UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant ERNEST D. GOODIN, JR.
United States Air Force

ACM 36266

19 December 2007

Sentence adjudged 20 January 2005 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Kevin P. Koehler (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 48 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, Major Matthew S. Ward, Major Nurit Anderson, and Captain Brendon K. Tukey.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

The appellant was tried at Eglin Air Force Base (AFB), Florida, by a general court-martial composed of a military judge. Contrary to his pleas, the appellant was found guilty of committing an indecent act on a child and possession of visual depictions of minors engaging in sexually explicit conduct in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was acquitted of one specification of committing an indecent act on his wife. The military judge sentenced the appellant to a dishonorable discharge, confinement for 48 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

In his initial assignments of error the appellant asserted that (1) the government was required by *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule for Courts-Martial (R.C.M.) 701 to disclose a computer given to them by the appellant's wife; (2) the evidence was legally and factually insufficient to sustain a conviction for an indecent act; and (3) the military judge erred by admitting evidence of legal pornography and sexual acts between the appellant and his wife. Because of conflicting affidavits submitted by the appellant and the government, this Court ordered a post-trial, fact-finding hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to develop more evidence relating to the appellant's claim that the government failed to disclose the existence of a second computer hard drive. Following that hearing the appellant submitted an additional assignment of error: whether trial defense counsel was ineffective for failing to investigate the second computer hard drive. We have examined the record of trial, the assignments of error, and the government's response. We find no merit in the assignments of error and affirm.

Background

At the time of the alleged offenses the appellant was residing on Eglin AFB, Florida, with his wife, young son, and his step-daughter, SL. Angela Goodin, the appellant's wife, testified that the appellant kept pornography at their home, some of which apparently caused her concern. She remembered two magazines in particular entitled "Barely Legal" and "Peach Fuzz." She stated that she could not read the titles of the other magazines because they were in a foreign language. Mrs. Goodin said the covers of the magazines depicted young women who "didn't seem too developed" performing sex acts on themselves. She further testified that the appellant spent a great deal of his time at home on his computer. Mrs. Goodin said she once walked in on the appellant and found him viewing pornography on "WebCam." Mrs. Goodin further stated that the person on the computer screen was a female who "didn't seem very developed."

Mrs. Goodin testified that from approximately 4 September 2003 to 13-14 September 2003 she took a trip out of town, leaving the appellant and her eleven-year-old daughter, SL, at their house on Eglin AFB. Mrs. Goodin testified that on 4 November 2003, SL told her that while Mrs. Goodin was away the appellant had touched SL on her "private parts." Mrs. Goodin called the police, and also put the appellant's computer outside on the curb. Forensic examination of the computer revealed numerous images of children engaging in explicit sexual conduct. Some 57 of the images matched pictures of known children from the database of the National Center for Missing and Exploited Children, and 2 images matched known children identified in the Federal Bureau of Investigation (FBI) database.

In April 2004 Mrs. Goodin brought a second computer into the Air Force Office of Special Investigations (OSI) at Eglin AFB. She said the computer belonged to the

appellant and she asked them to search it for child pornography. Because of uncertainties surrounding the potential admissibility of the second computer, as well as the length of time it would take to do a forensic analysis, the government made the decision not to analyze the contents of the second computer. Shortly before the trial started, the government's computer expert decided to examine the second computer; she found images of child pornography on the computer. The second computer and its contents were not offered or admitted into evidence by the government during the court-martial.

Disclosure of Evidence

In his first assignment of error the appellant claims the government erred by not disclosing the existence of the second computer prior to trial. Under *Brady*, 373 U.S. 83, the government has the duty to disclose evidence that is material and favorable to the defense. Whether undisclosed evidence is "material" is a question of law. *United States v. Morris*, 52 M.J. 193, 198 (C.A.A.F. 1999). Where the defense has made a specific request for discovery, this Court tests whether the nondisclosure was harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004). Issues of non-disclosure of evidence are reviewed de novo. *See United States v. Eshalomi*, 23 M.J. 12, 21-22 (C.M.A. 1986).

As noted above, this Court ordered a fact-finding hearing to resolve the competing affidavits submitted by the parties. The military judge who conducted the hearing made detailed findings of fact. These findings of fact are fully supported by the evidence and not erroneous. We have conducted our own complete review of the hearing, and we concur with the findings made by the military judge and adopt them as our own.

The appellant was represented at trial by Mr. (then Captain) G, an area defense counsel, and Captain C, a circuit defense counsel. Mr. G was detailed to represent the appellant at some point before 12 July 2004. Shortly after he was detailed to the appellant's case, the appellant told Mr. G that the OSI had possession of the second computer, and the appellant asked Mr. G to retrieve it from the OSI if it was not necessary to the investigation. The existence of the second computer was also made known to Mr. G through the report of investigation issued by the OSI on 20 July 2004. That report clearly listed the computer in question. Mr. G was aware of the second computer at least five months before the start of the appellant's trial.

