In her direct examination of the expert witness, trial counsel elicited testimony about previous errors made by laboratory employees involved in testing the appellant's sample, and the corrective actions taken as a result. This is a well known advocacy technique, based upon the theory that bringing the information out on direct examination lessens its impact on cross-examination. Trial counsel brought out previous discrepancies by Mr. Montgomery and Ms. Torres. She also delved into problems in the quality control section:

> Q: So, sir, would it be hard or easy to catch if somebody had mislabeled the quality control?
> A: If somebody had mislabeled the quality control, the analysis would reveal that rather easily.
> Q: Positive drugs wouldn't be positive or negative drugs wouldn't be negative?
> A: Right, we would get suspicious at that point.

Of course, the fact that trial counsel was concerned about this issue does not demonstrate either that the blind quality control sample at issue was what trial counsel was referring to, or that defense counsel was aware of it. The fact that trial counsel already elicited this information on direct examination may have been a good reason why trial defense counsel felt no need to pursue the matter on cross-examination. In any event, the information was before the court members deliberating on the case.

counsel did not specifically cross-examine the expert witness about the "technician error" for this particular failure of a blind quality control sample.

Considering the entire record, it is apparent trial defense counsel zealously defended their client in this case. For example, they made extensive requests for discovery, including inspection reports, reports of testing errors and discrepancies, documentation of the background, training, and disciplinary actions of involved laboratory personnel, and regular reports from the quality control section. Trial defense counsel moved for a new pretrial advice, claiming the earlier advice was inadequate and misleading in light of *United States v. Campbell*, 50 M.J. 154 (1999), *supplemented*, 52 M.J. 386 (2000). They then moved in limine to prevent the prosecution's expert witness from attempting to extrapolate the results of the urinalysis or to offer an opinion about whether the appellant felt the physiological effects of the drug, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Trial defense counsel vigorously opposed the prosecution's motion in limine that prevented the defense from cross-examining the prosecution's witnesses concerning errors by or disciplinary actions against laboratory employees who were not involved in the testing of the appellant's sample. Trial defense counsel even renewed their argument at the conclusion of the expert witness' direct examination, although they were unable to persuade the military judge to change his ruling. At the conclusion of the prosecution's case, trial defense counsel moved for a finding of not guilty based upon the alleged failure of the government to meet the requirements set out in *Campbell*, 52 M.J. at 388.

Trial defense counsel also conducted a broad-ranging cross-examination of the expert witness for the government, Dr. Michael Hlubek. Trial defense counsel got the expert witness to concede that the validity of the test result depended upon the people and the machines involved in the test, and that mistakes can be made at any stage. He got the expert to admit that the machines sometimes drop or misfeed the vials, or fail to pick them up properly. He elicited evidence that outside inspections revealed that maintenance logs on the machines had not been properly maintained. Moreover, trial defense counsel got the expert witness to admit that employees make mistakes, and that they face disciplinary action as a result. He specifically admitted that the quality control section had sometimes failed to catch mistakes. The expert conceded errors were made by Mr. Montgomery and Ms. Torres, who were involved in the testing of the appellant's sample. Trial defense counsel attempted to cross-examine the expert witness about disciplinary actions taken against three other laboratory employees, but the prosecutor objected on relevance grounds. After additional testimony and argument, the military judge ruled that trial defense counsel could only inquire into incidents within one year of the appellant's test. Furthermore, the military judge would not allow trial defense counsel to go into instances of reported discrepancies where no disciplinary action was taken against the employee.

Trial counsel's relevancy objection prevented trial defense counsel from continuing his cross-examination about other errors at the laboratory. It is not clear whether trial defense counsel intended to cross-examine Dr. Hlubek about other employees' discrepancies, or even upon the failure of the blind quality control sample in question. In any event, it is unlikely that the military judge would have allowed it. First, the failure of the blind quality control sample at issue did not result in disciplinary action against any employee. Second, although the documents relating to the failure of the blind quality control sample show who aliquoted the members' samples tested in that run, they do not indicate who aliquoted the quality control samples for that run. Therefore, it is not clear that the employees involved in the aliquoting of the blind quality control samples were also involved in testing the appellant's sample.

We find that even though trial defense counsel did not cross-examine the expert witness specifically about the "technician error" relating to the blind quality control sample in question, that does not rise to the level of deficient performance under *Strickland*. Trial defense counsel's cross-examination led the expert to concede that employees made errors and faced disciplinary action as a result, and that the quality control section sometimes failed to catch mistakes. The fact that appellate defense counsel, with more time and the benefit of hindsight, can devise more cross-examination questions on this point does not mean that, considering all the circumstances, the appellant was effectively deprived of counsel under the Sixth Amendment.

Assuming for the sake of argument that trial defense counsel did not inquire further into the data contained in the quality control monthly report provided by the government, we still do not find deficient performance. It is helpful to consider the difference between the quality control section of the laboratory and specimen control, the separate section involved in preparing service members' specimens for substantive testing. As the expert witness testified, the quality control section is responsible for making samples containing known quantities of drugs or drug metabolites that are used to calibrate and evaluate the accuracy of the testing instruments. Most importantly, quality control personnel never handle a member's specimen.

