UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S,	**)**	**ACM 37958**
Appellee	**)**	
	)	
v.	**)**	
	)	**ORDER**
Airman First Class (E-3)	**)**	
JIMMY HUGHES,	**)**	
USAF,	**)**	
Appellant	**)**	**Panel No. 2**

Contrary to his pleas, the appellant was convicted, by a military judge sitting alone at a general court-martial, of one specification of rape, one specification of forcible sodomy, and one specification of disorderly conduct, in violation of Articles 120, 125, and 134, UCMJ, 10 U.S.C. §§ 920, 925, 934, respectively. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 4 years and reduction to E-1.

On appeal before this Court, the appellant requests that we order a fact-finding hearing in accordance with *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967), to sufficiently develop facts required to determine whether: (1) the appellant's counsel failed to provide effective assistance with forum selection; (2) the military judge's service as a deposition officer in the same case disqualified her from presiding over the case; and (3) that the military judge had a sua sponte duty to recuse herself because she made certain pre-trial comments regarding the credibility of the victim.

Background

The appellant and A1C DFJ were casual acquaintances stationed at Aviano Air Base (AB), Italy. In a statement made to agents of the Air Force Office of Special Investigations (AFOSI), A1C DFJ said that she and her roommate were hosting a party in the common area of their dorm room. At one point during the evening, A1C DFJ went into her bedroom to change and go to sleep. As she began to change clothes, she turned around and noticed the appellant who had entered the room uninvited. A1C DFJ told the agents that the appellant raped and orally sodomized her against her will and by use of force.

On the basis of A1C DFJ's accusations against the appellant, court-martial charges were preferred and an Article 32, UCMJ, 10 U.S.C. § 832, investigation was ordered. Prior to the investigation, A1C DFJ was transferred to Charleston AFB for intensive in-patient mental health counseling. The investigating officer (IO) determined that A1C DFJ was unavailable for purposes of the Article 32, UCMJ, hearing and the IO made her recommendation to the convening authority using statements made by A1C DFJ prior to her being transferred to Charleston.

A deposition officer was subsequently appointed in accordance with Rule for Courts-Martial 702 to take A1C DFJ's testimony. The deposition was initially scheduled for 10 January 2011, but was deferred due to A1C DFJ's medical situation. The deposition order was rescinded on 2 February 2011 and reissued by the convening authority on 17 February 2011. Colonel (Col) Eflein, detailed herself to the appellant's court-martial as the military judge on 9 February 2011. The general court-martial convening authority's staff judge advocate (SJA) appointed Col Eflein as the new deposition officer on 7 March 2011. The deposition took place on 18 March 2011 at Charleston AFB, SC. The accused and counsel for both sides were present, along with Col Eflein proceeding as the deposition officer.[1]

At trial, the military judge stated on the record, "counsel, I am not aware of any matter which might be a ground for challenge against me. Does either side desire to question or challenge me?" No discussion was made concerning the military judge's involvement in A1C DFJ's deposition. Trial defense counsel inquired into the military judge's relationship with the Aviano AB SJA, as he was a former subordinate of the military, but ultimately declined to challenge the military judge. The appellant elected to be tried by military judge alone.

Prior to entering pleas, government counsel asked the military judge to declare A1C DFJ unavailable and to permit the prosecution to use her deposition in lieu of her in-court testimony. The military judge denied the Government's motion, observing, in pertinent part:

> The importance of [the victim's] testimony is absolutely key. There are no other witnesses who are alleged to have been in the room and therefore her testimony is the only direct evidence that exists in this case. The court finds that the circumstantial evidence that may be elicited does not go to the heart and soul of this case, so therefore [the victim's] testimony is critical. . . . It is . . . a fact that evidence or facts have come out in the pre-deposition interview with her that they [referring to the defense] need the opportunity to be able

[1] The record is silent on why the original deposition officer was replaced by the military judge.

> to explore her credibility is the heart and soul of the government's case.

Assignment of Error

In his third assignment of error, the appellant asserts that he made an improvident forum selection due in part to ineffective assistance he received from his trial defense counsel. In a post-trial affidavit, the appellant claims that the military judge made several ex parte comments to his trial defense counsel and separately to Dr. Rath, a retained expert consultant for the defense, that caused him to believe the military judge had made comments concerning the credibility of A1C DFJ prior to trial.

Specifically, the appellant states:

> My lawyers told [me] about numerous comments the judge made about the victim those remarks influenced my decision along with the fact that the judge used to be a nurse and probably new about [A1C DFJ]'s mental illnesses.
>
> One of the last things that Judge [Eflein] stated before we started court was "people with bi-polar are weird" – then we rolled into court. She had repeatedly made comments like this over the course of the proceedings. She and Rath talked at the airport and impressions we got were the same. In fact, Rath said later to us that he felt she wanted us to go judge alone so she could put her "nurse" hat and use the training w/respect to the bi-polarism. Rath later said if we went judge alone and he was found guilty, then she "baited" us the whole time. Frankly, that's the same opinion I have. Unfortunately, I didn't write all the comments she had made (another one was "I wonder if him having sex with her made her cross-eyed" (or words to this effect).
>
> Dr. Rath had a full blow conversation with her about the victim. Rath stated "It's as if she's begging you to go judge alone. But if she finds him G, she will have baited him into doing it" (or words to this effect).
>
> . . . .
>
> . . . My lawyers didn't fully explain the law or meaning of me going judge alone. They told me that they'd had off-the record talks with the judge after the deposition

> and that she'd made statements to them that she didn't think [A1C DFJ] would be believable, or was mentally unstable in some way. Dr. Rath had warned them about this. I was lead to believe that going judge alone was a slam-dunk.