Major (then Captain) R, the circuit trial counsel on the case, had two conversations just prior to trial with Captain C. Major R informed Captain C that the government expert did a preliminary examination on the second computer and that it contained adult and teen pornography, but nothing that Major R would describe as "kiddy porn." Major R informed Captain C that the government did not intend to use the second computer in its case-in-chief. Neither Mr. G nor Captain C asked that the computer be analyzed, and

they made no motion at trial to compel the government to provide a mirror image of the second computer's hard drive so that it could be analyzed by the defense expert.

Based on these facts, it is clear that the government disclosed the existence of the second computer to the defense prior to trial, and this assignment of error is without merit.

Ineffective Assistance of Counsel

The appellant now asserts he was denied effective assistance of counsel because his trial defense counsel failed to investigate the second computer hard drive. We disagree.

It is undisputed that members of the armed forces are entitled to the effective assistance of counsel. *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). We review claims of ineffective assistance of counsel de novo. *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F. 2006). An allegation of ineffective assistance of counsel faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). To prevail on an ineffective assistance of counsel claim, an

> [a]ppellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

United States v. Moulton, 47 M.J. 227, 229 (C.A.A.F. 1997) (quoting *Strickland*, 466 U.S. at 687) (internal citations omitted); *see also Tippit*, 65 M.J. 69.

The appellant shoulders the burden of establishing the truth of the factual allegations that establish the deficient performance. *See United States v. Boone*, 49 M.J. 187, 196-97 (C.A.A.F. 1998). This is commonly accomplished by the submission of post-trial affidavits. That was done in this case by the appellant and, to answer those allegations, by his trial defense counsel.

When the two affidavits create a factual dispute, we cannot resolve it relying on the affidavits alone. In such cases the issue is better decided by a military judge who is able to observe the competing affiants and make the required fact-finding decisions. *United States v. Ginn*, 47 M.J. 236 (C.A.A.F. 1997). If the affidavits do not conflict, however, we may decide the issues without ordering a post-trial hearing. *Id.* at 248.

The appellant avers in his post-trial affidavit that he "repeatedly" told Mr. G about the second computer held by the OSI; that the computer was given to him by a friend, Mr. M; that he never used the computer, nor connected it to the internet; and that he had given the computer to his wife for résumé writing. On appeal, he claims that his trial defense counsel, having learned there was child pornography on the second computer, should have investigated the source of the pornography and requested a continuance. In his post-trial affidavit, Mr. G outlines his investigation and preparation for the court-martial. He states that he explored multiple theories for defending the appellant against the child pornography, including shifting the blame to Mr. M or to the appellant's wife. Mr. G provides a thorough and cogent explanation for his decision to not investigate the pornography on the second computer.

The affidavits submitted by the appellant and Mr. G are not in conflict and there is no need to order a further hearing on this issue. The appellant's position is that either his wife or Mr. M was responsible for the child pornography found on the first computer which was admitted at trial. He argues that when his counsel learned of more child pornography on the second computer, he was deficient for not investigating its source. This argument is without merit. Mr. G considered three possible defenses in preparing for trial: (1) blame Mr. M; (2) blame Mrs. Goodin; and (3) present evidence indicating that the child pornography found on the first computer was there as the result of a virus. Mr. G ultimately concluded that a trial strategy of attempting to shift the blame would fail. Mr. G provides a completely reasonable explanation of his tactical decision to focus on the "virus theory" of defense. Any analysis of the second computer would undercut this defense and would likely have created additional evidence against the appellant.

Mr. G made a well-informed tactical decision to defend against the first computer and not to request any analysis of the second computer. Although the tactic he chose was ultimately unsuccessful, his decision was reasonable and his performance was not deficient. This assignment of error is without merit.

Legal and Factual Sufficiency

The appellant asserts the evidence is legally and factually insufficient to sustain a conviction of indecent acts with SL. He asserts that SL recanted her allegations against the appellant, that her credibility was suspect, and that she had a strong motive to lie.

We review each court-martial record de novo to consider its legal and factual sufficiency. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). With regard to legal sufficiency, we ask whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all of the elements of the offense proven beyond a reasonable doubt. For factual sufficiency, we weigh the evidence in the record of trial and, after making allowances for not having personally observed the witnesses, determine whether

we ourselves are convinced beyond a reasonable doubt of the appellant's guilt. *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

We have carefully reviewed the record of trial and conclude there is no question that the government presented legally sufficient evidence to support the findings in this case. The appellant's argument is unsupported by the evidence. We find that the military judge could have found beyond a reasonable doubt that the appellant committed an indecent act on SL. Furthermore, after reviewing the record of trial, we are convinced beyond a reasonable doubt that the appellant is guilty.

Admission of Evidence

The appellant alleges that the military judge erred by allowing evidence relating to the appellant's consensual sexual history with his wife, including videotaping sexual acts, masturbation, possession of adult pornography, and other unrelated sexual acts. The government's theory for admission of the evidence was that it showed the appellant's intent and state of mind in relation to the charged offenses. The military judge admitted the evidence pursuant to Mil. R. Evid. 404(b).

We review a military judge's decision to exclude or admit evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Barnett*, 63 M.J. at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). After carefully considering the record in this case, we find the military judge did not abuse his discretion in admitting the evidence in dispute.

Conclusion

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court