Assuming trial defense counsel made the decision not to inquire further into data revealed by the quality control monthly reports, we find that this was not an unreasonable decision that would fall outside the wide range of professionally competent conduct. First, the monthly reports revealed that the quality control employees sometimes made errors, and trial defense counsel duly elicited that on cross-examination. Second, the reports do not indicate any unusual problems with the quality control process during the month the appellant's sample was tested, or for the months before. The reports do not suggest an unusually large number of problems considering the number of samples tested, nor do they reveal significant problems with tests for the metabolite of cocaine, the drug at issue here. Third, the quality control section is separate and distinct from the specimen control section, where service members' samples were aliquoted and prepared.

An error in the quality control section would not make a member's sample positive when there was no drug present, thus demonstrating errors in the quality control section would not necessarily help show the likelihood of errors in the specimen control section. Finally, there was little to be gained from focusing an attack on the quality control section. The strength of a forensic system is not based upon the premise that people never make mistakes; the strength of a forensic system is that, through a process of careful documentation, transparent processes, and quality control, they can tell when an error has occurred and correct it. The quality control process is a strong point of the system, and it could be risky for trial defense counsel to devote too much time or effort into attacking it.

Considering trial defense counsel's performance in light of all the circumstances, we do not find deficient performance. It appears that much of trial defense counsel's strategy focused on challenging the prosecution's ability to meet the requirements of the *Campbell* cases. This was a sound strategy at the time, because at the time of trial our superior court had not yet issued its opinion in *United States v. Green*, 55 M.J. 76 (2001), *cert. denied*, 534 U.S. 988 (2001).

We turn to the second prong of the test for ineffective assistance of counsel–prejudice. We noted above that the test for error in the standard of review for discovery violations was different from the test for error regarding ineffective assistance of counsel. However, the test for prejudice is very similar under both standards of review. As the Supreme Court noted in *Strickland*, 466 U.S. at 694, citing *United States v. Agurs*, 427 U.S. 97, 104 (1976), "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . ." *See also Hutchison v. Bell*, 303 F.3d 720, 749 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2608 (2003) ("The standard of prejudice for an ineffective assistance of counsel claim parallels the materiality requirement for a *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] claim.").

In our earlier review of this case we found that the documents in question were not material, and therefore the appellant was not prejudiced by any failure to disclose the documents. *Brozzo*, 57 M.J. at 567-68. For the same reasons, we find no prejudice. Failure to investigate or present impeachment evidence of mishandling of a non-member's sample by the quality control section, on a separate date from the appellant's test, was not so significant that it would rise to the level of ineffective assistance of counsel, i.e. that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

The appellant raises several additional arguments in an effort to show that the trial defense counsel's failure to investigate this matter and use it at trial deprived the appellant of a fair trial. The appellant maintains again that this was a "false positive." In our earlier opinion, we explained that this was not a "false positive," because it was not a

member's sample and because it was never reported as a positive result. *Brozzo*, 57 M.J. at 566. Nonetheless, appellate counsel continues to parrot the term "false positive." For the reasons previously stated, we find this unpersuasive. All of the appellant's arguments based upon this faulty premise are equally flawed.

The appellant maintains that this failed blind quality control sample analysis was especially significant because it involved the gas chromatography/mass spectrometry (GC/MS) testing process. However, it appears the problem in this case was in handling or preparing the quality control sample; there is no evidence that the GC/MS test itself was flawed. In any event, there was other evidence at trial that not all GC/MS tests work properly every time–indeed, the first GC/MS test of the appellant's sample did not come out correctly and had to be redone. We find this argument unpersuasive.

The appellant ominously notes that Dr. Hlubek was involved in the testing of the failed blind quality control sample at issue, and argues that this was fertile ground for impeachment. We disagree. The documentation relating to the failed blind quality control sample suggests that the problem was in the aliquoting or handling of the sample; not the test itself. Dr. Hlubek supervised the actual testing; there is no evidence he was involved in aliquoting the quality control samples. We also note that the uncontested evidence at trial was that the GC/MS testing is automated so that once the samples are set up, the machine will proceed through the analysis of the entire run on its own.

Finally, the appellant argues that the documents at issue demonstrate that there were no procedures in place to catch this type of error in the GC/MS test, so that had this not been a blind quality control sample, "a member's negative urine sample could reach GC/MS . . . be contaminated and reported" as a positive result. This argument overlooks much of the evidence in this case. First, the challenged evidence does not prove that "this type of error" could even occur with a member's sample. Members' samples are aliquoted in the specimen control section under strict criteria; there was no evidence about the manner in which quality control samples are prepared. More importantly, members' samples are tested three different times, each beginning with a fresh aliquot from the original sample bottle. Only if a sample is positive in two prior tests would it ever reach the GC/MS test–thus appellant's argument about a "negative urine sample" reaching GC/MS has no factual basis.

For all these reasons, we find that trial defense counsel's performance was not deficient. We also find that, even if trial defense counsel had investigated and presented this additional impeachment evidence, there is no reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court