Major (Maj) Meginley, lead trial defense counsel, submitted an affidavit which included, in pertinent part, the following:

> During our pretrial consultation with AB Hughes, we [trial defense counsel, Dr. Rath, and the appellant] believed that being tried by officer members, or potentially officer and enlisted members, was the best idea. However, in the days leading up to trial, we began to discuss the possibility of going military judge alone.
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> . . . During pre-trial preparations, Judge Eflein made some out of court statements regarding her awareness of the [victim's] diagnosed mental health issues.
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> . . . Just before trial, Judge Eflein had said something to the effect of, "Can we all agree that people with bi-polar disorder are weird?" This was just after the deposition around March 19, 2011, in the presence of both defense and trial counsel, in an MRE 802 meeting. It is also my understanding that prior to trial, Judge Eflein made statements to Dr. Rath concerning the issues of the case and the [victim's] credibility. In discussing the comments with Dr. Rath, he mentioned the things she was saying surprised him and that her opinion of the [victim] and the case generally appeared to be in our favor.
>
> . . . .
>
> [Later] Dr. Rath changed his opinion and felt we should go with members.

Captain (Capt) Delph, the appellant's other trial defense counsel, submitted an affidavit that closely tracked Maj Meginley's in all respects related to this assignment of error.

The appellant's affidavit and original assignment of errors also alleges "the impact of the military judge's ex parte communication on appellant's forum selection was not lost on the military judge. After Appellant's court-martial, the military judge held a

debriefing session with his trial defense counsel [during which] she was 'bothered by the decision to go judge alone' and that 'she hoped it had nothing to do with her pretrial comments.'" The appellant's assignment of errors avers this statement was made in an email from Maj Meginley to Capt Delph, dated 18 Apr 2011, and states the email is "On file with appellate counsel." This Court has ordered the production of the referenced e-mail and will provide it to the *Dubay* fact-finding judge upon our receipt of it.

The appellant alleges that he selected trial by military judge alone because his trial defense counsel told him they believed the military judge doubted the alleged victim's credibility, and that such doubt would inure to his benefit if he selected her to be the fact finder. According to the appellant, his trial defense counsel formed this opinion because they heard the military judge make certain ex parte statements after the victim's deposition. Additionally, their expert psychiatric consultant reported to the defense team that the military judge made similar statements to him also suggesting that she questioned the victim's credibility. Trial defense counsels' post-trial affidavits corroborate that such ex parte statements were made but refute the appellant's assertion that they based their forum selection advice to the appellant on such statements.

After reviewing the record of trial, the appellant's assignment of errors, and the Government's answer, along with attached documents submitted by both parties, we are unable to resolve the concerns raised by the appellant without ordering a post-trial hearing.

Accordingly it is by the Court on this 31st day of January, 2013,

ORDERED:

That the record of trial is returned to The Judge Advocate General for referral to an appropriate convening authority for the purpose of directing a post-trial hearing in accordance with *United States v. DuBay*, 37 C.M.R. 411, 413 (C.M.A. 1967). The military judge conducting the hearing shall have broad authority to hear testimony, receive evidence, and enter findings of fact regarding the appellant's claim that Col Eflein made inappropriate ex parte comments to his trial defense counsel and to Dr. Rath that adversely impacted his forum selection.

At a minimum, the following questions will be addressed during the hearing:

1) What actions did Col Eflein take during the deposition of A1C DFJ? Why didn't she discuss her role as a deposition officer on the record?

2) What, if any, pre-trial comments did Col Eflein make to trial defense counsel and/or government trial counsel regarding A1C DFJ?

3) What, if any, pre-trial comments did Col Eflein make to Dr. Rath regarding A1C DFJ?

4) Assuming Col Eflein made pre-trial comments to trial defense counsel and/or Dr. Rath, why were they made?

5) Assuming Col Eflein made pre-trial comments to trial defense counsel and/or Dr. Rath, why didn't she discuss the comments on the record?

6) When did trial defense counsel decide to change their advice regarding forum selection? Was this decision made after Col Eflein's remarks concerning A1C DFJ's credibility?

7) Assuming Col Eflein made pre-trial comments to trial defense counsel or Dr. Rath regarding the credibility of A1C DFJ, or any other witness in the case, what impact did these comments have on the trial defense counsel's ultimate recommendation to the appellant on forum selection? What did the trial defense counsel tell the appellant concerning these statements? What did the appellant state in response?

8) Did Dr. Rath change his opinion on whether to advise that the appellant be tried by military judge, vice officer members, as a result of comments he received from Col Eflein? If so, why did he change his opinion?

9) What post-trial conversations did Col Eflein have with Maj Meginley and/or Capt Delph regarding forum selection? What was said during that period?

10) Did Col Eflein make comments to trial defense counsel to the effect that she was "bothered by the decision to go judge alone" and that "she hoped it had nothing to do with her pretrial comments?" If so, why?

11) Did Col Eflein make any other comments, either pre-trial or post-trial concerning the credibility of any witness other than A1C DFJ in this case? If so, what were they?

The military judge may address any other matters that may arise during the fact-finding hearing that he or she feels are pertinent to the issues in question.

The military judge will be provided with the record of trial and all appellate pleadings in this case. The record of the post-trial hearing along with the military judge's findings of fact will be returned to this Court for further review no later than 1 March 2013.

If the convening authority determines that a post-trial hearing is impractical, the convening authority may set aside the conviction, dismiss the charges, and take other administrative action as appropriate.

Requests for an extension of time will be addressed to this Court through appellate government counsel.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court